

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2014/CLE/gen/01740

BETWEEN

RUDOLPH BARRY KERR

Plaintiff

AND

**MARCIA KERR
ANN KERR MACKEY
VANESSA MACKEY
AMANDA MACKEY
THOMAS MACKEY JR.
RICARDO MILLER
EARL MUNROE
ELWOOD MAJOR**

Defendants

Before Hon. Mr. Justice Ian Winder

Appearances: Wayne Munroe QC with Regina Bonaby for the Plaintiff

Geoffrey Farquharson for the Defendants

11 February 2021

DECISION

WINDER, J

1. On 27 February, 2017 I granted an injunction in favor of the defendants with respect to property claimed by two factions of the Kerr family. The property was situated at the junction of Kerr Close and West Bay Street. According to the plaintiff's evidence, he along with his wife, with planning permission, built a single story wooden structure from which he operated a take-away restaurant. This was at a separate portion of the property upon which several of the defendants resided. The defendants' complaints were a breach of their quiet enjoyment of the premises in that the fumes from the restaurant's grill, which is said to have been outside the window of one of the defendants, caused a nuisance. There was also claims of rodent issues in relation to the operation of the restaurant.
2. At the time I granted the injunction the trial was set for November 2017, a few months away. At that time the tensions between the parties were also heightened.
3. The Court found that the parties could not co-habit and that the balance of convenience lay with the defendants.
4. The trial did not proceed in November 2017, or since, for a myriad of reasons for which both parties, and the Covid-19 pandemic bear some blame.
5. The plaintiff has now applied by Summons to vary the injunction to permit his operation of the take away.
6. In his affidavit in support the plaintiff says that:
 - (1) He has not opened the take away business at the premises in compliance with the Court Order.
 - (2) The trial originally set for November 2017 has not taken place some 3 years later.

- (3) Covid 19 pandemic has intervened and he and his wife are without income having been laid off from the hospitality industry.
- (4) The building housing the take away business remains unoccupied and unused. He has nonetheless continued the business licence up to 2019. Having utilized it since 2012. He is unable to further renew the business license as there is a need for the authorities to inspect the premises.
- (5) If permitted he will relocate the grill to ensure there is no air pollution nuisance to directly affect the defendants.
- (6) He will ensure that the premises are fumigated regularly.
- (7) He would like to remove his boat from the property in dispute.

7. The defendants did not answer the evidence directly but opposes the application and say, in submission, that:

- (1) there has been no change of circumstances since that time.
- (2) relations between the parties have not improved.

8. Having carefully considered the matter, I am satisfied that the injunction granted in February 2017 ought to be varied to permit the plaintiff to operate the premises until trial. Contrary to the defendants' assertions, I am satisfied that there is a change in circumstances, in that the trial has been delayed for 3 years and the plaintiff and his wife have lost their jobs whilst the commercial premises remain empty. The plaintiff has advanced a proposal to ensure the abatement of the air pollution and the nuisance. The balance of convenience in my view has shifted.

9. I order therefore that the plaintiff is permitted to operate the take away and not to interfere with the defendants' use of the premises they occupy. He is to relocate the grill to the front of the business and to take all appropriate steps to minimize the smoke pollution. The premises is to be fumigated regularly and ensure proper garbage collection to ensure the control of rodents. The plaintiff is permitted to remove his boat from the premises.

10. The cost of this application shall be costs in the cause.

Dated this 2nd day of March 2021

A handwritten signature in black ink, appearing to be 'I Winder', written over the date line.

Ian Winder

Justice