IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-001680
[2012] NZHC 1557

UNDER	the Judicature Act 1908, Section 16, Section 236A; the Property Law Act 2007, Section 297(2)(c), and under Schedule 5; the Fencing Act 1978, Part 2, Section 4, Section 8, Section 14(1)(b), Section 26
IN THE MATTER OF	an application for a restraining order pursuant to Part 3, Sections 9, 16, 18 of the Harassment Act 1997
BETWEEN	OLATAGA IAKOPO First Plaintiff
AND	JANICE HANIF Second Plaintiff
AND	CHARLOTTE RUTHERFORD AND ANDREW RUTHERFORD Defendants

Hearing: 25 May 2012

Counsel: O Woodroffe for the Plaintiffs
D M Hughes and L M Van for the Defendants

Judgment: 3 July 2012

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 3 July 2012 at 5.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] The first plaintiff, Olataga Iakopo, is the registered owner of a property at 114 Mangere Road, Otahuhu. The second plaintiff is Mrs Iakopo's daughter who has resided at the Mangere Road property for 23 years. The defendants, Mr and Mrs Rutherford, are the occupants of a property at 1A Golf Avenue, Mangere, which is adjacent to the Mangere Road property. The respective properties share a common driveway, which is the subject of a registered easement. Under the easement, the Mangere Road property is the dominant land and the Golf Avenue property is the servient land. The easement creates a right of way over the servient land in favour of the dominant land. A dispute has arisen between the parties regarding the use of the right of way; hence, these proceedings.

[2] The dispute between the parties has reached a stage where the plaintiffs have considered it necessary to apply to the Court for interim relief. When the application for interim relief came before me, I was advised by the defendants that they were prepared to consent to orders being made in the form of the orders sought in paragraphs (1)(a) and (d) of the application for interim orders. Their stance was made on a "without prejudice" basis and was done simply as a means of assisting the Court and ensuring that the focus of the argument was concentrated on issues that neither party could reach an accommodation on. Accordingly, by consent, I made interim orders as sought in paragraphs (1)(a) and (d) of the application. The plaintiffs agreed not to pursue, in the form of interim relief, the order sought in paragraph (1)(c) of the application. This left outstanding the order sought in paragraph (1)(b) of the application. This was for an order:

> Granting interim injunction restraining the joint defendants by themselves or their agents or any person acting on their behalf from closing the six foot solid wood double gates in front of the plaintiffs' garage, entry to the plaintiffs' double garage, thereby interfering with the right of entry of the plaintiffs, and interfering with the plaintiffs' right to peaceful enjoyment of their property.

[3] The question for determination is whether an interim injunction should be granted in such terms.

Facts

[4] The right of way is in the form of a concrete driveway which provides access to both properties. The grant of right of way is worded as follows:

> **RIGHT OF WAY**
>
> 2. The transferor (the owner of 1A Golf Avenue) grants to the transferee (the owner of 114 Mangere Road) the right for the transferee, its contractors, tenants, agents, workmen, licensees and invitees (in common with the transferor, its tenants and any other persons lawfully entitled so to do) at all times by day and by night to pass and re-pass on foot or with vehicles and with or without every kind of domestic animal, machinery, equipment and implements over and along that part of the servient land marked "A" on deposited plan 202005 for all purposes connected with the use and enjoyment of the dominant land but not for any other purpose.
>
> **GENERAL COVENANTS**
>
> 3. The grant of the right of way shall be forever a pertinent to each and every part of the dominant land.

[5] The right of way was created as part of an agreement under s 17 of the Public Works Act 1981 between the first plaintiff and the Auckland City Council, who then owned the Golf Avenue property. The Council had bought this property as part of a road realignment project. This project also involved re-siting the house on the Mangere Road property and adjusting the boundary between this property and the Golf Avenue property.

[6] As part of the agreement, the Council constructed a chain-link fence on the boundary-line between the two properties, with double chain-link gates placed on the boundary where the right of way adjoined the dominant land.

[7] In December 2011, the defendants, who were now the occupants of the Golf Avenue property, replaced the chain-link fence with a 1.8 metre high solid wooden fence and double wooden gates that were the same height and made in the same fashion as the fence.

[8] The new fence and gates were erected against the wishes of the plaintiffs. The defendants gave notice under the Fencing Act 1978 on 1 August 2011, and the plaintiffs served a notice of objection on 15 August 2011, which was within the statutory timeframe provided in s 11 of the Fencing Act.

[9] The plaintiffs claim that the new fence is much heavier than the chain-link fence and blocks sunlight from their property. The new gates are hung so that when they are opened, they are intended to swing inwards over the dominant land, thereby encroaching onto the plaintiffs' property. Like the original gates, one of the present gates is wider than the other so that when the wider gate is opened, it necessarily encroaches more than the other gate.

[10] The plaintiffs contend that when opened, the present gates impede persons driving on to their land in a motor vehicle from manoeuvring it so that it is no longer possible for them or their visitors to drive such vehicles along the right of way and park on the plaintiffs' property, even though there would otherwise be space to do so. If the gates were to swing outwards over the servient land, they would not pose this problem for the plaintiffs. But they would then impede the defendants from using their carport. This is a latter addition that was not present when the Council owned the Golf Avenue property. The original chain-link gates were not a problem because they were hinged so that they could open either way, and at that time there was no carport on the Golf Avenue property.

[11] The defendants claim that the fence and gates were constructed with the same dimensions as the chain-link fence, except that they are higher than the original ones. The defendants contend that even with the chain-link fence and gates, it was not possible for the plaintiffs to park vehicles on their property because of how the gates swung. This contention, however, is not entirely correct.

[12] There is no doubt that given where the gates are placed, any gates that swing inwards will encroach on the plaintiffs' property and impede the ability to park on this property. Because the chain-link gates were hinged so that they could swing either way, it was possible, when those gates swung outwards onto the servient land, for the plaintiffs to be able to have full use of the dominant land when it came to

parking vehicles on it. It also seems that when the gates and fence were first erected, the gates were often left open. For whatever reason, the original gates did not inconvenience the plaintiffs to the point where they were determined to assert their legal rights with respect to the gates' impact on their enjoyment of their property rights. If the present gates were to be hung so that they swung onto the servient land, the plaintiffs would not be inconvenienced by their presence when it came to access to parking on their land, though there would still be the inconvenience of having to open them each time they wanted to enter or exit the dominant land. It is not clear to me if the present gates can swing outwards over the servient land. In any event, I understand that if the gates were to swing in this way, they would then impede the defendants' access to their carport. For this reason, the defendants oppose the gates swinging outwards over the servient land.

Approach to interim injunctions

[13] Whilst the parties' dispute might be covered by the arbitration clause in the easement grant (cl 6), cl 9(1) of the First Schedule of the Arbitration Act 1996 still allows the Court to grant interim measures. So for present purposes, the arbitration clause can be put to one side.

[14] The court's jurisdiction to grant interim injunctions is set out at r 7.53 of the High Court Rules. In determining whether this discretion will be exercised, the Court will assess:

(a) Whether there is a serious question to be tried;

(b) Where the balance of convenience lies; and

(c) Where the overall justice of the case lies.

Serious question to be tried?

Obstruction of right of way

[15] A wrongful interference with a right of way constitutes a nuisance: see *McKellar v Guthrie* [1920] NZLR 729 (SC); and *Emmons Developments (NZ) Ltd v RFD Investments Ltd* HC Christchurch CP 42/01, 4 July 2001. However, unless the interference is substantial, no action will lie: *Pettey v Parsons* [1914] 2 Ch 653 (CA); *McKellar v Guthrie*; and *Emmons Developments (NZ) Ltd*.

[16] In *Emmons Developments (NZ) Ltd*, the defendant proposed to build a wall along the right of way that effectively prevented the plaintiffs from direct access to the right of way. William Young J stated at [43] that:

> It is certainly the law that a right of way does not necessarily entitle the grantee to go over every part of the surface of the land over which the right of way exists. As well, not every obstruction of a right of way amounts to an unlawful interference. ... [T]he rights of the grantee lie in nuisance and an action in nuisance will only lie if the alleged obstruction involves a substantial interference with the easement granted.

[17] As that particular easement had the purpose of creating a foot roadway and to permit a foot roadway to be used for all the purposes for which such a foot roadway might be used, the erection of a wall was found to be in breach of the covenant to allow public access to that right of way. William Young J, therefore, granted an injunction to stop the construction of the wall.

[18] A potential substantial interference can be actionable. In *Hurley v Harvey* HC Auckland HC 170/98, 20 May 1999, Cartwright J found that a swimming pool surround which was constructed in part over a grant of a right of way that was not presently used as part of the driveway but which was intended for possible future use for turning vehicles if the dominant land was developed more intensively amounted to a substantial interference with the grant.

[19] The Property Law Act 2007 implies certain specified rights attaching to a vehicular right of way. This includes implied rights to have the land over which the

easement is granted kept clear at all times of obstructions whether caused by parked vehicles, deposit of materials, or unreasonable impediment to the use and enjoyment of the driveway: see *McMorland on Easements, Covenants and Licences* (LexisNexis, Wellington, 2010) at [4.1.9], citing s 297 of the Property Law Act and Schedule 5, cl 2(c). This applies to the subject right of way. Section 297(2) provides for exceptions to the implied rights; none of the exceptions is applicable here.

Non-interference as applied to gates

[20] As gates are not impenetrable like walls, the law has traditionally taken a different view as to whether they may be built on a right of way and still not constitute a private nuisance.

[21] In *Pettey v Parsons*, the Court recognised that so long as there is reasonable access to the land and a reasonable opportunity of exercising the right of way, there is no obstruction and there is no derogation. This is a question of fact (at 665). In that case, the Court held that the plaintiff was entitled to erect a ten-foot gate on the condition that it would be kept open during business hours and must always be unlocked. It could not, however, be permanently closed and locked as that would then become a substantial interference with the right.

[22] In *Lister v Rickard* (1970) 21 P & CR 49 (Ch), the Court followed *Pettey v Parsons* and found that the servient owner was entitled to put gates across a right of way and to have them closed as long as they did not substantially interfere with the dominant owner's rights. It further held that the dominant owner could be bound to close the gates if it was necessary for the reasonable enjoyment of the servient tenement, but because in that particular scenario closing the gates would substantially interfere with his rights to do business, the defendant there was under no obligation to close those gates during business hours.

[23] New Zealand courts have applied the *Pettey* principle. In *Leith v Evans* HC Dunedin A34/85, 21 August 1986, Cook J emphasised that substantial interference is a question of fact. He considered that a gate maintained at the entrance of the

easement, provided it could readily be opened and remained unlocked, would not constitute substantial interference even if it was an irritation (at 11).

[24] A situation where a gate and a fence were found to be a substantial interference with the right of way was *Handforth v Kokomoko Farms Ltd* (2010) 11 NZCPR 171 (HC). In that case, the Court found that the grant of the easement included the right to move stock and machinery along the right of way. The defendants, irritated that the use of the right of way was substantially damaging parts of it, built post and rail fences along the right of way that constricted it to about four metres wide. The Court found that this completely changed the nature of the easement, and it was no answer that some farming operation could still be undertaken on the right of way. As it restricted vehicles and stock, it was found to be a substantial interference so that the fences and gates had to be removed.

[25] The case law on nuisance makes it clear that the locking of gates that lie across a right of way will be difficult to maintain: see *Deanshaw v Marshall* (1978) 20 SASR 146 (SC); *Carlson v Carpenter* (1998) ANZ ConvR 385 (NSWSC).

[26] One issue regarding assessing substantial interference is whether the personal circumstances of the plaintiffs should be considered. In a case concerning landlocked land, *Murray v BC Group (2003) Ltd* [2010] NZCA 163, [2010] 3 NZLR 590, the plaintiffs contended that they had no reasonable access to their property as they had developed health problems which made pedestrian access, as opposed to vehicular access, unreasonable. However, the Court's decision only focused on the nature of the land, showing that personal circumstances are irrelevant when dealing with easements. This is because easements are not personal covenants. They run with the land. If an approach on an occupier-by-occupier basis were adopted, then there is the danger that what was not substantial interference for one occupier suddenly becomes substantial interference when another occupier moves in, which would defy the landowner's expectations. Thus, in considering whether the weight of the present gates is a substantial interference on the right to use the easement according to the grant, the plaintiff's personal circumstances should be ignored.

[27] Whilst the case law required the interference to be substantial before it could constitute a nuisance, s 297 of the Property Law Act and the implied rights regarding vehicular rights of way may make it easier for a plaintiff to claim that a gate across a vehicular right of way giving access to residential land is an unreasonable obstruction. Schedule 5 provides, in cl 2(c), a right to have the right of way kept clear of obstructions, whether caused by parked vehicles, deposition of materials, or unreasonable impediment to the use and enjoyment of the driveway. Certainly, an owner may choose to erect a gate on her own property that requires her to stop, open and then close the gate each time she passes through; such inconvenience is a result of her own choice. But it is different when this owner imposes the obligation on a neighbour who is entitled to use the right of way and who did not consent to the gate. It might be acceptable to have a gate that is open during the day and shut at night, as this would not unduly affect the neighbour's use of the right of way. But obliging a neighbour to open and close the gate each time he uses the right of way seems to create so much more inconvenience that, in principle, it may arguably be an unreasonable impediment.

Easement of light

[28] Finally, I note that an easement to pass and re-pass the land does not automatically grant an easement of light, which must be created in the manner provided in ss 299 to 300 of the Property Law Act. As there is no evidence that this was done, I am satisfied that the plaintiffs do not have a right to light, per se. Because the easement was not granted for light, the fact that the present gates block light on the plaintiffs' property is not in itself a substantial interference that amounts to private nuisance, or something that gives rise to rights under the Property Law Act.

Analysis

[29] The grant of this particular easement provides a very broad right to pass and re-pass the land during the day and night, whether by vehicle or by foot. Thus, the right of way should, in accordance with s 297 of the Property Law Act and Schedule 5 thereto, be kept free of obstructions.

[30] In this case, the presence of the gates vis-à-vis the right of way may be actionable in two ways. First, by way of the inconvenience they cause due to the need to open and close them separately. Secondly, they may be an unlawful obstruction, or substantial interference by reason of their impact on the plaintiffs' enjoyment of the dominant land. As constructed, the gates are intended to and do open inwards over the plaintiffs' land, which is an encroachment on their land. This encroachment detrimentally affects their use of their land, as it makes it impossible for them or their visitors to park vehicles on the dominant land. There is no difficulty driving vehicles into the garage on the dominant land, but the plaintiffs contend that they should also have full use of vehicle parking space outside the garage. I accept this contention. There is no reason why they should not have the full use of their land available to them.

[31] The existence of these problems is disputed by the defendants, who say: first, the manual opening and closing of the gates is not an unreasonable expectation; and secondly, that the plaintiffs have never had enough room for anyone to park on their land because of the original configuration of the chain-link fence. I have already expressed a view on whether it is reasonable to expect the plaintiffs to deal with manually opening and closing gates across a residential vehicular right of way. The defendants' other argument relies on the Court finding that the chain-link gate was only meant to open inwards on to the plaintiffs' property, and that the easement legally provides for this occurrence.

[32] Photographs of the original chain-link gates show that they could open both ways. Thus, as already noted, they were not an impediment to the plaintiffs and their visitors being able to park on the plaintiffs' property. The defendants' actions, in removing those gates and replacing them with the present gates, have altered matters. The plaintiffs did not consent to those occurrences. The objection they filed to the Fencing Act notice establishes this.

[33] The easement does not expressly, or by implication, provide for any gates to be placed at the end of the right of way, and, especially, in a way that results in them encroaching on the plaintiffs' property when open. The Fencing Act was in force at the time the easement was created, so that Act's provisions would have been known

to the parties, including the need for consent or a Court order before a fence could encroach on private property.

[34] The defendants argue that the terms of the s 17 agreement between the Council and the plaintiffs run with the land, so that the defendants can enjoy the same benefits under that agreement as the Council enjoyed. However, I doubt that the agreement has this effect, and even if it did it is not clear to me that one of the benefits includes the right to have opening gates encroach on the plaintiffs' land.

[35] The purpose of the agreement was to resolve the plaintiffs' rights as a landowner affected by the Council's need to acquire land to perform a public work. The overall tenor of the agreement is one that suggests it gives rise to rights that were not intended to extend beyond the parties to the agreement. In addition, clause 9 of the agreement is a non-merger clause which provides that nothing in the agreement shall merge with the vesting of any property in any of the parties entitled thereto under the agreement. Its terms are restricted to the signatories to it. Thus, it is hard to see how any privity of estate can arise from this agreement. It follows that I do not consider that the benefit of rights created by the agreement can extend to the defendants.

[36] Furthermore, the agreement does not expressly refer to any right to construct gates across the right of way, let alone for them to encroach on the plaintiffs' land. The most that the agreement does in this regard is to include as part of its third schedule a series of drawings, which include the subject properties and the re-siting of the dwelling-house on the plaintiffs' property. One of these drawings shows the right of way running across the servient land with provision for double gates at the end of the right of way being drawn so as to show them opening inwards, and therefore encroaching on the plaintiffs' land. This drawing appears to have been done for planning purposes and to depict the proposed location of the re-siting, as well as the boundary alteration between the properties. It forms no part of the easement or plans that were deposited with the Land Registry Office. I have difficulty seeing how a planning drawing that forms part of an agreement under the Public Works Act between a landowner and a territorial authority can be said to give rise to enforceable rights by a non-party to the agreement. This is especially so when

the alleged right has to be inferred from no more than lines marked on a drawing. There is nothing about this material that would cause me to think that it could qualify as an exception under s 297(2) to the implied rights in Schedule 5.

[37] Another relevant consideration is the Fencing Act. From a plain reading of the Fencing Act, it appears that the plaintiffs have grounds for complaining that the encroachment of the gates on their property is unlawful. Section 2 defines a fence as including a gate, so the dispute comes squarely under the Act.

[38] The most relevant section for the purposes of the injunction is s 8:

> **Fence not to encroach without consent or Court Order**
>
> (1) Notwithstanding anything in this Act, no person is entitled to erect a fence that encroaches to any degree whatever upon any land of which he is not the occupier, except—
>
> (a) With the consent of the occupier of that land; or
>
> (b) Pursuant to an order of the Court made under section 24 of this Act.
>
> (2) Where any fence erected otherwise than in accordance with subsection (1) of this section encroaches upon any land of which the person who erected the fence is not the occupier, the occupier of that land may apply to the Court for an order that the fence be removed; and the Court shall order the removal of the fence (at the expense of the person who erected it) unless it is satisfied—
>
> (a) That the degree of encroachment is minimal; and
>
> (b) That the encroachment in no way adversely affects the use and enjoyment of his land by the applicant.
>
> (3) Nothing in this section applies in respect of a fence erected before the commencement of this Act.

[39] Although the original gates may have encroached on the plaintiffs' property if they were opened inwards, they were part of a fence that was built by the Council with the consent of the applicant. From a plain reading of s 8, the fact that part of an old fence encroached does not necessarily mean that a new fence that is substantially

different in nature may also encroach. So, the defendants should not have been able to build the gates such that they opened onto the plaintiffs' property without first obtaining a Court order. It was for the defendants to take the necessary steps under the Fencing Act to obtain a Court order permitting the present gates to encroach on the plaintiffs' land. They have not done so.

[40] The only way the present gates can avoid being an unreasonable obstruction in terms of s 297, or a substantial interference in terms of the law of nuisance is if they are opened outwards on to the servient land. Even then, I consider for the reasons given at [27] that there is a seriously arguable case that in today's world, manually operated gates over a residential driveway are an unreasonable obstruction and, therefore, unlawful.

[41] I consider, therefore, that the plaintiffs have established that they have a seriously arguable case that when the gates are open, they constitute an unlawful encroachment on that property. But unless the gates are opened, the plaintiffs cannot access their property using the right of way. So in this way, the gates (in a closed position) are a substantial interference with and an unreasonable obstruction of the right of way. In principle, the effect is much the same as if the gates were locked. The only way that the plaintiffs can access their property via the right of way is to suffer the unlawful encroachment of the gates on their property. Since they did not consent to this encroachment, I fail to see why they should have to suffer it. But unless they do so, they are met with the closed gates, which prevent them from using the right of way to gain access to their property.

[42] Thus, the plaintiffs have established that there is a serious question to be tried on this issue. I record that the conclusions I have reached on this topic result from the way the plaintiffs' case developed during the hearing. If there are matters that the defendants seek to address as a consequence of those conclusions that were not apparent to them at the hearing, they have leave to do so.

Balance of convenience

[43] This involves weighing up four considerations: the adequacy of damages should relief not be granted; the preservation of the status quo in the sense of "the last peaceable state between the parties"; the uncompensatable disadvantages to each party; and the relative strength of each party's case: *Wellington International Airport Ltd v Air New Zealand Ltd* HC Wellington CIV-2007-485-1756, 30 July 2008.

Adequacy of damages

[44] As matters stand, it is difficult to see how damages can provide an adequate remedy. The plaintiffs clearly do not want the gates encroaching on their land and they want to have use of the right of way. It is difficult to see how the inconvenience and harm the present circumstances cause them can be properly measured and quantified in a way that results in an adequate financial remedy. The harm and inconvenience that they are presently suffering is not something that readily translates into a financial solution. Some award of general damages may go so far to compensate for the harm done, but ultimately what is required is for them not to have to suffer the gates' encroachment on their property and yet for them to have use and reasonable enjoyment of the right of way.

Preservation of the status quo

[45] The status quo, in the sense of the last peaceable state between the parties, was when the original gates were in position. As these have now been removed, there is no going back to that state. The least alteration to the present circumstances, and the least interference with the parties' legal rights would be if the gates were left open in a way that has them swinging over the servient land.

Uncompensatable disadvantages

[46] Each party suffers uncompensatable disadvantages. The plaintiffs feel psychologically stressed with the present situation, as evidenced in the doctor's report. The defendants feel psychologically stressed with having to deal with what

they perceive to be a threatening neighbour and what they perceive as damage to their property.

Relative strength of each party's case

[47] I think that the plaintiffs have a strong case for establishing that in the way described herein, the gates are a substantial interference with the right of way and, therefore, are a nuisance, as well as an unreasonable obstruction under s 297 of the Property Law Act. I have already found the defendants' submission that the plaintiffs would not have been able to park cars on their land even before this gate to be unconvincing.

Conclusion

[48] My preliminary view is that the plaintiffs are entitled to the order they seek in paragraph 1(b) of the application, with the additional direction that the gates be kept open in a manner that sees them open outwards over the servient land. Whilst this may interfere with the defendants' use of their land, it needs to be kept in mind that it was the defendants who chose to erect the gates. Other designs that do not encroach on the plaintiffs' land, and which operate without the inconvenience of a vehicle user of the right of way having to stop, open and close the gates may not be objectionable.

[49] If the gates cannot be left open over the servient land, the question of whether the plaintiffs should pursue the application for an order removing the gates (cl 1(a) of the application) as part of their application for interim relief will need to be considered. Accordingly, the parties have leave to return to Court on the question of whether the gates should be left opening outward over the servient land, or instead be removed until such time as the issue is finally determined.

[50] The parties also have leave to file memoranda on costs.

[51] Any submissions that the parties seek to file in terms of [42], [49] or [50] herein should be filed within 10 working days of this judgment. The parties have

five working days to file any replies to the opposing parties' submissions. Following those events, I shall convene a telephone conference to determine if a further oral hearing is required.

[52] If the parties take no further steps, the preliminary finding I have made in [48] is to be treated as an interim order of this Court. It is to remain in place until further order of the Court.

Duffy J

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