IN THE DISTRICT COURT
AT WHANGAREI

CIV-2017-088-000023
[2017] NZDC 13184

BETWEEN	GERALD CHRISTOPHER ANDREW GRAHAM Mt Eden, Auckland, Teacher and TEREMOANA EMILY JONES Teiringa, Kaikohe, Housewife
AND	GAYHE PATRICIA MARTIN
AND	KEVEN BARTLEY SCHEURICH Remuera, Auckland Plaintiffs
AND	CHRISTINE ANN WOODS Sandy Bay, Whangarei PAT TE NGAHUE PUKETAPU Sand Bay, Whangarei Defendants

Hearing:	16 March 2017 (Date last submissions received: 2 May 2017)
Appearances:	G Warren for the Plaintiffs Defendants appear in Person
Judgment:	26 June 2017

RESERVED DECISION OF JUDGE K B de RIDDER

Introduction

[1] The defendant, Ms Woods, owns a property at Matapouri Road near Sandy Bay, Whangarei. She lives there with her partner, the second defendant Mr Puketapu

(I will refer to this property in this decision as "the defendants' property"). A right of way runs across the property in favour of the plaintiffs (together with other co owners) giving access to the plaintiffs' property known as Mana Aroha.

[2] The plaintiffs became concerned that the defendants were blocking the right of way thus preventing the plaintiffs from accessing their property. Accordingly, they obtained an injunction from this Court which directed the defendants to (amongst other directions) refrain from blocking the right of way.

[3] The plaintiffs now say that the defendants have defied the injunction by continuing to block the right of way, and accordingly seek an order for contempt.

History

[4] One of the co-owners of Mana Aroha, a Ms Ajani, was the former owner of a significant block of land bordering Matapouri Road which included the land now known as Mana Aroha and the defendants' property. In 1988 when Ms Ajani subdivided and sold Mana Aroha to the plaintiffs a right of way easement granting access to Mana Aroha was created over a property Ms Ajani retained.

[5] In 1995 Ms Ajani carried out a further subdivision of the property she had retained which created the defendants' property which was purchased by them in 1997. As part of that subdivision a further easement was created to allow Ms Ajani a right of way to drive over the defendants' property to get to Matapouri Road.

[6] Prior to the subdivision which created the defendants' property, the plaintiffs used the right of way created by the original 1988 subdivision. This right of way ran very close to a barn on the defendants' property. After the defendants purchased their property they commenced using the barn as their main residence, meaning that the plaintiffs' right of way ran right past their dwelling within a few metres.

[7] In 1999 the plaintiffs and their co-owners established their own crossing point and accessway from Matapouri Road over their own land. This accessway intersected the right of way over the defendants' property some distance up the right of way from

the entrance off Matapouri Road. This meant that the plaintiffs and their co-owners no longer drove past the defendants' house, and also gave the plaintiffs and the co-owners a more direct and better access off Matapouri Road. The plaintiffs' use of this new entrance point appears to have worked well for a reasonable period of time until 2014 when the plaintiffs allege that the defendants began erecting fences preventing the plaintiffs and their co-owners from accessing the right of way from their own accessway. In February 2015 Ms Ajani sought and obtained an interim injunction against the defendants restraining them from blocking the right of way. In a decision delivered on 12 January 2016 the District Court at Whangarei declined to make the interim injunction permanent on the basis that the Court did not consider that justice required that a permanent injunction be granted in all the circumstances.

[8] Annexed to this decision as Annexure 1 is part of a survey plan which shows the relevant properties and the easements [Editorial note: annexures are not attached to this judgment]. Lot 1 DP 195966 to the left-hand side of the plan is part of the land owned by the plaintiffs. The two lots owned by Ms Ajani are readily apparent as is the property bordering Matapouri Road owned by Ms Woods. The easements are marked in pink and yellow. Both the pink and yellow marking represent the easement created in 1988 when Ms Ajani subdivided and sold Mana Aroha to the plaintiffs. The pink marking is the easement created when Ms Ajani further subdivided in 1995 to create the defendants' property. The net result is that there are in fact two easements over the defendants' property which grant the plaintiffs the right of way to their property. The dotted lines below the pink marking from Matapouri Road to near halfway along the pink marking represent the separate accessway over the plaintiffs' land created by them in 1999. Once that separate accessway was completed the plaintiffs and the co-owners used that to access the right of way over the defendants' property from the point where their accessway intersects the right of way. The issue of whether or not the plaintiffs should be entitled to continue to access the right of way over the defendants' property at that point is at the heart of this case. The defendants had erected a fence along their boundary line which effectively fenced off the point where the plaintiffs' accessway intersects the right of way.

[9] On 18 January 2017 the plaintiffs sought and obtained an injunction preventing the defendants from fencing or obstructing right of way, particularly that part marked in pink. A copy of that injunction is attached to this decision as Annexure 2.

[10] The plaintiffs also obtained a supplemental order dated 31 January 2017 which, amongst other matters, authorised them to remove any fences constructed on the right of way.

[11] The plaintiffs now assert that the defendants have ignored the terms of the injunction by blocking the right of way with the boundary fence which they erected after the interim injunction was served on them. Accordingly they seek an order that the defendants are in contempt of court.

Evidence for the plaintiffs

[12] In his affidavit in support of the application for an order that the defendants are in contempt, Mr Scheurich briefly traverses the history relating to the easements both as to their creation and their use. He points to the benefits to both the plaintiffs and the defendants of the plaintiffs using their own accessway to access the right of way at the point where they intersect in that it provides the plaintiffs with a better entrance point and also means traffic does not run directly past the front door of the defendants' house. He also traverses the history of the previous proceedings leading to this injunction granted on 18 January 2017.

[13] He notes that the defendants were served with a copy of the injunction on 20 January 2017. He says that by the following Friday the defendants had erected the fence where the plaintiffs' accessway over their property joins the right of way. Attached to his affidavit and marked "N" is a photo taken on 23 March 2017 showing the fence in question.

Evidence for the defendants

[14] The defendants oppose the orders sought and say that no obstructions or obstacles have been placed on the right of way. In particular the fence in question as

shown in exhibit "N" to Mr Scheurich's affidavit is not on the right of way but is in fact on the boundary of the defendants' property and the plaintiffs' property. The defendants assert their right to fence this boundary and say that it was not on the right of way at all.

[15] The defendants have also filed an affidavit of Mr H J van Blommestein. Much of Mr van Blommestein's affidavit consists of legal submissions but it does also provide some useful information. Mr van Blommestein points out that the plaintiffs are claiming the right to access the right of way from their own accessway some 30 to 40 metres up the right of way. Mr van Blommestein supports the defendants in their assertion that the fence in question is in fact on the boundary between the defendants' land and the plaintiffs' co-owned land. He also makes the point that there is no easement creating a right of way for the plaintiffs to access the right of way where the boundary fence is. Of significance is his evidence that the plaintiffs have available to them an alternate vehicle access entirely across the co-owned land. He says this bypass was upgraded after some 16 months to provide all-weather access for the resident co-owners during winter 2016. The bypass he refers to can be seen on Annexure 1 and is the continuation of the dotted lines from the point where they meet the right of way marked in pink and passing to the left of the right of way marked in pink and rejoining the right of way marked in yellow.

Discussion

[16] The start point for consideration of this application are the terms of the injunction itself. The three essential provisions of the injunction are:

(a) Preventing the defendants, "…from erecting or placing upon the Plaintiffs' land and Right of Way…any fence,…vehicle or other obstructions whatsoever…that is not consistent with the Plaintiffs' rights in relation to and is not consistent with usual and proper use of, the Right of Way."

(b) Requiring the defendants to, "…provide immediate and unimpeded access to the Plaintiffs…to the Plaintiffs land and Right of Way."

(c) Requiring the defendants to, "…immediately remove any fence…or…motor vehicle or other obstruction…whatsoever from the Right of Way."

[17] The only evidence in support of the application is contained in the affidavit of Mr Scheurich dated 9 February 2017. In particular, in that affidavit he annexes at exhibit "N" a photograph taken on 23 January of the fence which prevents the plaintiffs from accessing the right of way from their own accessway. The plaintiffs have not produced any survey evidence to establish exactly where this fence is, but it appears not to be in dispute that the fence is on the boundary line of the defendants' property which is also the boundary line of the right of way, and where the plaintiffs' accessway meets the right of way. The defendants assert that the fence is on the boundary line, and on the balance of probabilities, I find that it must be so. There is no other evidence in Mr Scheurich's affidavit of any other obstruction that is placed within the right of way itself. In exhibit "N" a vehicle is shown which the plaintiffs claim is on the right of way. However, as I have said, there is no survey evidence which would establish whether or not this vehicle is in fact parked on the right of way. At the time the application for an injunction was filed it appears that there may have been a fence across the right of way further up the right of way at the point where the pink marking meets the yellow marking. However, in the evidence filed in support of this application there is no evidence before the Court as to whether or not that fence remained in place at the time the application was filed.

[18] The sole issue then, is whether or not the defendants have defied the injunction by erecting the fence on the boundary.

[19] The plaintiffs say that they are entitled to access the right of way at the point where their accessway over their own property intersects the right of way over the defendants' property. The fence prevents that access and therefore the defendants are in contempt. The defendants say that they have an absolute right to fence their boundary line which is all they have done, and no other obstructions are on the right of way. It is necessary to determine which of those competing positions is correct.

[20] With respect to fencing of the boundary the learned authors in Hinde McMorland & Sim *Land Law in New Zealand* at 16.038 comment:

> Where the easement runs along the boundary of the dominant land, in the absence of a specific provision in the terms of the easement, and except where the circumstances otherwise indicate, the servient owner is entitled to fence the right of way, provided sufficient points of access through gates are allowed to permit reasonable user (sic) of the right of way. The prima facie position is that:
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> (1) The servient owner is entitled to fence the right of way in order to secure its property along the whole boundary, but not so as to interfere with reasonable user (sic) of the right of way by the dominant owner through gates at such points as meet the dominant owner's reasonable requirements; and
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> (2) The dominant owner may have access through gates at a number of places, and may determine from time to time the points of access, which may vary over the years; but
>
> (3) The dominant owner is not entitled to have the easement remain unfenced.

[21] In this case of course the servient owner is the defendant, Ms Woods, and the dominant owner the plaintiffs.

[22] The first point to note is that there are no specific provisions in the easement certificates themselves which deal with the issue of fencing of the boundary of the easement. In determining what is the reasonable use of the right of way and what are the plaintiffs' reasonable requirements the following matters appear to be relevant:

(a) The plaintiffs (and the other co-owners) appear to have had unfettered use of the right of way by accessing it from their own accessway over their property for a period of some 14 years approximately.

(b) The plaintiffs do have the use of a bypass which accesses the right of way above the boundary between the defendants' property and the property owned by Ms Ajani.

(c) In his affidavit Mr Scheurich attaches the decision of the District Court at Whangarei of 12 January 2016. I note the findings of His Honour Judge McDonald in the Ajani proceedings against the defendants where

he found that Ms Ajani allowed the defendants to use the first 20 metres of the right of way in ways that effectively breached the plaintiffs' rights to pass uninterrupted on the right of way. The plaintiffs, as the dominant tenant, have not maintained the right of way from its entry point on Matapouri Road to where the plaintiffs' accessway intersects the right of way. It appears that the right of way is unusable as such for this first part.

(d) The plaintiffs' prior use of the right of way from the intersection with the plaintiffs' accessway was clearly for the benefit of both parties in that it prevents the plaintiffs' (and the co-owners') vehicles passing within a few metres of the defendants' house, and it also provides the plaintiffs with a more direct and easily accessible entranceway to their property.

(e) At no point does it appear that the plaintiffs have requested the defendants to place a gateway in the fence they have erected which would maintain a boundary for the defendants but would provide access to the right of way to the plaintiffs.

[23] The issue narrows down to whether or not the defendants' exercise of the right to fence their boundary in the way they have interferes with the reasonable use of the right of way by the plaintiffs and whether or not access to the right of way at that point meets the plaintiffs' reasonable requirements.

[24] In all the circumstances, it appears that it is simply not practicable for the plaintiffs to exercise their rights to pass over the right of way from its entranceway point on the Matapouri Road to where the fence has been erected. It also appears that both the plaintiffs and Ms Ajani (as owner of the separate titles in her name) have not maintained the initial section of the right of way. It seems in fact that portion of the right of way has not been utilised by the plaintiffs (or their co-owners) since 1999.

[25] However, the plaintiffs do have the use of the bypass on their own property to access their property. The plaintiffs have not filed any evidence disputing that they

have access to this bypass or to explain why it is not reasonable for them to use that. Mr Warren for the plaintiffs submits that if the plaintiffs were to utilise the bypass that "…would be to acquiesce to negate the effect of the Easement Certificates and validate the Defendants' thinly veiled attempt to annexe and substitute the Right of Way back into her property." Although it may be reasonable for the plaintiffs to use the bypass on their own land, that would effectively mean that they would have no use of any part of the right of way over the defendants' property. That would effectively render that part of the right of way ineffective. The short point is that the plaintiffs have the right to use the right of way and by maintaining the fence where it is the defendants are effectively denying the plaintiffs use of any part of the right of way that is on the defendants' property. Although the defendants do have the right to fence the boundary they can only do so by providing gates to meet the plaintiffs' reasonable requirements.

[26] There is nothing in the evidence that establishes that the plaintiffs accessing the right of way at the fence in any way interferes with the defendants' quiet enjoyment of their own property. In all the circumstances, it can only be that it is perfectly reasonable for the plaintiffs to access the right of way from that point. That is not incompatible with the defendants' right to fence their boundary, as that part of the boundary fence where it intersects the right of way can be maintained by way of a gate. In the circumstances I find it reasonable for the plaintiffs to access the right of way at the point where their own accessway intersects the right of way by means of a gate through the boundary line. The defendants have not provided an access gate in the fence-line, and to that extent therefore are in breach of the injunction.

[27] In that sense I then find that the defendants are in breach of paragraph 3.1 of the injunction in that they have erected a fence, "…that is not consistent with the plaintiffs' rights in relation to and is not consistent with the usual and proper use of the right of way."

Are the defendants in contempt?

[28] In determining this issue I note the summarisation of the law by Palmer J in *Zie Zhang v King David Investments Ltd (in liquidation) and Others*[1] at [39]. Applying that summary I note that the terms of the interim injunction were clear and unambiguous, were binding on the defendants and they had knowledge of them. The defendants have acted in breach of the order by fencing the boundary line without providing gateway access to the right of way to the plaintiffs. This was a deliberate act on their part. Accordingly, I must find that the defendants are in contempt.

[29] In considering the appropriate sanction regard must be had to the history of the creation and the use of the right of way easements and the relationship between the parties. The initial mutual co-operation between everyone involved with the various blocks of land appears to have evaporated, and the parties instead of compromise, have retreated to strict legal positions. In my view imprisonment is not justified in this case. The defendants clearly understood they had the right to fence their boundary and considered they were doing no more than what they were entitled to do. Of course their right to fence the boundary is not unconditional as noted by the learned authors in *Land Law in New Zealand* referred to above. The error lay in not recognising that, in all the circumstances, and having regard to the use of the right of way that it was reasonable for the plaintiffs to require access to the right of way at the point where the defendants have fenced the boundary line. The defendants have fallen into error in not appreciating that their right to fence was not unconditional. However, the defendants' actions have not totally denied the plaintiffs access to their property as they have an alternate bypass which provides that access. Thus the issue is more one of a matter of principle in that the plaintiffs seek to maintain the integrity of the right of way which of course they are entitled to do.

[30] A gate in the fence at the point where the plaintiffs' accessway intersects the right of way capable of being used by vehicles, and capable of being opened freely at all times would maintain that integrity.

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[1] *Zie Zhang v King David Investments Ltd (in liquidation) and Others* [2016] NZHC 3018

[31] In all the circumstances a financial penalty is not called for either. An order for costs in favour of the plaintiffs against the defendants on a 2B basis is, in my view, sufficient sanction for the contempt.

K B de Ridder
District Court Judge