IN THE DISTRICT COURT
AT HAMILTON

CIV-2014-019-000025
[2017] NZDC 21386

BETWEEN	WAIPA DISTRICT COUNCIL Plaintiff
AND	WIREMU HIRA RICK MURU, TE AIRA ANITA BERRYMAN, DONNA MATATAHI, TE HURITAU MURU, ORA TE NGAKAU MURU Defendants

Hearing:	6 September 2017
Appearances:	P Lang for the Plaintiff S Barker for the Defendants
Judgment:	22 September 2017

RESERVED JUDGMENT OF JUDGE I D R CAMERON

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[1] The Waipa District Council applies for a permanent injunction to enforce the registered easement over the defendants' land. The defendants oppose a permanent injunction.

[2] The easement allows the plaintiff access over the defendants' land to a reserve area contained within a predator proof fence. The easement also allows the plaintiff access over a mountain track to Maungatautari Mountain.

[3] The predator proof fence was paid for and erected by Maungatautari Ecological Island Trust (MEIT), which carried out extensive pest removal programmes within the perimeter fence and release programmes to increase the number and diversity of the native fauna. The plaintiff accepted responsibility for

arranging legal access across the defendants' land so that members of the public could experience and enjoy the reserve.

[4] Difficulties over locked gates were encountered in 2014, as a result of which the plaintiff obtained an interim injunction enforcing its rights granted by the easement. The plaintiff now seeks to have that interim injunction made permanent.

[5] Since the granting of the easement MEIT has established paid guided tours within the boundary of the predator proof fence. This has been the source of resentment by the defendants, who have taken various steps in an attempt to have such paid guided tours prohibited.

[6] In particular, on 25 February 2014 the defendants filed an interim junction application with the Maori Land Court. In that application the defendants sought to prohibit all commercially guided tours within that predator proof fence unless and until the defendants consented.

[7] That application failed, the Maori Land Court recognising that there was no prohibition in the easement of paid tours being conducted on the reserve land contained within the fence.

[8] It is accepted by the plaintiff that paid guided tours are not authorised on land owned by the defendants. Ms Clark gave evidence for the defendants to the effect that she joined a paid tour group on site on 27 January 2015, and that the guide imparted information to the participants while they were standing on the defendants' land. A video she took was played to the Court, showing the guide addressing the participants both outside the perimeter fence (and so on the defendants' land) and inside the perimeter fence on a small portion which is the defendants' land (and not reserve land). It is accepted by the plaintiff that this was a breach of the arrangement between the parties, and evidence was given that MEIT was instructed not to repeat such action. There is no evidence of any further breach of that arrangement by MEIT.

[9] In addition to taking proceedings in the Maori Land Court, the defendants also applied to the Environment Court on issues related to paid guided tours. The defendants were not successful in that application.

[10] There were further difficulties when MEIT in 2016 applied red tape around the entrance area to the facility indicating that the defendants and their invitees were not permitted to access their property at that point. That resulted in a judicial settlement conference following which that red tape was removed by MEIT. There has been no repetition of that since.

[11] The tension between the parties has been ongoing, culminating in the present application. From the defendants' perspective, there is a steel gate forming part of an enclosure outside the entrance to the facility. To access their land at that point the defendants need to slide the bolt in that steel gate, cross the enclosure, and enter their land through a white wooden gate. Mr Muru, the Chairman of the Board of Trustees of the defendants' Trust gave evidence that while he knew the steel gate could be opened in that way, not all his whanau would know that. The defendants' position is that this is an unauthorised obstruction to their right of access to their lands.

[12] Mr Roxburgh for the plaintiff gave evidence that the steel gate is on road reserve, and that the plaintiff has a licence to occupy that area and is therefore entitled to have erected that enclosure. I note that the defendants have not initiated the disputes procedure contained in the easement terms to determine whether the plaintiff is in breach.

[13] There is also a locked gate at the entrance to a pedestrian pass leading to the visitors centre. The defendants contend that this is on their land. The plaintiff now accepts that a small portion of the gate and possibly a post may encroach on to the defendants' land. This matter clearly needs to be resolved as between the parties, and failing the resolution by agreement then the disputes procedure can be invoked.

[14] There is also an issue as to the correct combination for a lock on a gate preventing unauthorised vehicles proceeding up the mountain track towards the summit. From the plaintiff's perspective there has only been one combination of

numbers and this has been disseminated to the defendants. The evidence of Mr Cullen (an agent for the defendants) was that this combination was not the correct one. Clearly this is a matter that is capable of simple resolution as between the parties.

[15] The defendants' position is that the issues over those three gates, and the paid guided tour over their land conducted on 27 January 2015, demonstrate ongoing breaches of the easement by the plaintiff, thereby disentitling it from having the interim injunction made permanent.

[16] The plaintiff's position is that the hostile attitude of the defendants towards its rights under the easement, and in particular to paid guided tours in the reserve, indicates likely breaches of the easement into the future.

[17] The plaintiff's position is that the defendants, having failed to obtain redress from the Maori Land Court or the Environment Court, now seek to disrupt the plaintiff's and MEIT's legitimate activities through the "Authorised Persons" process.

[18] The easement allows authorised persons engaged by the plaintiff or MEIT "to monitor, repair and maintain the Fence and to monitor and control mammalian pests and pest plants". Authorised Persons are defined as those specifically appointed by the plaintiff "and approved by the landowner".

[19] Mr Roxborough in his affidavit of 25 July 2017 (paras 22 and 23) stated that since the second decision given by the Maori Land Court (16 December 2014) the plaintiff had put forward some 80 applications for MEIT workers for approval by the defendants, and that approximately one-half of those applications had been refused with no meaningful reasons having been given.

[20] For their part, the defendants point by way of example to some 27 applications where the contact telephone number and contact address of the individual is identical. That is, that those contact details are simply contact details of MEIT itself and are not personal to the individual being considered. Mr Cullen's

evidence was to the effect that this justified a refusal of applications in that category. He contended that the defendants were entitled to have the personal details of each such person in case an emergency situation arose while that person was on their land, or to follow up with that person for any alleged breach of the easement terms, including the sending of any notices of breach to that person's actual address.

[21] The process for approving "Authorised Persons" has been an issue between the parties for some time. I note in the Maori Land Court's second decision of 16 December 2014 that the Judge commented that the affidavits of Mr Cullen and Mr Muru made it clear that they would not meet with the plaintiff or MEIT over that authorised persons process and indeed were refusing to consider any requests for approval at that time.

[22] Against that background, there is the evidence of Mr Roxborough that despite repeated requests the defendants refused to provide reasons for the many applications for approval which have been declined. In particular, annexed to Mr Roxborough's affidavit of 25 July 2017 is a letter dated 31 January 2017 from Mr Cullen for the defendants to the plaintiff stating:

> "The meeting findings of the approval panel are strictly confidential and will not be released at this stage."

[23] In other words, the attitude of the defendants was that it was not obliged to provide reasons for declining applications in relation to particular persons.

[24] When giving his evidence in opposition to the current application, Mr Cullen appeared to accept that in future reasons could be provided. However, the plaintiff's position is that there have been ongoing difficulties in obtaining the defendants co-operation to have persons approved, and that there has been no complaint to them previously by the defendants that insufficient contact details were being provided. The plaintiff's position is that there is ample evidence that the defendants are deliberately being obstructive by arbitrarily declining without reasons many of the applications for approval which have been submitted.

[25] My reading of the relevant correspondence and the evidence leads me to precisely that conclusion. There is no doubt that while the defendants have a discretion in relation to each approval, they must not exercise that discretion arbitrarily or in bad faith – see *C & S Kelly Properties Limited v The Earthquake Commission and Southern Response Earthquake Services Limited.*[1] An ongoing failure to provide reasons for declining to approve applicants is evidence of those decisions being made arbitrarily, especially against the background that there has been no formal complaint to the plaintiff about lack of contact details being provided.

[26] I conclude that the evidence points to ongoing unhappiness on the part of the defendants with the plaintiff and MEIT running paid guided tours within the predator proof enclosure. Mr Muru accepted as much when cross-examined by Mr Lang for the plaintiff. He accepted that the whole purpose of the Maori Land Court application was to block paid guided tours. From his perspective access to and within the reserve ought to be free to members of the public. I understand this perspective, but the fact is that the defendants willingly granted the easement over their lands for commercial gain in 2011. While they clearly did not anticipate this would result in paid guided tours, nevertheless such are not prohibited by the terms of that easement.

[27] While, too, the defendants may have some legitimate grievances in relation to structures and gates, there is a dispute resolution mechanism including mediation available to them under the conditions of the easement.

[28] In the material before the Court was a claim that the plaintiff had fallen behind in the payments agreed to for the grant of the easement. The plaintiff's position was that it had not seen an invoice from the defendants prior to the material being filed in Court, and that having now been presented with that invoice it will make immediate payment. There is nothing in favour of the defendants in this point.

[29] The defendants offer an undertaking to comply with the conditions of the easement, but only provided an equivalent undertaking is provided by the plaintiff. In the context of everything which has occurred between these parties since the

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[1] *C & S Kelly Properties Limited v The Earthquake Commission and Southern Response Earthquake Services Limited* [2015] NZHC 1690, at [67], Mander J

granting of the easement, I consider that such a conditional undertaking would not be sufficient. In my view there has been ongoing resistance by the defendants to activities being conducted by MEIT and that there is a likelihood of further resistance to the easement arrangement in the future. A permanent injunction is necessary to restrain future breaches of the easement by the defendants. *(Shell (Petroleum Mining) Co Limited v Todd Petroleum Mining Co Limited.*[2]

[30] In this case damages would not be an adequate remedy for the plaintiff and would lead to protracted and lengthy proceedings. While there is a dispute procedure contained within the conditions of the easement, in my view this is not sufficient to disentitle the plaintiff to a permanent injunction. While there was some point made by the defendants about delays in obtaining a permanent injunction, I see no conduct on the part of the plaintiff in terms of alleged delay which would disentitle it from obtaining that injunction.

[31] Finally, the permanent injunction will do no more than reflect the terms of the easement itself and therefore there can be no prejudice to the defendants.

[32] The form of injunction contended for by the plaintiff is appropriate, and accordingly the Court makes the following orders:

> *The Trustees of the Maungatautari 4GIV Block Trust shall not prevent or impede access over the easement land described in registered easement 9240868.2 South Auckland Registry ("the Easement"), by the Waipa District Council, its invitees and visitors, at any time when that Easement remains in effect, nor assist or procure any person to prevent or impede such access.*
> *This order above shall not prevent actions to prevent or impede such access when:*
> *there is or has been a breach of the Easement by the Waipa District Council or its invitee;* ***and***
> *The dispute resolution procedure specified in the Easement has been followed;* ***and***
> *that procedure has not result in agreement being reached;* ***and***

[2] *Shell (Petroleum Mining) Co Limited v Todd Petroleum Mining Co Limited* [2008] 2 NZLR 418, 430

as a consequence of the breach the defendant is legally entitled to restrict or prevent access to the easement land.

[33] There is no application for costs on the part of the plaintiff. However, should the plaintiff wish to pursue an application for costs it must file a memorandum within 14 days of the date of this decision. The defendants will then have a further 14 days to file any response. I can indicate that from the material I have received the likely outcome is that each party will be ordered to meet its own costs.

I D R Cameron
District Court Judge