**IN THE DISTRICT COURT**
**AT NORTH SHORE**

**CIV-2016-044-001624**
**[2017] NZDC 25965**

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| BETWEEN | GILLIAN ANNE BARRON<br>Plaintiff |
| AND | MELT JACOBUS LOUW AND TONI MARIE WARREN<br>Defendants |

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| Hearing: | 10 October 2017 |
| Appearances: | Mr DA Cowan and Mr J San Diego for the Plaintiff<br>Mr KP McDonald for the Defendans |
| Judgment: | 17 November 2017 |

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**DECISION OF JUDGE G M HARRISON**

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[1] The plaintiff, Ms Barron, seeks effectively an injunction against her neighbours, Mr Louw and Ms Warren, to remediate ongoing drainage issues.

**History of the two sites**

[2] Mr Louw and Ms Warren own 5 Spencer Terrace, Hauraki, Auckland. Ms Barron owns the neighbouring property at 42 Harley Close, Hauraki. The contour of the land falls generally from a southeast to northwest direction, with the Spencer Terrace property higher than that at Harley Close. Surface water flows from the Spencer Terrace property into and across 42 Harley Close.

[3] In 1986 the Spencer Terrace property was held in one ownership with an area of approximately 1,813 square metres.

[4] It is accepted by the parties that the then owner built a rock retaining wall, a set of concrete stairs next to it, and a smaller block wall, sometime around 1998 and possibly earlier.

[5] At that time the then owner had a small studio built below the stairs and retaining wall.

[6] In 2003 the Spencer Terrace property changed hands and in 2009 the then owners undertook a subdivision.

[7] On 18 March 2010, the original certificate of title was cancelled and four residential lots were created. Lot 2 on DP 426552 is the remaining Spencer Terrace lot. Lot 3 on DP 426552 being CT 515371 is the Harley Close property.

[8] The legal boundary between Spencer Terrace and Harley Close runs through the rock retaining wall and the stairs.

[9] Ms Barron lived in the studio at 42 Harley Close as a tenant from November 2009 to March 2010. She purchased the Harley Close property when separate title issued for it on or about 18 March 2010.

[10] Mr Louw and Ms Warren purchased Spencer Terrace in about November 2011.

[11] Since purchasing her property Ms Barron has constructed a house on it.

**The discharge of water**

[12] Ms Barron complains that the defendants have failed to undertake work on their property that might alleviate the emanation of water on to her property.

[13] She called as a witness Mr Sean Finnigan, a senior environmental engineer, as an expert. Mr Finnigan identified drainage issues as coming from a number of sources on the defendant's property. These were:

(1) Flow from under the concrete steps.

(2) Discharge from the end of the curved rock retaining wall which he described as wall A.

(3) A leak in that wall.

(4) Leaking from the steps and wall A.

(5) A blocked overflow pipe below wall A.

(6) A block retaining wall which he described as wall B constructed on the eastern side of the defendants' property.

[14] He noted that the best information available indicated that wall A was constructed around 1998, and wall B was constructed some time pre-2010.

[15] Mr Finnigan noted two other areas. The first he described as "the drained area". This is provided with a surface drainage system comprising two downpipes for roof runoff, a small sump draining most of the carparking area on Spencer Terrace and, secondly, a "driveway drainage area" which drains not only the driveway for Spencer Terrace but also from adjoining properties, that runoff being conveyed by a pipe to an outlet by an estuary on the northern side of Harley Close, and across that road from Ms Barron's property.

[16] As for drainage area two, this resulted from some landscaping and balcony improvements undertaken by the defendants during 2014. There had been an earlier complaint from Ms Barron in 2010 regarding runoff from the roof and other impervious areas at Spencer Terrace. The then North Shore City Council inspected the property which concluded that the stormwater system in place complied sufficiently with Council requirements. In particular, the downpipe discharging water from the roof guttering while 65 millimetres, when it should be 100 millimetres, was nevertheless creating no unacceptable overflow. As part of ongoing maintenance to Spencer Terrace, in January 2017 Ms Warren arranged for a roofing company to replace the 65 millimetre downpipe with one of 80 millimetres, there having been a minor leak to the roof of the Spencer Terrace house.

[17] I note also that in undertaking landscaping and balcony improvements the defendants arranged for plans to be drawn professionally to ensure that the proposed building coverage area was less than the maximum permitted by the District Plan, and similarly for the proposed impervious area. In both instances neither maximum area was exceeded.

[18] Mr Finnigan accepted in cross-examination that nothing on the roof of the house at Spencer Terrace had changed from the time of the Council's inspection in 2010. (NOE p 57.) He also accepted that the roof issue was minor in relation to the solution options. (NOE p 58.)

[19] I asked Mr Finnigan to comment on the difference between his evidence and that of Mr Raymond Search, the expert called by Ms Warren. The essential difference was the view of Mr Finnigan that because of the subdivision creating the new titles a new situation develops which required different drainage measures to be undertaken, whereas Mr Search was of the view that there had been no increase in surface water flow post subdivision, and no action by the defendants was required.

[20] A further complicating factor is that Ms Barron's partner, Mr Peter Fairclough, undertook some extensive drainage work in September 2013 where by use of a mechanical digger a trench was excavated at the base of wall A and it was impossible to say whether that work or merely the effect of time had caused the nova coil pipe at the base of the wall to become blocked.

[21] Almost needless to say, the local Council has received numerous complaints and requests for inspections of the drainage issue. My view, as expressed to the parties in the course of the hearing, was that whatever view the Council held was irrelevant to the resolution of the issue. It seems the Council agreed because in a letter of 2 April 2013 to Ms Barron the Council stated:

> The overland flow of stormwater is in essence a civil issue between neighbours and needs to be managed by the parties concerned.

[22] Mr Raymond Search gave evidence on behalf of the defendant. He is a senior civil and structural engineer with 32 years' experience, with an emphasis on

stormwater projects. He assessed the history of the sites and concluded that there has been no increase in surface water flow from Spencer Terrace to Harley Close and that the subsequent extension and wall construction on Spencer Terrace has progressively decreased surface water flows to Harley Close. He also concluded that the side yard landscaping works had no effect on surface water to Harley Close.

[23] One of his concerns was that there may well be water flowing from the property at 3 Spencer Terrace through the southeastern corner of Harley Close, although that could only be confirmed if the affected area was exposed.

[24] He also concluded that Ms Barron could undertake the construction of a drain on her property at the base of wall A which would remedy the problem. Ms Barron, on the other hand, presses for a finding against the defendants that they implement what Mr Finnigan described as option 3 which would similarly require a drain to be installed above walls A and B, and the concrete steps, on the defendant's land at a cost of $55,000.

**The law on surface water in New Zealand**

[25] The basic principle is that lower land is subject to a natural servitude by which it is obliged to receive the water which falls naturally from higher land.

[26] This was confirmed by the New Zealand Court of Appeal in *Bailey v Vile* [1930] NZLR 829. In reaching its decision the Court followed the earlier decision of the Privy Council in *Gibbons v Lenfestey* [1915] 84 LJPC 158. The statement of the Privy Council, adopted by the Court of Appeal, was as follows:

> The law may be stated thus: when two contiguous fields, one of which stands upon higher ground than the other, belong to different proprietors, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water which falls from the superior. If the water which would otherwise fall from the higher ground without hurting the inferior tenement should be collected in one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property. …

[27] This was followed by North J in *Wilsher v Corban* [1955] NZLR 478, in which that learned Judge stated certain principles as follows (p 490):

> First, the obligation of the inferior proprietor to receive the natural waters flowing from higher land was not an ordinary servitude which required to be supported by an express grant, or by registration to bind successors. Secondly, it could never be said as a matter of law that the collection of surface waters into one body per se was not a natural user of land for this was a question of fact which required to be determined in each case with due regard to the whole of the surrounding circumstances. Thirdly, if the facts disclose that the natural waters from the superior tenement had been cast on the inferior tenement in a certain place over a period of years, then, prima facie, at all events, the inferior proprietor was obliged to receive the surface waters in this way. Fourthly, the mere circumstance that surface waters had been collected into one body and so discharged on to the inferior tenement did not necessarily alter the nature of the right, and, therefore, no question of the need of an express grant or of registration need arise.

[28] These authorities were reviewed by Mahon J in *Davis v Lethbridge* [1976] 1 NZLR 689. That was a case very similar to the present. Land had been subdivided creating two lots with one higher than the other. When in its natural state, as might be expected the land at the lower level received by natural flow the surface water from the defendants' land. Soon after acquiring the land at the higher level, the then owner constructed a concrete retaining wall just within the common boundary. This was intended solely as a prelude to filling part of the section to create a building platform.

[29] When the owners of the lower land bought their section the retaining wall was in existence and directed the natural flow of surface water away from their property. After the defendants purchased the higher level section the area behind the retaining wall was filled which resulted in the surface water which had temporarily been deflected by the wall from now returning to the plaintiff's land in times of heavy rain. The judge found against the plaintiff and held that the construction of the retaining wall was no more than an intermediate stage in the proposed operation of raising the level of the defendants' section at which time the natural flow of surface water was restored.

[30] The judge held further (p 698):

> The tort of nuisance is committed when the user of the defendant is either non natural, or unreasonable as between him and his neighbour or his local community, with resulting damage or interference with property rights

> sufficiently substantial to warrant the intervention of the law. At modern society where land use is controlled by zoning ordinances it is now impossible to contend, in my opinion, that the building of a house and the laying out of paths and other amenities is not a reasonable and natural user of land zoned by law for that use alone, even though the resulting impermeability of the land surface now diverts surface water elsewhere, and not wholly into the stormwater drains prescribed by the controlling local authority.

[31] He concluded (p 698):

> The lower owner may have legal redress only if the user of the defendant, reasonable in his own interests, is shown to be unreasonable having regard to the rights of the lower owner and to the nature and extent of the detriment which he or his property has suffered.

**Is there a nuisance?**

[32] It is clear that surface water runs from the Spencer Terrace land over the Harley Close land.

[33] The evidence is clear that there has been no change to the contour of the land or in the buildings or other improvements made to the Spencer Terrace land, which has increased the natural flow of surface water. That was the view of Mr Search, and I did not understand Mr Finnigan to disagree with him, the stance taken by the latter being that the subdivision created a different situation requiring the higher land to undertake remedial measures.

[34] That is not the law as I have described it.

[35] Mr Cowan's point was that even if a person comes to a nuisance he/she may have the right to have that nuisance abated.

[36] He relies upon the case of *Marcic v Thames Water Utilities Limited* [2003] UKHL 66. In that case the plaintiff failed in his claim based on nuisance arising from the overloading of public sewers and flooding from surface water and backflow from two sewers in a residential street. At [32] the Court said:

> The old distinction between misfeasance and nonfeasance no longer rules the day. *Goldman v Hargrave* [1967] 1 AC 645 and *Leakey v National Trust for places of historic interest or natural beauty* [1980] QB 485, building on the decision in the leading case of *Sedleigh and Denfield v O'Callaghan* [1940] AC

> 880, establish that occupation of land carries with it a duty to one's neighbour. An occupier must do whatever is reasonable in all the circumstances to prevent hazards on his land, however they may arise, from causing damage to a neighbour. In *Goldman*'s case a red gum tree in Western Australia was struck by lightning and set on fire. The fire spread to neighbouring property. In *Leakey*'s case natural causes were responsible for soil collapsing on to neighbouring houses in Bridgewater, Somerset. In both cases the landowners were held liable to their neighbours for the damage caused. A similar approach was adopted regarding loss of support due to a land slip in *Holbeck Hall Hotel Limited v Scarborough Borough Council* [2000] QB 836 and incursion of tree roots in *Delaware Mansions Limited v Westminster City Council* [2001] UKHL 55.

[37] I note that in each of those cited cases none related to the natural flow of water. They were all concerned with hazards suddenly arising and damaging neighbouring land.

[38] It is unlikely that the *Sedley Denfield* case, decided as it was in 1940, would not have been taken into account in *Wilsher v Corban* or *Davis v Lethbridge* if it had been relevant.

[39] In my view the issue is put beyond doubt by the decision of the English Supreme Court in *Lawrence v Fen Tigers Limited* [2014] AC 822. This was a case involving a speedway and unreasonable noise produced by activities at the stadium. The Court held that in all the circumstances of that case a nuisance had been established.

[40] The Court went on to observe whether a person coming to a nuisance could nevertheless have it abated by injunction. The Court said:

> 55 It is unnecessary to decide this point on appeal, but it may well be that it could and should normally be resolved by treating any pre-existing activity on the defendant's land, which was originally not a nuisance to the claimant's land, as part of the character of the neighbourhood – at least if it was otherwise lawful. After all, until the claimant builds on her land or changed its use, the activity in question will, ex hypothesi, not have been a nuisance. This is consistent with the notion that nuisance claims should be considered by reference to what Lord Goff referred to as the "give and take as between neighbouring occupiers of land" quoted in para 5 above (and some indirect support for such a view may be found in *Sturges,* at pp 865-866).
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> 56. On this basis where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that

> (i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land, (ii) it was not a nuisance before the building or change of use of the claimant's land, (iii) it is and has been a reasonable and otherwise lawful use of the defendant's land, (iv) it is carried out in a reasonable way, and (v) it causes no greater nuisance than when the claimant first carried out the building or changed the use.
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> …
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> 58 Accordingly, it appears clear to me that it is no defence for a defendant who is sued in nuisance to contend that the claimant came to the nuisance, although it may well be a defence, at least in some circumstances, for a defendant to contend that, as it is only because the claimant has changed the use of, or built on, her land that the defendant's pre-existing activity is claimed to have become a nuisance, the claim should fail.

[41] In my view that is the situation here. The flow of water from Spencer Terrace over Harley Close has not changed as a consequence of anything done by the defendants. The flow of water has been consistent. It is only because Ms Barron has constructed her house that the flow of water is now claimed to be a nuisance. I do not accept as a matter of law, that that can be so.

[42] The claim must therefore fail.

**Conclusion**

[43] I note that it is still open to Ms Barron to undertake drainage work on her property to alleviate the condition of which she complains. That obviously is a matter for her.

[44] In my view costs should follow the event assessed on a 2B basis on which I invite counsel to agree, failing which I will receive memoranda.

G M Harrison
District Court Judge