IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2020-004-000565
[2021] NZDC 23949

BETWEEN	GINA LOUISE CARTWRIGHT ADAM ST JOHN RADNOR BARTLETT Applicants
AND	ANDREW REID ATKA REID Respondents

Hearing: 2 December 2021

Appearances: JK Goodall & JMG Hansen for the Applicants
JWA Johnson & SJ Macintosh for the Defendants

Judgment: 23 December 2021

RESERVED JUDGMENT OF JUDGE D J CLARK

Introduction

[1] Disputes between neighbours are never easy to resolve. This dispute is no exception.

[2] The applicants are the owners of a wall that leaks. As a result of the leak they have suffered water ingress into their home causing significant damage. Understandably they wish to have the wall fixed. The issue in this proceeding is that in order for the applicants to have the wall fixed, they say that they need to gain access onto their neighbour's property who are the respondents.

[3] Despite a number of attempts over the years the parties have been unable to reach an agreement on access and, related issues. In the circumstances, the applicants have issued these proceedings seeking orders in accordance with ss 319 and 320 of the Property Law Act 2007 ("the Act").

[4] The respondents oppose the application. In their amended notice of opposition dated 27 October 2021, the respondents state that the Court's jurisdiction to grant orders under ss 319 and 320 of the Act does not extend to some of the orders which the applicants seek.[1] The applicants interpret this objection to mean the Court's power is limited to permitting access simpliciter.[2] On that basis they say a preliminary determination of this threshold question is necessary, and have filed an application pursuant to District Court Rule 10.21 seeking that this jurisdictional issue is dealt with separately from the substantive issues.

[5] The respondents say the jurisdictional issue is not the only threshold issue which may provide a "basic determination" of the substantive application.[3] They say the scope of works suggested involve an ongoing infringement onto their property in terms of the drainage system that will be necessary to fix the leaking. As such a

[1] Para 3(d) Respondents Amended Notice of Opposition.
[2] Para 7 Mr Goodall's submissions.
[3] Para 17 Mr Johnson's submissions.

trespass of permanently encroaching materials would result, which is something the Court is unable to allow.[4]

[6] The respondents also argue the applicants are ignoring regulatory obligations which they say are necessary. If building and/or resource consents are necessary, then a further process may be required which may be unsuccessful.[5] One or both of the trespass or regulatory issues may prevent the Court from making any orders under s 320 of the Act, or, at least complicate an argument which attempts to solely focus on the jurisdictional issue.

[7] To determine the substantive proceeding a defended hearing of anywhere between four to five to days or more is necessary. Even though there is some agreement that time may be reduced by having the affidavit evidence accepted as read, it would appear that lengthy cross examination of witnesses will occur, dealing with matters and issues which are complex.

[8] The applicants are concerned that they do not wish to proceed with a lengthy trial only to have the Court reach a decision that it has no jurisdiction to make the orders. They would rather have the jurisdictional issue dealt with as a preliminary issue and split the trial in accordance with District Court Rule 10.21. The split trial would deal firstly with the jurisdictional issue and if it is determined against them, that will be the end of the matter. The associated time and expense of lengthy trial would be avoided.

[9] This application then seeks to have the jurisdictional issue determined in a separate hearing which they say will last somewhere between a half to one day.

[10] The respondents oppose the application. They say that a split hearing is inappropriate and "ultimately, the longest way round will be the shortest way home."[6]

Background

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[4] Ibid at para 23 citing *Duncan v Taylor* (2011) 12 NZCPR 235 at [72]-[83]; *Barry Park Investments Ltd v Johnson* [2019] NZCA 686.
[5] Para 29 Mr Johnson's submissions.
[6] Para 1 Mr Johnson's submissions and *Windsor Refrigerator Co v Branch Nominees* [1961] 1 CH 375 (CA) at 369 per Lord Evershed MR.

[11] The applicants are the registered proprietors of 10 Rawene Avenue, Auckland. The respondents are the registered proprietors of 8 Rawene Avenue, Auckland. A masonry wall abuts the boundary between the two properties and the leaking is through part of this wall. The water ingress into the applicant's property has caused significant damage.

[12] There is significant dispute between the parties over the background of why the parties now face each other in Court. It is unnecessary in this judgment to determine any disputed facts other than acknowledging these disputes exist. I summarise then the background by attempting to discern what can be agreed.

[13] Discussions between the parties have included, the scope of works which will be required, the impact of the scope of works on the respondents' property, security, if any, to be held in respect of the remedial repair to the respondents property, whether compensation should be paid to the respondents and how much, the duration of the intended remedial works and the payment of legal and expert costs. All of the above has caused considerable distress between the parties. Resolution of the issues has been close, but to date, nothing has been settled.

[14] Water ingress into the applicants' property was first noticed in December 2012. Water ingress has occurred on six further occasions.

[15] In 2018 the applicants carried out renovations to their property and attempted to deal with the water ingress issue by way of internal waterproofing. It did not prove successful and in November 2019 further water ingress occurred causing further damage.

[16] A permanent solution was necessary which again meant access to the wall was necessary via the respondents' property. Tensions had arisen immediately prior to Christmas 2019 when the respondents received a letter from the applicants' lawyers. The letter demanded, amongst other things, access through the respondents' property, with the threat of Court proceedings if an agreement could not be reached.

[17] The respondents were not inclined to respond in the manner demanded by the applicants. They agreed to meet them in March 2020 to discuss the issues, but those discussions were unsuccessful. The applicants then filed these proceedings in April 2020.

[18] Discussions again were held in June 2020. An agreement was reached where access for a physical inspection of the wall could be undertaken. This occurred on the basis that the property would be reinstated. The respondents say that although there was access and the works undertaken, digging equipment was left on the property, and reinstatement of the garden did not occur which further eroded the relationship between the parties.

The Scope of Repair Work Required

[19] Mr Sturmfels, an inspector engaged by the applicants is of the view that a combination of factors has caused or contributed to the water egress. His findings can be summarised:

(a) A sealing joint at the base of the wall had failed (the normal serviceable life of these joints expired in 2021);

(b) The backfill against the wall from the respondents' property was 200-300 mm higher than the recommended height; and

(c) There were roots behind the trees planted on the respondents' property that had entered above and behind the tanking membrane at the foot of the wall.[7]

[20] Mr Sturmfels says that for the wall to be remediated the following needs to occur:

[7] Paragraph 17, Mr Goodall's submissions and affidavit of Elton Sturmfels dated 10 September 2020 at 9.

(a) Inspecting the tanking membrane at the base of the wall and repairing the damage to that membrane;

(b) Installing a new underground drainage system (because the respondents want the existing drainage coil removed, as it is located on their side of the boundary);

(c) Installing tree-root persistent protection boards to protect the tanking membrane; and

(d) Applying waterproof coating to the tanking membrane and replacing all the sealant joints at the base of the wall.[8]

[21] As the wall abuts up against the boundary the work cannot be carried out from the applicants' property. Accordingly, the following works would need to occur which will directly affect the respondents' property:

(a) Access to the respondents' property would be required for 10 days (although the works are expected to be completed within seven good weather days);

(b) A trench would be excavated by hand along a 15.6 metre section of the wall being a maximum of 1.2 metres deep and 1.5 metres wide;

(c) Several small trees within the excavation area would be removed and reinstated by professional arborists;

(d) A temporary wire fence would be erected at the edge of the respondents' driveway for public safety. The driveway would not otherwise be affected by the works; and

(e) At the completion of the works all the landscaping on the respondents' property would be reinstated by professional landscapers.

[8] Paragraph 18, Mr Goodall's submissions and Mr Sturmfels' affidavit dated 10 September 2020 at 13.

[22] Further protection measures are set out within paragraph 21 of Mr Goodall's submissions which I do not repeat here. All of them are designed, the applicants say, to minimise the period required to undertake the remedial works, ensure adequate independent supervision is engaged to supervise the work and, at all stages to minimise any disruption to the respondents personally and to their property. In addition, the sum of $50,000 was offered on an open basis to avoid the Court proceedings.

[23] The terms to complete this scope of works have been rejected by the respondents. The respondents say that they are not trying to be unreasonable in terms of the scope of work and accept the wall does need to be repaired. However, given the level of mistrust that they have and the protracted nature of the negotiations, they require security to be put in place. They have requested a bond in the sum of $250,000, the payment of the sum of $110,000 to cover expert and legal costs, a further sum for any future legal and expert costs, and payment of $2,000 day (which was reduced to $1,000 day) for the duration of the work as compensation.

[24] The respondents have gone further as well. One of their major concerns is that they do not accept that the intended scope of works will necessarily remediate the wall because the wall itself is inadequately designed and constructed. The wall never met the New Zealand Building Code and the internal repairs undertaken in 2018 were not completed with the required building consent.

[25] Describing the approach to date as "cavalier" Mr Johnson is concerned that any of the intended works will not substantially deal with the real issue, will ignore regulatory controls and requires a drainage system which will encroach on the respondents' land without any legal framework being built around how that encroachment will work out, how continued and future access to the encroached area (where the drainage system and scoria will be) will be resolved in terms of an easement or compensation. As an example, the respondents point to the footing of the wall which encroaches onto the respondents' land without any legal right to do so.

The Separate Question

[26] The applicants filed this application on 7 October 2021. On the same day they filed an amended originating application seeking the orders under ss 319 and 320 of the Act. The amended application sets out a schedule of the proposed terms of access.

[27] The following question is proposed by the applicants to be determined as a preliminary matter:

> Does the Court have jurisdiction under ss 319 and 320 of the Property Law Act 2007 to authorise the following works on the respondents' property at 8 Rawini Avenue, Auckland:
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> (i) Excavation and refilling of soil along with the removal and replanting of palm trees and other foliage; and
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> (ii) More specifically, the works particularised in Schedule A of the originating application dated 7 October 2020.

Submissions

[28] Mr Goodall says the jurisdictional issue needs to be determined in any event irrespective of whether it is as a preliminary matter or in a substantive hearing. By determining it as a preliminary issue it will provide the parties with certainty regarding the fundamental issue and avoid the need for a substantive hearing lasting for a period of over four to five days. The associated costs and expenses if the preliminary question is determined against the applicant would save costs and expenses for the parties and, a saving in terms of judicial resource.

[29] Mr Johnson argues that the jurisdiction issue needs to be seen in some context. The determination of the trespass and the regulatory consent issues conflates with the jurisdictional issue in terms of what orders can be granted under s 320. Evidentiary issues, much of it is not agreed between the experts, need to be determined or certainly considered as part of a determination of any legal issues under ss 319 and 320 of the Act.

[30] The preliminary question is not necessarily a strict legal question but will involve issues of mixed law and fact. Separating out the jurisdictional issue or even

attempting to answer the question posed will involve a consideration of issues far wider than what the applicants say the preliminary question is focused on.

Discussion and Analysis

[31] Rule 10.21 of the District Court Rules:

> **10.21 Orders for Decision**
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> The Court may, whether or not the decision or dispose of the proceeding, make orders for:
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> (a) The decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
>
> (b) The formulation of the question or the decision and, if thought necessary, the statement of a case.

[32] Rule 10.21 mirrors High Court Rule 10.15. A significant amount of authority exists and provides guidance on determining whether a separate hearing should be ordered. As the Hon. Kós J stated in *Hayden v Attorney General*:[9]

> [46] The Court has a general discretion under Rule 10.15. Each case must be considered individually. But one must start with at least a moderate presumption against splitting trial. That presumption is born out in practice: applications under Rule 10.15, were contested, far more frequently than they succeed. The burden lies on the applicant and is "not insignificant".
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> [47] The classic statement of the risk of the Rule 10.15 procedure is that by Fisher J in *Clear Communications Limited.*
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> > Split trials risk a number of difficulties. It is often difficult to define with sufficient precision the demarcation between those issues to be addressed at the first trial and those left for the second … it is not always easy to see what matters have become the subject of issues. It may be necessary to prepare and issue estoppel schedules and hear argument as to the scope. A Judge may inadvertently disqualify himself or herself by expressing views on matters yet to be fully addressed at the second hearing … findings might be inadvertently made without the benefit of evidence and argument envisaged by a party is appropriate only for the second hearing. The second hearing can require the recalling of the same witnesses with needless extra time and cost to the parties and the public. There is duplication of time spent by counsel in the Court and reacquainting themselves that issues imperfectly remembered from an earlier trial and the time spent re-traversing those matters in Court. It can be multiple appeals (in extreme cases taking the matter to the Privy Counsel as in *Ryde v*

[9] *Hayden v Attorney General* HC Wellington CIV 2-10-485-2380, November 2011, 46.

> *Sorrenson*) before returning to the Court of first instance to embark upon a second phase of the case. Even without appeals, there can be delay in embarking upon a second round of discovery and other interlocutory matters and amending pleadings following the first trial and then the delay of obtaining a fixture for the second hearing. There can be difficulties in ensuring that the same Judge is available for the second hearing, bearing in mind the usual commitments, sabbaticals, retirements and deaths which are the unhappy lot of the judiciary. If a different Judge has to preside in the second hearing there can be difficulties over earlier views as to credibility and the status of the notes of evidence from the first hearing. In my view these and other difficulties together place a heavy onus on any parties seeking split trials.
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> [48] Complex cases in particular ones where Rule 10.15 decision may be inappropriate. As Lord Scarman once said:
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> > Preliminary points flawed are too often treacherous shortcuts. Their prize can be, as here, delay, anxiety and expense.
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> (citations omitted)

[33] The burden rests of course with the applicants. There is a presumption that needs to be discharged but each case must be considered individually.[10] The starting point remains that there is a presumption against a split trial. As Associate Judge Osborne observed in *Karem v Fairfax New Zealand Limited*:[11]

> There is some onus on an applicant to establish a preponderant balance of factors in favour of the determination of a separate question – the onus has been variously described as "not insignificant", "moderate" and "heavy". An appropriate approach is to consider whether the applicant has established good, preponderant reasons in favour of a separate question determination.

[34] Guidance in the approach has been set out in *Hayden v Attorney General*[12] based on the following questions:

(a) Will there be difficult demarcation questions between those issues addressed at the first trial and those left for the second?

(b) Will the separate questions bring the proceedings to an end?

(c) What potential time saving does the separate question offer?

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[10] *Karem v Fairfax New Zealand Limited* [2012] NZHC 1331 at 58-59.
[11] *Karem v Fairfax New Zealand Limited* [2012] NZHC 1331 at 58.
[12] See n 4 above.

(d) How will appeals be dealt with?

(e) Are there any other practicable considerations tending one way or the other?

[35] Against the background set out above, I consider each of the questions as follows:

(a) Will there be difficult demarcation questions between those issues addressed at the first trial and those left for the second?

[36] Mr Goodall argues[13] that the jurisdiction arises because the respondents claim that the Court:

(a) Can only allow *entry* onto the land under ss 319 and 320 of the Act; and

(b) Cannot permit any alterations to their land, which in this case would be the temporary removal of some planting and the proposed excavation.

[37] The jurisdictional issue is distinct, and a consideration of the wider issues as suggested by Mr Johnson are unnecessary.

[38] Mr Johnson's argument is that the jurisdictional issue goes beyond simply access issues and deals with the scope of work and a permanent encroachment of the drainage and scoria. A consideration and a determination of:

(a) What will the necessary remedial works be;

(b) The amount of harm and destruction to the respondents and their property; and

(c) Whether consents are required (resource or building or both) for the works to be completed

[13] Para 32 Mr Goodall's submissions.

will be needed as part of the preliminary issue hearing.

[39] Furthermore, any orders which are made (ancillary or otherwise) under s 320 will need to take into account the contested evidence of the witnesses (expert and lay witnesses) in reaching the determination.

[40] I agree with Mr Johnson. I am unable to see how the issues that the respondents have raised can be easily separated from the question posed by the applicants. I accept access or entry may be an issue that can be separately determined but the question posed goes beyond that. It deals with scope of work issues and what type of work will be undertaken on site. I fail to see how a Court can deal with those issues without a thorough examination of the expert evidence. This must also involve a consideration of whether the works do need to be consented and what remains following the remediation works are completed (ie the trespass issue).

[41] In my view a trial Judge will want to hear from the experts to hear on these issues. If the decision is decided in favour of the applicants then the risk is, the same experts will need to reappear and provide the same evidence. While that problem may be cured if the same Judge is scheduled to hear the preliminary matter and the substantive matter, but that is by no means a certainty given the impact of Covid and the restrictions on Judges' time.

[42] In the circumstances I cannot see how the preliminary question can be easily separated from many of the other substantive issues in the proceeding.

(b) Will the separate questions bring the proceedings to an end?

[43] If the matter is determined in the respondent's favour (ie: no jurisdiction exists) then clearly that will determine the substantive issue. If the question is determined in favour of the applicants then the proceedings will continue, all of which is subject to appeal rights dealt with below.

(c) What potential time saving does the separate question offer?

[44] The argument framed by Mr Goodall is not an issue as to the saving of time as he says the preliminary question itself will only take approximately half a day. In my view it will take more than half a day and more likely a day, especially if evidence is referred to and cross examination is required. Mr Goodall's main focus is on wasted costs and expenditure for all of the parties if the preliminary issue is determined against the applicants.

[45] Whilst Mr Goodall's concern is certainly laudable in terms of saving legal, and expert costs as well as judicial resources, what will be effectively argued, based on the question posed, are most of the substantive issues which will need to be considered at the second trial. Again, I refer to *Hayden* on this issue:[14]

> It is difficult to see the effect of the separate question doing other than bringing forward in time an issue … that would otherwise need to be dealt with at trial. It does not seem likely to alter markedly the time required at trial, either way. But it will have the deleterious effect of splitting trial, with all of the associated inefficiencies that go with that.

(d) How will appeals be dealt with?

[46] This is a matter that has existed since 2012. Numerous attempts to resolve this have failed with litigation resulting in 2020. The parties appear determined to have this matter resolved through the Court processes. A determination against the applicants does not fix their wall and may leave them with little option but to appeal. A determination against the respondents means either the substantive hearing proceeds or they may wish to appeal. In either event it does not move the parties closer to a final determination and indeed, it could move them further away.

(e) Are there any other practicable considerations tending one way or the other?

[47] Mr Johnson has outlined a number of other considerations which includes the delay in filing this application even though it was signalled some 14 months ago. I do not put much weight on this argument.

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[14] Supra at 63.

[48] The primary issue that I consider necessary to be determined is whether access is to be granted and on what terms.

[49] If access is granted then it is inevitable that any form of construction works will be disruptive, notwithstanding the best endeavours by the contractors involved. Orders will need to be made stipulating the nature of the access, setting out the scope of works but also protecting the interests of the respondents. To short cut the process by not taking into account all of these issues provides no remedy at all to either of the parties.

[50] Finally, I am mindful of the scheduling difficulties in the District Court which have only been exacerbated because of Covid and the need to vacate numerous hearings during the current period. To schedule a separate trial on a matter which substantively can all be dealt with in one go is not a wise use of judicial resource. The matter is ready to proceed to a trial and should proceed to a trial forthwith. Proceeding to a substantive hearing as soon as possible and determining all matters at once is the most efficient use of judicial resources.

[51] For those reasons, the application is dismissed.

Result

[52] The application is dismissed. The respondent is entitled to costs which I fixed based a category 2 band B basis. Those costs are stayed however pending the final determination of the substantive proceeding.

Signed at Auckland this 23rd day of December 2021 at 10.15 am

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Judge D J Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 23/12/2021