

**IN THE DISTRICT COURT  
AT WHANGANUI**

**I TE KŌTI-Ā-ROHE  
KI WHANGANUI**

**CIV-2022-083-000167  
[2023] NZDC 5465**

BETWEEN

JOHN CHARLES ANDERSON  
GEOFFREY ANDERSON  
Plaintiffs

AND

BASHFORD ANTIQUES LIMITED  
Defendant

Hearing: 20 January 2023

Appearances: T Manktelow for the Plaintiffs  
M Organ, Director for and on behalf of the Defendant

Judgment: 24 March 2023

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**RESERVED JUDGMENT OF JUDGE L C ROWE  
[On application for summary judgment]**

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[1] John and Geoffrey Anderson own a block of land situated between St Hill Street and Victoria Avenue, Whanganui which contains their furniture shop known as Wanganui Furnishings.

[2] Bashford Antiques Limited (Bashford) owns a neighbouring block of land which also runs between Victoria Avenue and St Hill Street, Whanganui.

[3] Michael Organ is the director and a shareholder of Bashford.

[4] The Bashford property has a shop front onto Victoria Avenue and a large carpark at the rear from St Hill Street.

[5] The Andersons have a right of way from St Hill Street through Bashford's carpark to their property.

[6] The right of way, specified in easement certificate 523437.2, was registered on the titles of both properties in 1982. It has five parts marked on a deposited plan 51923 as parts A, B, C, E and F.

[7] The right of way is in a "cross" shape. It begins at St Hill Street with part E, running through the centre of Bashford's carpark for about 20 metres to where it is crossed by parts A, B and C. Part F continues beyond this, down the centre of the carpark to Bashford's shop.

[8] Part C ends at a brick wall on the Anderson's property, attached to part of the Wanganui Furnishings building.

[9] The Andersons used the right of way, or parts of it, for more than 30 years to receive and dispatch deliveries to and from their furniture store.

[10] Access to and from the delivery/dispatch area was via a gate next to the brick wall where the right of way terminates. While the gate cannot be reached without deviating from the right of way as registered, the Andersons and previous owners of the Bashford property have either not realised this, or the previous owners have allowed the Andersons to use the gate as if the right of way led directly to it.

[11] Sometime after Bashford acquired its land however, Mr Organ refused to allow the Andersons to use the gate access to their loading bay and padlocked the gate. He also served trespass notices on the Andersons preventing them from using Bashford's land.

[12] In addition, Bashford, through Mr Organ, placed a 40-foot shipping container on the carpark, against Wanganui Furnishing's wall and across Part C of the right of way preventing the Andersons from reaching their premises via the right of way.

[13] The Andersons wish to access their brick wall from the right of way to have it removed and a gate installed so they may, once again, access their loading bay from

St Hill Street. Their present alternative is to load and unload furniture and other goods through shop frontages on Victoria Avenue or St Hill Street.

[14] The Andersons seek summary judgment granting them a mandatory injunction against Bashford for the immediate removal of the shipping container from the right of way and a permanent injunction preventing Bashford and their successors in title from further obstructing the right of way.

### **Bashford's response**

[15] Mr Organ, on behalf of Bashford, raises six broad points in opposition:

- (a) Parts of the right of way have been extinguished by a Whanganui District Council service lane rendering the right of way redundant.
- (b) Bashford is not committing an actionable or unreasonable infringement of the right of way by placing the container on it because the brick wall stops the Andersons entering their property via the right of way anyway.
- (c) A permanent injunction would be contrary to Bashford's property rights, the rights of successors in title and unreasonably affect the value of Bashford's property.
- (d) The Andersons' claim is vexatious.
- (e) As this is a "dispute" in respect of rights under an easement, the Land Transfer Regulations 2018 require the parties to submit to arbitration, meaning the District Court does not have jurisdiction.
- (f) The right of way amounts to a "private way" under the Local Government Act 1974, which was extinguished three years after its creation.

[16] Mr Organ developed other points, but they can be addressed in the context of the above six broad grounds of opposition.

[17] Mr Organ argues that each of these grounds, individually or cumulatively create an arguable defence to the Andersons' claim, such that there are real questions to be tried.<sup>1</sup> In these circumstances the Andersons' claim for injunctive relief by way of summary judgment ought not be granted.

**Does the right of way still exist?**

[18] Bashford's land is in Deposited Plan 51923 as Lot 2.

[19] Lot 1 in Deposited Plan 51923 is a thin strip of land which runs alongside Bashford's carpark and is owned by the Whanganui District Council.

[20] The easement certificate, 523437.2, which created the Andersons' right of way contains the following clause at Schedule C, paragraph 6:

The right of way as delineated on Plan 51923 marked E and F shall terminate when Lot 1 DP 51923 is designated "service lane" by the Whanganui City Council when such service lane comes into existence. The said easements marked E and F on DP 51923 shall extinguish and merge with the freehold interest of Lot 2 DP 51923.

[21] Mr Organ says the Whanganui City Council (as it then was) designated Lot 1 DP 51923 as a service lane, thus extinguishing the Andersons' right of way access.

[22] Mr Organ produced letters between the Andersons and previous owners of the Bashford property and their solicitors (Brookfields). Brookfields' letter dated 5 December 1995 says they had been advised by the Council that the neighbouring property (being lot 1 DP 51923) had been designated a "service lane", meaning parts E and F of the right of way no longer existed.

[23] Mr Organ also produced an application filed by John Anderson with the Whanganui District Council in 1997 and the resulting Council decision and minutes.

[24] Mr Organ submits that the Council minutes prove the existence of the Council designated service lane in Lot 1 DP 51923.

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<sup>1</sup> *Krukziener v Hanover Finance Limited* [2008] NZCA 187 at [26].

[25] The documents Mr Organ has produced are contradictory.

[26] Mr Anderson's 1997 application was to have a service lane designation bisecting **his** property lifted. The Council accepted that application for the reasons that:

The designation affecting this property shows no linkage to the street network **or any existing service lane**. The Council submission proposes to add this linkage by designating access out to St Hill Street.

Where the Council owns these access ways **such a designation could be put in place**. Where they are not, this would result in additional land being affected by a designation and as such the submission process is not appropriate to achieve that outcome. (Emphasis added)

[27] The Council's decision in 1997 suggests there was no existing service lane providing access out to St Hill Street.

[28] This is at odds with the hearsay "advice" referred to in Brookfields' 1995 letter.

[29] The correspondence Mr Organ produced between the Andersons and previous owners of the Bashford property and their lawyers, is clearly incomplete. The four letters Mr Organ has produced refer to other correspondence.

[30] Mr Organ's proposition that Parts E and F of the right of way have been extinguished by a Council designated service lane is unsupported by any information from the Council itself.

[31] This is important given that a service lane is defined in the Local Government Act 1974, s 315 as:

Any lane laid out or constructed either by the authority of the Council or the Minister of Works and Development or, on or after 1 April 1988, the Minister of Lands for the purpose of providing the public with a side or rear access for vehicular traffic to any land.

[32] There is no evidence the Council has designated Lot 1, DP 51923 as such a service lane. It is clear from the parties' descriptions of Lot 1 and Mr Organ's submissions, where he said Lot 1 is blocked by a power transformer, that Lot 1 would

not support, and never has supported, vehicular traffic to either Bashford's land or the Andersons' land.

[33] The point of Schedule C, paragraph 6 of the easement certificate is to ensure that the Bashford carpark is not unduly burdened with a right of way if the Andersons have another realistic means of access such as by a service lane. There is no evidence Bashford's carpark is so "doubly" burdened.

[34] Even then, if the service lane existed, the Andersons would have access to their property along the service lane and then the balance of the right of way marked A, B and C on the deposited plan which runs across Bashford's carpark. Extinguishment of E and F, if it had occurred, would still leave the Andersons with a right of way across A, B and C.

[35] Finally, on this point, all parts of the right of way remain registered on the Bashford title, including Parts E and F. The indefeasibility of registered titles and interests conferred for example in s 51 of the Land Transfer Act 2017, means Bashford's title remains subject to the Andersons' registered easement.

[36] There is a procedure in s 114 of the Act to apply to the Registrar for extinguishment of a registered easement if grounds for doing so exist. Neither Bashford, nor its predecessors in title have made such an application.

[37] Mr Organ has shown no reason that I may depart from what is clearly shown on the Land Register.

[38] It is not reasonably arguable that the Andersons' right of way no longer exists.

**Is Bashford committing an actionable infringement of the right of way?**

[39] Mr Organ argues that Bashford is not committing an actionable infringement of the right of way because:

- (a) The right of way is not physically “formed” because there is a brick wall at the end of it preventing the Andersons from accessing their property via the right of way.
- (b) The Andersons have never used the right of way to access their property. Their access from the carpark has always been via the gate next to the brick wall which is not part of the right of way.
- (c) Bashford’s placement of the shipping container on the right of way is not a substantial or unreasonable interference with the easement or the Andersons’ ability to access the wall, given they are able to access the wall, if they wish to, from their property.

[40] Mr Organ submitted that, while the brick wall was in place, the shipping container was not interfering with the Andersons’ right to pass across Bashford’s carpark using the right of way because they could not reach their property anyway.

[41] This submission suggests the Andersons’ right of way only became effective once they had removed the brick wall, which Mr Organ said they could do from their side of the wall without having to use the right of way.

[42] Mr Organ drew a parallel with the decision of *McKellar v Guthrie*, where Sim J in the then Supreme Court found that the owner of a dominant tenement had no bona fide desire to exercise a right of way when she began cutting down trees on the servient land that no longer served any practical purpose for accessing her land.<sup>2</sup> The Court found that the owner of the dominant tenement had an ulterior motive for cutting down the trees that had nothing to do with the existence of the right of way.

[43] The starting point is the Rights and Powers of Grantees implied in a right of way under schedule 7 of the Land Transfer Act 1952.<sup>3</sup> Schedule 7 provides to a grantee such as the Andersons:

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<sup>2</sup> *McKellar v Guthrie* [1920] NZLR 729.

<sup>3</sup> While repealed in 2002, it continues to apply to easements registered prior to 2002 – see Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, s 66(1), and Land Transfer Regulations 2018, sch 1, part 1, cl 1.

The full, free, uninterrupted and unrestricted right, liberty, and privilege for the grantee, his servants, tenants, agents, workman, licensees and invitees (in common with the grantor, his tenants, and any other person lawfully entitled so to do) from time to time and at all times by day and by night to go pass and repass, with or without horse and domestic animals of any kind and with or without carriages, vehicles, motor vehicle, machinery and implements of any kind, over and along with the land over which the right of way is granted or created.

[44] This very broad right for the Andersons to “pass and repass” along the right of way is tempered only by Schedule C, paragraph 1 of the easement certificate which says the owners of the dominant and servient tenements (i.e. the Andersons and Bashford) “shall use the said rights of way in such manner as to cause as little inconvenience and disturbance as possible to the others of them”.

[45] The present case is quite different to *McKellar v Guthrie*. The Andersons previously used at least part of the right of way to access their loading bay and now wish to use the entire right of way to again access their loading bay, Mr Organ having locked the gate they previously used.

[46] The existence of the brick wall does not nullify or “unform” the right of way. It is an obstruction or impediment that the Andersons are entitled to remove to make the right of way usable.<sup>4</sup>

[47] Mr Organ submitted that the Andersons were not permitted to have their builders or other agents “set down” on the right of way to remove the wall but this submission is incorrect. The Andersons are entitled either themselves or by their agents, to enter onto the right of way to carry out work on the right of way itself for any lawful purpose for which the Andersons’ land may be used, which includes removal of an obstruction, these being ancillary rights reasonably necessary for the effective and reasonable exercise and enjoyment of the rights expressly granted by the easement.<sup>5</sup>

[48] This point answers Mr Organ’s suggestion in oral submissions that a small portion of the wall encroaches on Bashford’s land. If the wall does encroach in a

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<sup>4</sup> *Spear v Rowlett* [1924] NZLR 801 at 804.

<sup>5</sup> *Spear v Rowlett* n 4; and *Cornes v Village Residential Limited* [2021] NZCA 216 at [26]-[30].

minor way, and Mr Organ produced no evidence that it does, the Andersons are still entitled to remove it.<sup>6</sup>

[49] This is also an answer to Mr Organ's proposition that the Andersons must remove the brick wall from their side of the wall first before the right of way became effective. The law allows the opposite. The Andersons may remove the wall, using the right of way, from Bashford's carpark. Mr Organ's arguments to the contrary are not tenable.

**Is a permanent injunction contrary to Bashford's or successor's property rights?**

[50] Bashford's property rights have always been subject to the right of way which was registered on its title when it purchased the property.

[51] Mr Organ argued that the Andersons have no right of ownership or occupation of Bashford's land, but this misses the point. The right of way does not confer ownership or occupation but a right to pass on and use Bashford's land for the purpose for which the right of way was granted, namely, to access the Andersons' land.

[52] Nor will this unreasonably affect the value of Bashford's property. Any subsequent purchaser will purchase Bashford's land on the same basis as Bashford, knowing the Andersons have a right of way over the carpark.

[53] Having said that, successors in title are not parties to this proceeding. The Andersons have not demonstrated any basis that a permanent injunction can be issued against them.

[54] A permanent injunction against Bashford is however a different matter. It would do nothing more than insist on observance of rights and obligations that already exist, and which Bashford knew of when buying its property.

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<sup>6</sup> *Spear v Rowlett* n 4.

### **Is the Andersons' claim vexatious?**

[55] Mr Organ describes a series of clearly acrimonious dealings between himself and John Anderson in particular. He suggests matters may have come to a head when they fell out over whether the Andersons could continue to use the carpark for parking, or fees that Mr Organ wished to charge for them doing so.

[56] Mr Organ suggests the Andersons have an ulterior motive in bringing these proceedings to force him to allow their access through the gate next to the wall, which he has padlocked.

[57] He suggests the appropriate course, if the Andersons wish to demolish the brick wall (which he suggests without evidence would render their building structurally unsound) they ought to utilise the procedure in s 319 of the Property Law Act 2007 and apply to enter Bashford's land to do so.

[58] None of these matters demonstrate the Andersons' claim is vexatious.

[59] The Andersons accept the right of way does not permit them access through the gate. This point is moot.

[60] An application to enter Bashford's carpark to carry out work on the brick wall is not necessary when the Andersons already have the right to do so via the right of way.

[61] The fact the parties have had a falling out is not determinative. Indeed, Mr Organ's insistence that the shipping container should remain on the right of way, despite the Andersons' clear wish that it be removed from the right of way could itself be seen as an act of vexation which the Andersons are entitled to challenge via these proceedings.

[62] By bringing this application, the Andersons seek nothing more than the lawful use of the right of way. Their claim to do so is not vexatious.

### **Are the parties required to go to arbitration?**

[63] Mr Organ relied on the Land Transfer Regulations 2018, r 21, which provides that matters set out in Schedule 5 of the Regulations are implied for each class of easement (including rights of way). Clause 14 of Schedule 5 requires the parties to a dispute in relation to an easement to submit the dispute to arbitration under the Arbitration Act 1996 in the event they cannot resolve the matter by agreement or mediation.

[64] Clause 14 and other rights and powers implied by r 21, however, do not apply to the easement at issue in this case. Schedule 1, part 1, clause 1 of the Regulations provides that r 21 applies only to an easement registered on or after commencement of the Regulations, i.e. 2018. The present easement was registered in 1982.

[65] For completeness, the present rights and powers implied in easements under schedule 5 of the current Regulations were also contained in schedule 4 of the Land Transfer Regulations 2002. Those provisions, however, did not apply to easements registered prior to enactment of those Regulations by the virtue of s 66(1) of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002, which is the empowering legislation for the 2002 Regulations.

[66] This Court accordingly has jurisdiction to determine this dispute. The parties were not required to refer the matter to arbitration.

### **Is the easement a “private way” under the Local Government Act 1974 which has now been extinguished?**

[67] The easement certificate notes that it is subject to s 309(1) of the Local Government Act 1974. This section, when it was in force, provided that an easement could not be varied without the consent of the then City Council if the Council had approved a survey plan conditionally on the easement being shown in the plan as being duly granted or reserved.

[68] Mr Organ submits that, because the easement was subject to s 309, it was also subject to s 348 of the Local Government Act, which provides that a person may not

layout any private way without the prior permission of the Council and such permission is deemed to lapse after three years unless the work to establish the right of way has been completed to the satisfaction of the Council.

[69] Mr Organ's argument is flawed for two reasons:

- (a) The present case is concerned with a right of way, established under an easement certificate, which is a separate matter to a "private way" which is what s 348 is concerned with.
- (b) The easement certificate is expressly subject to s 309(1) of the Local Government Act only. This does not make the easement certificate subject to s 348 or any other provision of the Local Government Act.

### **Conclusion**

[70] None of the matters raised by Mr Organ are reasonably arguable.

[71] There is no question that, by placing the shipping container across the right of way, Bashford is unreasonably interrupting or restricting the Andersons' full and free right to use the right of way to access their land. No other conclusion is available.

[72] It follows that the Andersons are entitled to the injunctive relief they seek.

### **Orders**

[73] I grant the Andersons' summary judgment application.

[74] I issue a mandatory injunction requiring Bashford Antiques Ltd to remove the shipping container from the right of way by Friday 14 April 2023.

[75] Mr Organ submitted that the Andersons could not require him to move the shipping container "on a whim" but were required to give him sufficient notice. These proceedings were issued in June 2022. Mr Organ and Bashford have been on notice for several months.

[76] I also issue a permanent injunction that Bashford Antiques Limited, whether through its director, agents or otherwise, is prohibited from breaching its obligations under easement certificate 523437.2.

[77] I decline to issue the injunction in relation to successors in title of the Bashford land for the reason they are not parties to this proceeding. The transgressor has been Bashford, through its director Mr Organ. Unless the easement is extinguished by law, successors in title will be obliged to comply with the easement certificate anyway.

### **Costs**

[78] As the Andersons have been wholly successful in this proceeding, they are entitled to costs.

[79] I direct that the Andersons' solicitor file and serve a memorandum in support of costs by 6 April 2023, with Mr Organ to file and serve his response by 13 April 2023. I will then fix the costs that Bashford is required to pay to the Andersons in this proceeding.

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Judge L C Rowe

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 24/03/2023