**IN THE DISTRICT COURT**
**AT NELSON**

**I TE KŌTI-Ā-ROHE**
**KI WHAKATŪ**

**CIV-2022-042-000355**
**[2023] NZDC 18822**

| | |
|---|---|
| BETWEEN | JODY ANN DORRINGTON<br>Applicant |
| AND | BARRY STEVEN MCLEOD<br>MARGARET LILA MCLEOD<br>Respondents |

Hearing: 25 August 2023

Appearances: C Maslin-Caradus for the Applicant
G Praat for the Respondents

Judgment: 25 August 2023

---

**ORAL JUDGMENT OF JUDGE A A ZOHRAB**

---

[1] The respondents make application to adduce further evidence after the close of pleadings date in this matter. The substantive matter has been set down to be heard on 16 and 17 October of this year. This application is opposed by the applicant.

[2] By way of background the applicant seeks relief for a wrongly placed structure. Basically it is a boundary adjustment as parts of her house encroach onto the land owned by the respondents.

[3] The respondents oppose the substantive application and they say that if the adjustment is granted that they would lose the ability to fully utilise their land, and in particular to build a garage on land immediately adjacent to the road with flat access directly onto the site. They say this is the only place that they can build the garage. The respondents also say that if an order is made to give effect to the boundary

adjustment which is being sought, they would be put to the cost of erecting a retaining wall in order to continue to be able to build this garage.

[4] The respondents wish to adduce further expert evidence from Mr Cory Robertson, a builder, Mr Philip Judge, a building consultant, and Mr Barry Rowe, a valuer.

[5] The respondents have already filed an opposition and affidavits in support of the opposition and, as part of Mr McLeod's substantive affidavit from paragraphs 53 to 61, he talks about what he thought Ms Dorrington could do, and also talks about the fact at paragraph 54 that if the boundary is moved as requested by the applicant Ms Dorrington, then they would not be able to build their garage as planned on the existing excavated and flat site.

[6] He makes reference to the affidavit of Mr Paul Newton, and also comments that as shown in plans prepared by Boulder Bank Architectural Design, they had contemplated building a single garage on that area and intended siting it within one metre of the legal boundary.

[7] As far as the law is concerned r 7.6 of the District Court Rules 2014 provides that no statement of defence or amended pleading or affidavit may be filed after the close of pleadings date without leave of a judge and in accordance with the decision of *Elders Pastoral v Marr*, the respondents must show when adducing the evidence that it is in the interests of justice, it will not significantly prejudice the other parties, and also it will not cause significant delay.[1]

[8] The respondents say that it is in the interests of justice to adduce the evidence from experts about the garage they intend to build and the position of it. Whilst it is not directly relevant to the elements of the claim by the applicant, it is directly relevant to the issue of relief, and there is a dispute between the evidence of Mr Newton, who states that there is an alternate site for the garage the respondents want to build, and Mr McLeod's evidence. So, given that dispute, it is in the interests of justice that these three experts be permitted to give evidence because it will assist the Court to determine

[1] *Elders Pastoral v Marr* (1987) 2 PRNZ 383.

the issues between the parties that have already been raised and this is particularly so, the respondents' lawyer submits, because we have got an application here under s 323 of the Property Law Act 2007 which relies on the Court's discretion as to what is just and equitable.

[9] The position for the respondents is that if one considers the decision of *Thornton Hall Manufacturing v Shanton Apparel Ltd*, and the proposition there that the parties should have every opportunity to ensure that the real controversy goes to trial so as to secure the just determination of the proceedings, what is submitted here is that if leave is not granted, then the parties will not have an opportunity to ensure that the real controversy goes to trial and the Court will fail to secure a just determination of the proceedings.[2]

[10] As to whether or not the granting of leave would significantly prejudice the other parties, it is submitted that if one looks carefully at the applicant's main grounds before opposing it, that correspondingly the respondents are also distressed about the situation and are distressed about the risk of not only losing part of the land, but then also being unable to build the garage that they had planned.

[11] The respondents submit that the applicant either ought to have known when proceedings were initiated that additional expert evidence would be required and the respondent's counsel points out the decision of *Blomfield v Slater* where the defendant attempted to file a fourth and fifth amended statement of defence introducing new defences and he did so two weeks before the trial and then after the trial had commenced and was not allowed to do so.[3]

[12] But here the fact is that this application can be distinguished because here the evidence goes directly to issues already pleaded as from December 2022, and the application is being made a number of months before the hearing. So, any prejudice to the applicant is denied, and it is far outweighed by the prejudice to the respondent in not having the evidence before the Court.

---

[2] *Thornton Hall Manufacturing v Shanton Apparel Ltd* [1989] 1 NZLR 234.
[3] *Blomfield v Slater* [2018] NZHC 2781.

[13] It is also submitted that the granting of leave would not cause significant delay because the applicant has known since June 2023 that the respondents wanted to adduce this further evidence. It could have been adduced by consent, and it is submitted that the applicant would have ample time to instruct an expert if she chose to do so.

[14] The respondents are not seeking to change the trial date and are happy and content to work towards the trial date. It is suggested that submissions that have already been filed should be sufficient to deal with the issues.

[15] Mr Praat on behalf of the respondents acknowledged that there had been a timetable set, that the close of pleadings date had clearly been set, and that the issue of the garage had been first raised in Mr McLeod's affidavit. He acknowledges that this expert evidence could have been filed at around that time and in compliance with the timetable, but his instructions are that an issue arose as between his clients and Mr Logan, and that his clients wanted to file this evidence, but there were issues in the relationship between them and Mr Logan.

[16] I note at this point that I do not have anything from Mr Logan addressing that issue, and I am aware from my dealings with Mr Logan on the file that on 9 March he agreed that the evidence was complete. He agreed that the close of pleadings date was 9 March, and he confirmed that the proceeding was ready for hearing. I am also aware from the case management conference on 5 May that the respondents were behind in their filing of submissions, and what the Court was told by Mr Logan was that that was because the respondents could not afford counsel and were considering representing themselves. There was no mention of additional evidence at that point.

[17] It was acknowledged by Mr Praat on behalf of the respondents that whilst we had a timetable being set and pleadings being closed, that it appeared the McLeods were working behind the scenes, dealing with Mr Judge and Mr Rowe and Mr Robertson as to building issues and valuation issues, but Mr Praat's point was that his instructions seemed to suggest that his clients were keen to file evidence from one or more of these experts, and that was a point of contention between them and Mr Logan.

[18] I suggested to Mr Praat that a potential way of resolving the matter might be for me to grant leave for the experts for the respondent to file their evidence, but for his clients to meet costs on an indemnity basis for the work incurred by the applicant's lawyers to deal with the new issues, and also the re-briefing of their existing witnesses, or any new witnesses. That did not find much favour with Mr Praat, his submission being that if this matter had been dealt with properly she would have had to have answered through her witnesses their evidence.

[19] So, essentially the submission on behalf of the respondents is that it is in the interests of justice to grant this application because only then will the real issues be ventilated, there will be prejudice to his clients if they are not able to flesh out their concern in relation to the garage, it will not significantly prejudice the applicant, and it would not cause significant delay.

[20] I simply observe that we have a two day hearing, and I would have thought that this would at least take us into a third day, which potentially might jeopardise the fixture. It had been anticipated when we had closed the pleadings that it did not seem likely that we would be getting a fixture until next year, and it has taken some persistence to obtain a judge to hear the matter.

[21] The submission on behalf of the applicant is that it is not in the interests of justice to grant this application, and part of the reason for that is because of the nature of the application of being an originating application and the timetabling of the matter. The originating application for relief was filed on 7 December 2022. The respondents filed a comprehensive notice of opposition and affidavits in response on 20 February 2023 and by that stage they had had two months to consider Ms Dorrington's case and put together their own case.

[22] As I have observed, Mr McLeod in his affidavit dealt with the issue of how the proposed boundary change would affect them and also the building of the proposed garage.

[23] The applicant Ms Dorrington, having received the notice of opposition and affidavits in response from the McLeods, filed her reply evidence by the due date of

27 February 2023. There was a case management conference on 9 March. The respondents were represented by their lawyer. Mr Logan agreed that the evidence was complete, and I set a close of pleadings date as 9 March 2023. I confirmed in my minute that the proceeding was ready for hearing. That was, of course, significant because it enabled us to put in an application for some judge time.

[24] At that stage there was no mention at all of the respondents giving thought to seeking some expert assistance to flesh out or support the matters raised by Mr McLeod in his affidavit. Both parties were then required to file submissions. There was, however, an issue with the respondents' filing of submissions, and on 5 May Mr Logan accepted that they were behind in filing their submissions. What was raised by counsel was that there was a suggestion that they could not afford counsel, that they were considering representing themselves, and there was at that point no mention of additional evidence.

[25] The applicant expresses a concern about what the Court was being told at that point because what becomes clear upon closer examination of the respondents' leave application is that it seems that from January through to June 2023 they had in fact been working with Mr Logan on gathering further evidence from a builder and a valuer. So, notwithstanding that all of the evidence was in, as it were, and the pleadings had closed, then on 29 June at a case management conference, so that is four months after the close of pleadings date, the respondents indicated that they might wish to adduce some additional evidence. At that point there was no mention made of representing themselves, they appeared with new counsel, and the submissions had not been filed. They were granted a 21 day timeframe to apply for leave and made such application.

[26] What the applicant asks me to reflect upon when considering whether or not the granting of this application is in the interests of justice, is the respondents' delay, which they say is evidence of, on examination of what happened before the proceedings were filed, and what has happened since proceedings were filed and the issues with having them respond in a timely fashion, they say that they do not come with "clean hands".

[27] As I understand it from reading the McLeods' affidavits, they also have issues with the applicant Ms Dorrington and there are issues from their perspective about her willingness to be reasonable. They suggest that she has been unreasonable at times. So, we have got competing views on those matters.

[28] What is submitted on behalf of the applicant is that it would not be in the interests of justice to totally ignore the timetabling because it would send a message to all evasive respondents that they need not follow the court timing and they can "march to the beat of their own drum", and if and when it suits them file some further evidence that they can then use to bolster their case and have an additional "bite of the cherry".

[29] So, it is not in the interests of justice, the applicant says, because of the fact that granting leave would be inconsistent with the just, speedy and inexpensive determination of the dispute, given that we had a clear timetable and agreement that the pleadings had closed and all the necessary evidence was in, we are working towards a hearing date, and then we have this last minute request and it is not about an issue which is new or novel, the garage and the importance to the McLeods of the siting of the garage and the impact that this application might have on it, that has always been at the forefront of the McLeods' mind because it is specifically mentioned in Mr McLeod's affidavit.

[30] It is also submitted on behalf of the applicant when considering the issues of the interests of justice, is that the proposed evidence is not sufficiently relevant or cogent, and obviously issue is taken with that by Mr Praat on behalf of the respondents.

[31] The applicant submits that without Geotech evidence there is little in the way of substance to this and the *bona fides* of whether or not the McLeods really have any real intention to build such a garage is very much in dispute from the applicant's perspective.

[32] The applicant's lawyer in her submissions analyses the proposed evidence of Mr Robertson, Mr Rowe and Mr Judge, and submits that it is not sufficiently relevant or cogent. The applicant also submits that we have got a two day fixture, and at the

close of pleadings date there were three witnesses of fact and two expert witnesses, and several of them had filed multiple affidavits and the hearing time of two days was scheduled accordingly. It was done on the basis of a simplified trial time limit to ensure that was a time for all of the witnesses for both the applicant and also the respondent.

[33] The respondents' application for leave indicates three new experts, building, valuation and building consultant, and to respond properly the applicant would need to file evidence from two more and completely new experts, both building and Geotech, as well as additional evidence from existing experts, Mr Newton, a surveyor, and Mr Stevens, the valuer.

[34] Mr Praat on behalf of the respondents wonders whether or not as much reply evidence would be required because some matters would not be in dispute and would be very brief in nature and so he takes issue with that.

[35] In any event, what the applicant submits is that two days would no longer be sufficient for the hearing and from the applicant's perspective she interprets this as a further attempt on the part of the respondents to have the hearing date postponed. That is denied on behalf of the respondents by Mr Praat because his submission is that he would have thought that even with these new witnesses, if leave is granted it could still be heard within two days.

[36] It is also submitted on behalf of the applicant that if leave were to be granted it is going to take some time to locate new experts, brief them and also existing witnesses. We have got one of the witnesses, Mr Newton, the surveyor, away until 8 October, and it is anticipated that there would be difficulty briefing him. In any event, if leave is granted and the applicant is required to respond to these matters, then it is unlikely the new evidence briefing would be completed until the end of September, so that would only leave two to three weeks before the hearing with insufficient time for the applicant to amend her submissions and the respondents to amend theirs.

[37] Ms Dorrington, the applicant, is anxious to avoid trial by ambush, and so she wishes to know before the hearing what she is dealing with.

[38] Also, it is suggested on behalf of Ms Dorrington the applicant that this matter has had a significant impact upon her. She has had to re-mortgage her home to fund this litigation, and one of the reasons for pursuing the matter by way of an originating application is to try and reach a fixture date in a cost effective and timely fashion.

[39] She asks me to reflect upon the chronology of matters and the fact that, for example, she was required to obtain an injunction so that some valuation evidence could be obtained. I am asked to reflect upon the fact that, on the other hand, we have the McLeods seemingly co-operating with their lawyer, Mr Logan, and filing material, but it seems in the background they were seeking further evidence which they must have known would have been relevant and the sort of evidence that they would have wanted to have filed to deal with this garage issue.

[40] I am, of course, acutely conscious of the factors identified in the *Elders Pastoral v Marr* case, and the respondents' need to show in adducing the evidence that it is in the interests of justice, and that it would not significantly prejudice the other parties and will not cause significant delay. And, of course, I am acutely conscious of the fact that as a judge it is really important that the parties have the opportunity to have their case heard and to ensure that the real controversy goes to trial so we can secure the just determination of the proceedings.

[41] But also I have got to balance issues such as the integrity of the process. What I mean by that is that the proceedings were filed and served on the respondents. They had the opportunity to get some legal advice. They then filed a response to the applicant's claim and that was done in this case. Mr McLeod was alive to the issues and specifically in his affidavit raised the issue with respect to the garage.

[42] We have Ms Dorrington, the applicant, responding. We then have a case management conference. Both sides are represented by lawyers. It is agreed by the legal representatives that the evidence is complete and that the close of pleadings date is 9 March and it is ready for hearing. All that is required at that point then is the

detailed submissions from both sides. Yet, whilst this is all going on, it seems that the respondents are working with some people in the background by way of the builder and surveyor, but are not, on the face of it, communicating with the Court about that.

[43] There is no application made at that stage, or no statement that the evidence is not yet complete, that for example we want to raise some other matters. That is not what happens. And it is only on 29 June, more than four months after the close of pleadings date, that the respondents raise an issue that they might want to adduce additional evidence. They then appear with counsel, and the submissions still had not been filed.

[44] So, the concern that I have is that this issue with respect to the garage had always been there and it is unclear to me why this evidence was not introduced at a far earlier stage. I know Mr Praat has his instructions, but I find it difficult to accept that senior counsel such as Mr Logan would be telling the Court that they were behind in filing their submissions because they could not afford counsel and were considering representing themselves. I find it difficult to accept that he is telling the Court that, whereas the truth of the situation is that the respondents are wanting him to file affidavit evidence from Mr Rowe, Mr Robertson and potentially Mr Judge, addressing the issues with respect to the garage.

[45] My view on the matter is that it is not appropriate to grant leave to adduce this extra evidence because it is not in the interests of justice to endorse a failure to cooperate with the trial process and the timetabling. As I say, this is not a new issue, this issue with respect to the garage. It has always been there. It is mentioned in Mr McLeod's affidavit and the proceedings were filed, the process was started, the McLeods have had the opportunity with experienced counsel to respond by way of evidence, and then we have the response from the applicant, and the pleadings are closed.

[46] Fortunately we are able to get a trial date in October and we have been working towards that. If I grant this application I am not upholding the integrity of the process given that a clear timetable was set out, and it would significantly prejudice the applicant. She has been planning towards this hearing at significant cost to her, and

the benefit of the originating process is that it is relatively efficient and effective and there is a clear timetable that is set out. Not only is the integrity of the process damaged if I grant this application, I mean the issue as far as the garage is already there. It is in the materials. A judge will be able to consider that. Ms Dorrington will be significantly prejudiced by having to be put to a significant extra expense.

[47] I appreciate Mr Praat's point that if this material had been filed in compliance with the timetable she would have been required to meet the costs of instructing those witnesses. But the key thing is that there was a timetable put in place and the McLeods, for whatever reason, did not put their best foot forward and did not file the evidence. What is going to happen is because we have got this compressed timeframe, in my view, that would put significant pressure on Ms Dorrington. She has planned the cost and the timing of all of this, and also it would blow out the hearing time, it would go potentially into a third day, and I do not know if we have a third day.

[48] In my view, it is not in the interests of justice to grant the application. There will be significant prejudice to Ms Dorrington, and it will cause delays, so my view is that the application should be refused.

[49] Costs are to be on an indemnity basis on this application in favour of Ms Dorrington and I will invite counsel to submit submissions on costs.

_____
Judge AA Zohrab
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 12/09/2023