EDITORIAL NOTE: PERSONAL/COMMERCIAL DETAILS ONLY HAVE BEEN DELETED.

IN THE DISTRICT COURT
AT MANUKAU

CIV-2015-092-2600
[2016] NZDC 9207

BETWEEN	ZORKA KRILL Plaintiff
AND	ANTHONY AND JANICE RAMPLING Defendants

Hearing: 24 March 2016

Appearances: Plaintiff appeared in Person
Ms Rhind appeared for the Defendants

Judgment: 7 June 2016

RESERVED DECISION OF JUDGE P RECORDON

Introduction

[1] This is an application by Ms Krill under s 334 of the Property Law Act 2007 ("the Act") for an order to trim and maintain a hedge to a height of 2.2 metres. The respondents in this matter are the Ramplings and they are Ms Krill's neighbours.

[2] On 24 March 2016 at the Manukau District Court I heard oral submissions from Ms Krill, who was self-represented and also from the respondents' lawyer, Ms Rhind. Anthony and Janice Rampling were also present in court.

[3] After discussion with the parties and with the time available in the afternoon after the morning hearing, I visited both properties affected in the presence of their respective owners.

Factual background

[4] Ms Krill and her then husband purchased [address 1 deleted] 29 July 1993. At the time of purchase, the house was a single level dwelling. The Ramplings' property

at [address 2 deleted] was purchased on about 17 February 1994. The front, north facing boundary of Ms Krill's property is 77.97 metres long. Of this, 20 metres is a boundary shared with the Ramplings, who are situated on lower ground than Ms Krill.

[5] Sometime after the Ramplings moved in, a multi-level structure was built on Ms Krill's property. Positioning of the home gave the occupants a view of Cockle Bay which can be seen over the Ramplings' home and the surrounding neighbourhood.

[6] The Ramplings have a carefully selected and maintained garden. Along the boundary they have cultivated a row of Pittasporum and Leptospermum trees which provide a screen and obscure Ms Krill's house. Ms Krill's house looks down into generally private areas of their house, such as the master bedroom, spare bedroom, bathrooms and back garden. The Ramplings also maintain that the trees add stability to the slope between the two properties. At the time of the hearing the hedge had been cut from around 5.5 metres to 3.3 metres (this tendered as a compromise by the respondents).

[7] The photographs which have been supplied in support of the application illustrate different perspectives on the tree line. From the dining room on the second storey of Ms Krill's the trees are most apparent. Through the window, the ocean is scarcely visible through the trees. If the applicant succeeds in an order for a 2.2 metre limit she would be provided with a view of the surrounding bay from her dining room. At the current height of 3.3 metres, a view is possible from the top left storey of the abode. This is not in dispute.

Ms Krill's position

[8] Ms Krill initially made the application to have the hedge trimmed to a height of 2.2 metres. She would accept 2.8 metres as a compromise. 3.3 metres is too high, she says.

[9] She submits it would be fair and reasonable to make an order to trim the hedge to 2.2 metres in order to maintain the view from her property and still ensure the Ramplings privacy.

[10] Ms Krill submits that trimming the hedge would reduce the shadow cast from the tree and enable her to plant vegetables and flowers on her property. The trees shade her property which is to the south of the trees.

[11] She submits that the existing fence is being pushed towards her property by spreading shrubs and trees on the Ramplings property.

[12] Ms Krill submits that the hedge is dense and unattractive on her side and obstructs sea and city views from the main living areas of her house.

[13] In her submissions, Ms Krill attested to support of the application from neighbouring residents. None swore affidavits.

The Ramplings' position

[14] The Ramplings say they will continue to maintain the hedge at the reasonable height of 3.3 metres.

[15] For their part, the Ramplings deny that there is any undue interference with the applicant's view or ability to enjoy her land. If it is considered that there is an undue interference, the Ramplings maintain that the hardship they would suffer due to an interference with privacy is greater than the hardship suffered by the applicant.

[16] The Ramplings submit that even when the degree of obstruction is looked at in isolation it is not such that there is any significant impact on Ms Krill's view.

[17] The Ramplings do not accept that the trees prevent growth of flowers and vegetables. They say Ms Krill is living in an area where this is to be expected. They argue that adjacent to the hedge is not the only available spot on Ms Krill's property where it would be possible to grow vegetables.

[18] They submit that the hedge has not caused the fence to lean as the hedge does not touch the fence. Further, they submit that if it were accepted that the fence leant towards Ms Krill's property as a result of the hedge, this does not amount to undue interference.

[19] They say that the sea view is not extinguished by the hedge, and from Ms Krill's living area the hedge is in line with houses looking west and not with the sea which she can see by looking north. They submit that the dining room would not have a sea view, irrespective of the hedge, because the hedge only restricts Ms Krill's view of a valley of houses. They say that Ms Krill's home has been well-positioned to give her plenty of sea views.

[20] The Ramplings submit that no neighbours are a party to the application and none has provided evidence, therefore, any evidence tendered by Ms Krill on the effect on the neighbours is hearsay and inadmissible.

[21] They say that that the bottlebrush tree is a separate issue and does not form part of Ms Krill's application.

The law

[22] Section 333 of the 2007 Act provides the District Court with a discretion to require the owner of land upon which trees are located to trim or remove the trees if they unduly obstruct the views enjoyed by a neighbouring property:

> **333 Court may order removal or trimming of trees or removal or alteration of structures —**
>
> (1) A court may, on an application under section 334, order an owner or occupier of land on which a structure is erected or a tree is growing or standing —
>
> (a) to remove, repair, or alter the structure; or
>
> (b) to remove or trim the tree.
>
> (2) An order may be made under subsection (1) whether or not the risk, obstruction, or interference that the structure or tree is causing —
>
> (a) constitutes a legal nuisance; and

(b) could be the subject of a proceeding otherwise than under this section.

[23] The discretion in section 333 is not unfettered. The court may only make an order if it is permitted to do so having regard to the matters referred to in s 335. Section 335 provides as follows:

> **335 Matters court may consider in determining application for order under section 333**
>
> (1) In determining an application under section 334, the court may make any order under section 333 that it thinks fit if it is satisfied that—
>
> (a) the order is fair and reasonable; and
>
> (b) the order is necessary to remove, prevent, or prevent the recurrence of—
>
> (i) an actual or potential risk to the applicant's life or health or property, or the life or health or property of any other person lawfully on the applicant's land; or
>
> (ii) an undue obstruction of a view that would otherwise be enjoyed from the applicant's land, if that land may be used for residential purposes under rules in a relevant proposed or operative district plan, or from any building erected on that land and used for residential purposes; or
>
> (iii) an undue interference with the use of the applicant's land for the purpose of growing any trees or crops; or
>
> (iv) an undue interference with the use or enjoyment of the applicant's land by reason of the fall of leaves, flowers, fruit, or branches, or shade or interference with access to light; or
>
> (v) an undue interference with any drain or gutter on the applicant's land, by reason of its obstruction by fallen leaves, flowers, fruit, or branches, or by the root system of a tree; or
>
> (vi) any other undue interference with the reasonable use or enjoyment of the applicant's land for any purpose for which it may be used under rules in the relevant proposed or operative district plan; and
>
> (c) a refusal to make the order would cause hardship to the applicant or to any other person lawfully on the applicant's land that is greater than the hardship that would be caused to the defendant or any other person by the making of the order.

(2) In determining whether to make an order under section 333, the court must—

(a) have regard to all the relevant circumstances (including Māori cultural values and, if required, the matters specified in section 336); and

(b) if applicable, take into account the fact that the risk, obstruction, or interference complained of was already in existence when the applicant became the owner or occupier of the land.

(3) Despite subsection (2)(b), an order may be made under section 333 if, in all the circumstances, the court thinks fit.

[24] Justice Lang in *Yandle v Done* [2011] NZLR 255 noted that the use of the word "may" in the heading of s 335 is misleading because it suggests that the court has a discretion as to whether or not to have regard to the listed factors. However, the court has no ability to make an order unless it is satisfied that subsections (1)(a), (1)(b) and (1)(c) are met.

[25] In addition, the court's discretion is also fettered by the factors listed in s 336:

336 Further considerations relating to trees —

(1) A court determining an application under section 334 for an order for the removal or trimming of a tree under section 333 must have regard to the following matters:

(a) the interests of the public in the maintenance of an aesthetically pleasing environment:

(b) the desirability of protecting public reserves containing trees:

(c) the value of the tree as a public amenity:

(d) any historical, cultural, or scientific significance of the tree:

(e) any likely effect of the removal or trimming of the tree on ground stability, the water table, or run-off.

[26] Pursuant to s 337, the court is able to impose any conditions it thinks fit when making an order under s 333. Section 338 provides timeframes for compliance with orders made under s 333.

[27] In *Warbick v Ferguson* (2005) 5 NZCPR 520 (HC), a case decided under the s 129C of the Property Law Act 1952, at p 524 Keane J observed that the discretion must be exercised cautiously. This reflects that the Act interferes with the rights of property owners to plant trees regardless of their effect on neighbouring properties.

[28] Therefore, as noted in *Yandle* at [104] it will often not be appropriate to make an order that restores the applicant's views completely because the order is only necessary to the extent that it prevents the obstruction of the view from being undue.

Discussion

[29] Do the trees constitute an undue obstruction to the view that Ms Krill would otherwise enjoy from her property? Section 335(1)(b) only permits the court to make an order under s 333 if it is satisfied that the order is necessary to remove an 'undue' obstruction. I note that parts of this inquiry also overlap with the inquiry into the balance of hardship which follows.

[30] The meaning of 'undue' was considered by Judge Rod Joyce in the case of *Judge v Rhodes* [1995] DCR 25 where at p 28 he stated:

> I resort to the dictionary. The *Shorter Oxford Dictionary* relevantly refers to "'unjustifiable' … going beyond what is appropriate, warranted or natural; excessive". 'Excessive' seems to me to be the most appropriate synonym. This will come down to questions of fact and degree.

[31] Further guidance can be obtained from *Yandle* where Lang J observed that s 335(1)(b) calls for an evaluation of the degree of obstruction having regard to the relevant and competing interests. Lang J observed at [35]:

> The object and purpose of these particular statutory provisions are, in my view, to provide a strictly regulated mechanism whereby a landowner can be required to trim or remove trees in order to remove the excessive, unwarranted or disproportionate obstruction of a view.

[32] Ms Krill submits that the trees present an undue obstruction of a view from her property that she (and her three neighbours) would otherwise enjoy. It is accepted that her dwelling was built with the intention of maximising available

views and the structure and its position reflects this. Ms Krill also argues the hedge has unduly interfered with her ability to grow vegetables and flowers.

[33] The respondents submit the hedge has no significant impact on Ms Krill's view and certainly not at 3.3 metres. They argue that a "minor obstruction from one room of the large three storey property cannot be considered significant when one looks at the views from other rooms in the house."

[34] Clearly the trees do not obliterate Ms Krill's view entirely and this is to be a factor in determining whether or not the obstruction is 'undue'. As previously noted, although the view north from Ms Krill's dining room is partially blocked, there are other areas, such as the balcony, where Ms Krill does get a view.

[35] Any order that I may grant is only necessary to the extent that it prevents the obstruction "from being undue". I have given thought to whether a reduction is necessary to prevent an undue obstruction. The hedge previously stood over 5 metres high. In my view that was too high. The hedge is currently at 3.3 metres and the applicant seeks a further reduction to 2.2 metres.

[36] Ms Krill accepted a height of 2.8 as a form of compromise, i.e. 60 centimetres from the height proposed at the date of the hearing.

[37] That height will preserve the Ramplings' privacy and allow Ms Krill something of a view and more sun on her property.

[38] The next step is to undertake a hardship assessment by weighing the competing interests involved with the making of an order: s 335(1)(c). This assessment asks which losing party would be forced to bear greater hardship if the decision went against them. In this case the interests are finely balanced and somewhat complicated. I will briefly canvass various interests which have been recognised in similar applications.

[39] In *Warbrick v Ferguson* the competing interests were the applicants' desire for their view to be unobstructed and the respondents' desire for the trees to provide

them privacy. The trees in question were standing at a height of 3.6 metres obstructing a view of St Heliers Bay previously enjoyed by the owners of adjoining townhouses. On appeal, Justice Keane made an order that the trees be maintained with a maximum height of 3.5 metres which was in fact a consensus. In weighing the competing interests Justice Keane said:

> [36] … The owners of land may not have an absolute right to do with it what they will. They may be subject to planning ordinances, building codes, the law of nuisance, and in this case review under s 129C. But, those constraints apart, their land is theirs, and they can choose to do with it what they will. Privacy, especially in urban areas, is, and has always been in every culture, a prime value.
>
> [37] A view, by contrast, is fortuitous. It depends on the relative elevation of and prospect from the land. It may be enhanced by how the land is developed. But it is often, as it is in this case, a view over the land of others. It can be contingent on what use is made of the land surrounding it. The owners of adjoining land may not enjoy absolute rights to do with their land what they will. But they can develop their land, very often in ways which reduce, even obliterate, the views enjoyed by adjoining owners, perhaps even to the extent of affecting value. That is a harsh fact of life. The only recourse may be s 129C.

[40] In *Yandle,* Lang J made the additional comment that privacy in bedrooms and bathrooms is paramount. Although outdoor spaces can also be private to a degree, landowners may have to accept a lesser degree of privacy in areas like a backyard.

[41] In the present case, competing interests are essentially the applicant's view and the respondent's privacy. Both are equally important.

[42] There is a legitimate reason to protect privacy. Without any trees and with a low fence, the balcony looks directly into several key rooms. In *Courteney v Garstang* Miller J referred at [15] to the fact that, where the applicant has built in such a way that interferes with another's privacy, he or she must accept that the other person may take reasonable steps to restore it. In *Shakespeare v Kirker,* Judge Moore made the comment that (at 113):

> It is normal for property owners to enjoy, or expect to enjoy, some views across neighbouring properties, but if such views are exploited in a way and to an extent which intrudes upon the privacy of those neighbours, particularly within their homes or in their rear yards, then retaliatory steps have, or ought, to be anticipated.

[43] When the Ramplings first bought their property, Ms Krill's lived in a single level dwelling. She built the new property and thereby tacitly encouraged the Ramplings to take steps to reduce the adverse effect on their privacy. They had every right to plant trees.

[44] I am satisfied that an order to maintain the trees at 2.8 metres would cause hardship to neither Ms Krill nor to the Ramplings. I see no argument to lower the trees further whether Ms Krill's acceptance of 2.8 metres is a reluctant acceptance or not.

[45] I consider it appropriate to make an order. That order will be to maintain the trees within an average maximum height of 2.8 metres. The cost of maintaining the trees to that height will remain the responsibility of the Ramplings.

[46] I will not make a decision on costs unless requested by the parties. I am grateful to Ms Rhind for her very helpful and detailed submissions and also to the Ramplings and to Ms Krill for their efforts and clear proposals at compromise. In the end they were indeed not far apart recognizing the concerns and interests of the other.

P Recordon
District Court Judge