

**IN THE DISTRICT COURT  
AT DUNEDIN**

**CIV-2014-012-000441  
[2017] NZDC 11924**

BETWEEN                      PETER ALAN MARR  
   Plaintiff  
  
AND                                NOEL GRAHAM THOMPSON  
   Defendant

Hearing:                      1 June 2017

Appearances:                L A Andersen for the Applicant  
   G A Paine for the Respondent

Judgment:                    1 June 2017

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**ORAL JUDGMENT OF JUDGE M B T TURNER**

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**Introduction**

[1]     At the conclusion of the evidence and after counsels' submissions I advised the parties of the result in this case, indicating that I would give reasons later in the week. I did so because it permitted the Court to engage with counsel and the parties as to how the driveway fence would be repaired or reinstated.

[2]     Agreement was reached that the plaintiff would undertake the work at no cost to the defendant. Other agreements were reached as to when the work would be undertaken and permitting of the plaintiff, and those assisting him, to enter and remain on the defendant's driveway while carrying out the work.

[3]     I intend to incorporate those agreements in the formal orders later in this judgment.

## **Proceedings**

[4] The plaintiff and the defendant are neighbours, the plaintiff owning [Property 1], and the defendant [Property 2].

[5] In 2012 or 2013, the plaintiff's parents, Mr and Mrs Marr, who occupy [Property 1], constructed a dwelling on the plaintiff's land together with a boundary fence, which I will refer to as the driveway fence, along the property's northern boundary. The fence is about 80 metres long and runs the entire length of the boundary between [Property 1] and [Property 2]. It is common ground that the concrete and block fence encroaches onto the defendant's property at the road end (the north western corner) by 22 centimetres for a distance of approximately 40 metres. The balance of the fence straddles the boundary so that the north eastern corner is 20 centimetres inside the plaintiff's property.

[6] A bitter dispute developed between the Marrs and the defendant over the driveway fence, resulting in animosity between neighbours, the cross-issue of trespass notices, and removal of a portion of the fence by the defendant, the issue of an interim injunction to prevent the defendant from doing so, allegations of abuse, both verbal and physical, and the issue of these proceedings.

## **Plaintiff's case**

[7] The plaintiff alleges that the defendant consented to the location of the driveway fence (and thus the encroachment) and seeks a declaration recording same. Alternatively, the plaintiff seeks relief under the provisions of the Fencing Act 1978 (the Act) authorising the encroachment.

[8] Further, the plaintiff seeks:

- (a) An order permitting his agents to repair the fence;
- (b) An injunction restraining the defendant or his servants or agents from removing or attempting to remove the fence;

- (c) Orders for costs both as to the repair of the fence and in respect of these and the injunction proceedings.

### **Defendant's case**

[9] The defendant disputes he consented to the positioning of the fence. He alleges that the plaintiff was specifically instructed not to erect a fence which encroached onto his property. He asserts the encroachment is more than minimal and adversely affects his use and enjoyment of the land.

[10] Accordingly, he counterclaims, seeking an order that the plaintiff remove the offending portion of the driveway fence at his cost. The defendant too seeks costs in respect of these proceedings.

### **Issues for determination**

[11] Given that the acceptance that the driveway fence encroaches onto the defendant's land as described, the issues for determination in this case are these:

- (a) Did the defendant consent to the construction of a fence which encroached onto his property? If so, was the fence constructed in accordance with that agreement?

If the answer to both of these questions is yes, then the provisions of s 8(1) of the Act apply and the fence was properly and legally constructed.

- (b) If the answer to either of those questions is no, then is the encroachment minimal and does it unreasonably interfere with the defendant's use and occupation of his land?

If the answer to this question is yes, then the provisions of s 8(2) of the Act apply and the Court must order the removal of that part of the driveway fence which encroaches onto the defendant's land, the plaintiff being liable to meet the cost of same.

If the answer to the question is no, should the Court decline the order for removal of the fence pursuant to s 24 of the Act and, pursuant to the same section make consequential orders?

### **General background**

[12] Before addressing those specific questions, it is useful to set out general background matters which are not contested.

[13] The defendant is now 72 years of age. He purchased [Property 2] 30 years ago and constructed his home and other buildings, including a fence at the rear of [Property 2] which runs along his western boundary bordering [Property 1]. He has lived at that property ever since.

[14] The defendant's property is a rear section which has access to [street name removed] Avenue via a driveway approximately 4 metres wide and 80 metres long. The driveway provides vehicular and pedestrian access to and from the property. It is made of compacted gravel covered with loose gravel.

[15] On 30 June 2014, the defendant's solicitor wrote to the MARRS claiming that a portion of the driveway fence encroached onto the defendant's land and required its removal, failing which the defendant indicated proceedings would be commenced. Trespass notices were enclosed with that letter.

[16] Thereafter, and over a period of several months, correspondence was exchanged between solicitors for the defendant and the MARRS setting out their respective views on the facts but failing to resolve their differences.

[17] By letter dated 24 September 2014, the defendant, through his solicitor, advised the MARRS' solicitor that the offending portion of the driveway fence was to be removed by 5.00 pm on Thursday, 2 October 2014, failing which the defendant indicated he would have it removed the following day. The plaintiff responded by obtaining an interim injunction on 1 October 2014, restraining the defendant from removing or attempting to remove any part of the driveway fence.

[18] However, on 2 October, prior to the injunction being served on him, the defendant and his son removed a portion of the fence, a 1.8 metre high trellis, cobble stone capping and some block work. The capping, associated plaster and block work still lie on the defendant's driveway.

[19] Proceedings were commenced in October 2014. Attempts to settle the dispute proved unsuccessful and fixtures set for September 2015, November 2015, and May 2016 were vacated at the request of counsel.

## **Hearing**

### *Witnesses*

[20] I heard oral evidence from:

- (a) On behalf of the plaintiff:
  - (i) Mr and Mrs Marr (the plaintiff's parents who built the house and driveway fence on [Property 1]);
  - (ii) Ms Cameron Manu who lives at [Property 3];
  - (iii) Mr Clearwater and Mr Nash (contractors involved in the construction of the dwelling and driveway fence); and
  - (iv) Mr Copson (a surveyor who, in June 2016, established the boundary line along the driveway).
- (b) The defendant gave evidence, as did his son, Mr G N Thompson.

[21] On the morning of the first day of evidence I conducted a site visit in the presence of counsel.

[22] I have regard to all of the evidence, both written and oral together with the submissions of counsel.

### *Issues*

[23] Has the plaintiff proved on the balance of probabilities that the defendant consented to the construction of a fence which encroached onto his property?

### *Plaintiff's evidence*

[24] In support of his claim that the defendant agreed to the construction of a fence which encroached, at least partially, onto the defendant's land, the plaintiff relied on the evidence of Mr Marr and Mr Nash.

[25] Mr Marr's evidence is that prior to the construction of the dwelling at number six, he spoke with his neighbours as to what was proposed to be built, showing copies of design plans for the dwelling. He spoke with the defendant about access to the property via the defendant's driveway.

[26] Mr Marr proposed that a gate be put in the proposed driveway fence about two-thirds along its length so as to allow access off the defendant's driveway onto the plaintiff's property.

[27] Mr Marr's proposal was that an easement would be given and in consideration the plaintiff would meet the cost of sealing the driveway. On Mr Marr's account of events the defendant initially agreed but later said he was not willing to grant an easement. Consequently, other options were then considered.

[28] Mr Marr was unable to locate any boundary peg for [Property 1], either at the roadside boundary between [Property 3] or [Property 2]. However, a boundary peg between [Property 3] and [Property 4] was located and from this Mr Marr, a builder with decades of experience, calculated the front boundaries for [Property 1] based on what he described as Council's plan. He did the same for the rear boundary.

[29] In relation to defining the boundary between the plaintiff and defendant's property, Mr Marr's calculations at the roadside end appear to have been reasonably accurate.

[30] Having defined the boundaries between [Property 1] and [Property 2], Mr Marr discovered that a power pole about 40 metres along the drive was, in fact, on the plaintiff's land. The power pole serves no function for the plaintiff but provides electricity to the defendant's property.

[31] This led, on Mr Marr's evidence, to a further discussion with the defendant involving the removal of the pole and the running of power underground, on the basis the plaintiff would pay one half of that cost. This proposal was not acceptable to the defendant who said he would not meet any cost associated with it.

[32] Subsequently, a further discussion was held which involved the defendant, Mr Nash and Mr Marr. It was at this discussion Mr Marr alleges agreement was reached permitting him to construct a fence which was to consist of:

- (a) A concrete block wall running from the road end to the power pole. This would encroach onto the defendant's land. (I refer to it as the top portion of the driveway).
- (b) From the power pole to the eastern boundary, it would be a concrete post and panel fence that would meet the defendant's existing fence at the south eastern corner of the driveway. In doing so, this portion of the fence would encroach onto the plaintiff's land. (I refer to it as the lower portion of the driveway).
- (c) The plaintiff would meet the cost of construction of the fence.

[33] Having reached agreement with the defendant, Mr Marr's evidence is that he then arranged for the ground to be marked with fluro paint to show the position of the top portion of the driveway fence, profiles having earlier been set out.

[34] From Mr Marr's recollection, construction of the driveway fence commenced in or about August 2012 and took approximately three months, he undertaking the work during weekends. His said he was assisted at various times by Mr Nash and

Mr Clearwater, contractors who had been engaged to undertake work in connection with the construction of the dwelling and landscaping of the property.

[35] Mr Marr said that from time to time the defendant was also present. He recalled the defendant requesting that some of the spoil from the foundations for the driveway fence be delivered to his friend's place.

[36] The top portion of the driveway fence comprised a double row of concrete blocks with a small hedge planted in between. In addition, a trellis about 1.8 metres high was erected so as to screen the main bedroom of the Marrs' dwelling. The lower portion consisted of concrete posts into which steel panelling would be inserted, and the fence was to join the existing boundary fence earlier constructed by the defendant.

[37] Mr Marr's evidence is that about 18 months after the fence was constructed, the top portion completely, the lower portion minus the steel panels, he was approached by the defendant who complained about the encroachment of the fence onto his land. The defendant wanted the top portion of the driveway fence removed.

[38] Mr Marr believes this discussion took place a matter of weeks before he received a letter from the defendant's solicitors dated 30 June 2014.

[39] The Marrs then took legal advice and correspondence was exchanged between the solicitors culminating, as I have earlier described, in the defendant's ultimatum that he would remove the offending portion of the fence if the plaintiff failed to do so and the plaintiff obtaining an interim injunction preventing same. As also noted, the injunction was not served before the defendant and his son, removed the trellis and demolished some of the block work and capping stones on the defendant's side of the top portion of the driveway fence.

[40] Mr Nash was engaged to undertake plumbing and drain laying at the property but also provided general assistance in the construction of the dwelling and landscaping. His evidence is that he was present when various discussions were held



on site involving Mr Marr and the defendant concerning the fence along the driveway.

[41] Mr Nash recalled the boundary line on the driveway being established from measurements taken from a boundary peg at [Property 3]. He said that the power pole was found to be on the plaintiff's property and its position obstructed the construction of a fence on the boundary. He further said that he was present when discussions occurred with the defendant about removing the power pole and burying the power cable, the cost of which the defendant said he was not prepared to contribute to.

[42] Relevantly, Mr Nash said that he was present when agreement was reached between Mr Marr and the defendant to, "work around the power pole", so as to avoid its removal.

[43] Mr Nash said the agreement reached was the top portion of the fence could encroach onto the defendant's property, but from the power pole to the eastern boundary of the driveway, the fence was to be stepped back and had to meet the end of the existing fence which the defendant had earlier built.

[44] Mr Nash's evidence also related to observations when excavation of the driveway fence commenced. He said he was present and after the first load of spoil had been taken from the site the defendant asked that the remaining spoil be delivered to his friend's section across the road. This was agreed to.

[45] Mr Nash said that he later spoke to the defendant, that is, after the concrete work and plastering of the columns of the driveway fence had been completed. The purpose of this discussion was to obtain the defendant's agreement to the construction of a cover over firewood the Marrs had stacked at the back of their garage. Specifically, Mr Nash sought agreement to construct what was described as a lean-to, which would be affixed to the defendant's existing fence on the boundary with the plaintiff's land. On Mr Nash's evidence, the defendant was agreeable to this and accordingly he built a cover over the firewood.

[46] Subsequently, Mr Nash said he learnt that the Marrs had received a letter from the Council requiring them to remove the structure.

[47] This led Mr Nash to speak to the defendant to ascertain what had happened because the defendant had agreed to the construction of the lean-to. Mr Nash deposed that the defendant began to “rant” about the plaintiff/the Marrs over the position of the top portion of the driveway fence, leading Mr Nash to conclude that the personal relationship between neighbours had “gone downhill.”

[48] Following that discussion, Mr Nash removed the lean-to over the firewood.

*Defendant's evidence*

[49] The defendant denied any agreement with the plaintiff permitting any part of the driveway fence to encroach onto his land. He denied there had been a discussion to grant the plaintiff an easement over the driveway.

[50] He recalled Mr Marr offering to pay \$2,000 to buy half of the driveway and denied there was a proposal to seal it. He denied any discussion with Mr Nash as to the location of the fence and any conversation with him over the removal of the lean-to. He denied that he had asked for the spoil from the footings for the driveway fence to be delivered to a friend's address across the road.

[51] The defendant said Mr Marr was to construct a fence entirely within his boundary and that on three occasions said he would have the boundary line surveyed. It therefore came as a surprise to him when the defendant saw the first block for the top portion of the driveway fence being laid within his land.

[52] The defendant said he immediately approached Mr Marr about the matter, then took advice from the local Council and on being told it was a civil matter, sought legal advice.

[53] When Mr Marr failed to have the boundary surveyed and the matter was not resolved despite the involvement of his solicitor, the defendant said he issued an ultimatum, requiring the offending portion of the fence to be removed by 5.00 pm on

2 October 2014, failing which he, the defendant, would arrange for its removal on 3 October.

[54] The defendant accepted that he and his son damaged the fence in the way I have described, prior to the expiry of the deadline.

### *Discussion*

[55] Mr Marr impressed me as an honest and reliable witness. He was not able to recall specific dates but that did not detract from his evidence overall. He was building a house for himself and his wife, undertaking some of the work on weekends. In the circumstances it is unsurprising that he did not keep a diary of events which might well have been expected if he was contracted to build a home by a third party.

[56] I accept he is a builder with significant experience. He was well aware of the need to determine the boundaries of the section before finalising the design for the dwelling and laying it out on the land. I also accept his evidence that he was aware he could not build a fence over the boundary to [Property 1] without the consent of the adjoining land owner.

[57] The evidence establishes that, being new to the area, Mr and Mrs Marr endeavoured to advise their immediate neighbours of their building plans and keep them informed as to progress. Ms Cameron Manu referred to this in her evidence. That was unchallenged. I also accept the Marrs spoke with the defendant, not only as to their general plans for the dwelling, but over options concerning the defendant's driveway and later the construction of the driveway fence. I am satisfied that the relationship between the Marrs and the defendant was initially amicable, if not friendly, and characterised by discussion and cooperation, commencing at the time of the initial site preparations until mid-2014.

[58] During this period there is evidence that the defendant lent tools to the Marrs, permitted the Marrs and their workmen to access the building site using the defendant's driveway, engaged in reasonably regular communication over progress,

and from time to time the defendant provided food to the Marrs who, in return, knew of the defendant's fondness for chocolate and provided same to him. At that time, Mr Marr was working at a local chocolate factory.

[59] Generally, it can be said that a good neighbourly relationship developed. It was in this context that discussions concerning the defendant's driveway occurred. I accept the plaintiff's evidence that initially there was discussion about the defendant granting the plaintiff an easement to use the driveway to access [Property 1], which included constructing a gate in the proposed fence. Subsequently, there was discussion about removing the power pole and replacing it with underground power but neither of those proposals found favour with the defendant. Although he did not accept either of those proposals, I find the parties remained on good neighbourly terms throughout.

[60] I accept the evidence of Mr Marr that he ascertained the western and eastern boundaries of the driveway by taking measurements from a boundary peg at [Property 3]. He is not a surveyor and did not use survey equipment to ascertain the boundary line. It is not clear from the evidence what documentation he in fact relied on, he referring to Council plans, rather than plans deposited at the Land Transfer Office following survey. But, as Mr Copson's evidence confirms, Mr Marr's calculations were very close to the true position. Mr Marr had ascertained that the boundary at the driveway end (the western end) was partway behind a power pole located on the berm; the power pole midway along the boundary fence was on the plaintiff's land, and the western boundary was not at the end of the existing fence.

[61] I further accept the evidence of Mr Marr that he had prepared a sketch of the driveway fence he proposed and showed it to the defendant for discussion. I accept his evidence that agreement was reached whereby the top portion of the driveway fence was to encroach onto the defendant's land but that from the power pole there was to be a step back and the balance of the fence was to run directly to the end of the fence which the defendant built and which was short of the actual boundary. That discussion was witnessed by Mr Nash. I accept he was present during the discussion and agreement was reached on this basis. I acknowledge Mr Nash was unable to be precise on various aspects of his evidence but he was clear on this topic.

[62] It follows I do not accept the evidence of the defendant in this matter. Being adamant that there was no agreement and repeating it does not make the assertion correct. The defendant acknowledged difficulty recalling events given the time which has elapsed and his evidence in relation to the construction of the driveway fence cannot be reconciled with other evidence including documentary evidence.

[63] For example, the defendant said that when Mr Marr laid the first concrete block of the driveway fence and was obviously on his property, the defendant raised the issue with Mr Marr and on the following Monday spoke with somebody at “the town hall” who told him it was a civil matter. Consequently, the defendant said he saw his solicitor resulting in correspondence being sent to the Marrs which lead to the ongoing exchange of correspondence between solicitors. The defendant also accepted that it took some time for the driveway fence to be constructed.

[64] If his evidence is correct then, at the time he instructed his solicitor, work on the driveway fence had only recently begun and it follows the fence was still being constructed while the solicitors exchanged correspondence.

[65] The first letter from the defendant’s lawyer to the Marrs was dated 30 June 2014. Correspondence ongoing to September 2014 refers to the fence having been constructed rather than being in the course of construction.

[66] Furthermore, Mr Marr’s evidence that the fence was commenced in late 2012 and completed in about three months is supported to some extent by the photographic evidence in the bundle and the evidence of Mr Nash.

[67] I find, on balance, that the fence had been constructed for in excess of 12 months by the time the defendant consulted his solicitor.

[68] There are other aspects of the defendant’s evidence concerning this fence which I am unable to accept. A street view photograph from Google of the driveway and the plaintiff’s property dated October 2012 shows a profile having been established; this was for the driveway fence. Pink fluro markings are clearly visible, from the profile running towards the power pole. The evidence of Mr Marr is that

they marked the intended location of the concrete block wall. The evidence of Mr Clearwater is consistent with Mr Marr's evidence, Mr Clearwater saying that excavation went a further 200 millimetres onto the defendant's driveway to allow for boxing for the concrete footings. The defendant disputes this saying that the markings were intended to delineate the area to be excavated for the footings and that the wall was to be built inside the plaintiff's boundary. He maintained this position notwithstanding his evidence that he had experience in building fences and houses and that in doing so he would mark out (by a string line) the position of the fence, not the area that had to be excavated for the footings. The defendant could not explain why the marking out in this case differed in that respect but was adamant it did.

[69] I am left with the impression that the defendant's insistence was driven by his position that he had not consented to the position of the fence.

[70] To accept the defendant's evidence is accurate would involve my rejecting the evidence of Mr Marr, Mr Nash and Mr Clearwater. It was not suggested to them that they had colluded over the issue of the defendant's consent to the location of the driveway fence.

[71] Like Mr Marr, I consider Mr Nash to be a credible witness. In a material particular, Mr Nash's evidence was confirmed by the defendant. Mr Nash said that, after the wall was built, he spoke to the defendant and obtained consent to construct a cover for the Marrs' firewood stack and then built same. When he later discovered that the Council had required the lean-to structure to be removed, Mr Nash went to the defendant's home to raise the matter with him and it was at this point Mr Nash said the defendant started to rant about the Marrs and the location of the driveway fence.

[72] Initially, the defendant denied any discussion with Mr Nash over the removal of the cover but then went on to say he had a discussion with Mr Nash in which he said he had been "conned" in to giving consent and/or agreeing to the fence line.

[73] That evidence is telling in several respects. First, the defendant's acknowledgement that he did in fact speak with Mr Nash is a further example of the defendant's evidence changing during his testimony. Secondly, it corroborates the evidence of Mr Nash. Thirdly, it provides corroboration of the plaintiff's case that the defendant consented to the driveway fence line.

[74] While Mr Paine, on behalf of the defendant, suggested that the defendant's statement should be interpreted as indicating he did not give "true" consent to the position of the driveway fence, it is my view that for whatever reason the relationship between the defendant and the Marrs deteriorated to a point where some 12 or so months after the driveway fence had been constructed in accordance with their agreement, the defendant no longer wanted the fence in that position.

[75] The answer to this question is "yes", I am satisfied on the balance of probabilities that the plaintiff has proved the existence of an agreement between the plaintiff and the defendant for the construction of a driveway fence as later built, that is with an encroachment onto the defendant's land at the road end to the power pole, and thereafter the fence joining the existing fence between the two properties being approximately 20 centimetres within the plaintiff's land.

### **Defendant's counterclaim**

[76] Given that finding, it is not strictly speaking necessary to consider the defendant's counterclaim pursuant to s 8(2) of the Act for an order seeking removal of the encroachment, but I make these observations.

[77] Section 8(2) provides:

Where any fence erected otherwise than in accordance with subsection (1) encroaches upon any land of which the person who erected the fence is not the occupier, the occupier of that land may apply to the court for an order that the fence be removed; and the court shall order the removal of the fence (at the expense of the person who erected it) unless it is satisfied—

- (a) that the degree of encroachment is minimal; and
- (b) that the encroachment in no way adversely affects the use and enjoyment of his land by the applicant.

[78] Having heard the evidence and viewed the property, I would find, the degree of encroachment is minimal. At the road end the encroachment is 22 centimetres onto the defendant's land, and approximately 30 centimetres by the power pole. The exact area involved was not put in evidence but when taken against the size of the defendant's property, 1,424 square metres, it can only be described as minimal.

[79] Although Mr Paine submitted that determination of whether the encroachment adversely affects the use and enjoyment of the land by the defendant is entirely a subjective test, I do not find myself in agreement with that proposition. No authority was provided in support. In my view, the subjective views of an affected party are relevant but the overall picture must be objectively, in other words the Court needs to assess the reasonableness of the subjective perception of the affected party.

[80] The defendant's evidence is that the encroachment creates an "optical illusion" and causes some difficulty when reversing out of his driveway. The ageing process resulting in less flexibility when turning his head has increased the problem. The defendant said he had never struck the fence but had come close on some occasions. The driveway is about four metres wide, a little narrower at the road end by reason of the encroachment, and the photographs produced clearly show the nature of the driveway, essentially straight, with the driveway fence one side and a grass space on the side opposite that portion of the driveway fence which encroaches onto the defendant's land.

[81] Furthermore, the tyre marks in the defendant's driveway, as shown in the photographs, do not support his contention that there are difficulties caused by the encroachment in relation to ingress or egress using vehicular transport.

[82] No other adverse effects were raised by the defendant in evidence.

[83] In these circumstances, had I been required to decide the point I would have found that the defendant's counterclaim based on s 8(2) of the Act must fail on the basis that the degree of encroachment is minimal and does not adversely affect the use and enjoyment of the defendant's land.



## **Result**

[84] I find, on balance, that the plaintiff has proved the existence of an agreement to construct the fence with an encroachment onto the defendant's land. I further find that the fence was constructed in accordance with that agreement.

[85] Therefore the plaintiff is entitled to relief as follows:

- (a) A declaration that the encroachment does not breach the provisions of the Fencing Act 1978, in that it does not encroach on the defendant's land without his consent.
- (b) A final injunction restraining the defendant, his servants or agents or any of them, either alone or in conjunction with anyone else, from removing or attempting to remove any part of the driveway fence situated on the northern boundary of [Property 1], Dunedin, and partly encroaching on [Property 2], Dunedin, unless permitted by the Court or consented to in writing by the plaintiff.
- (c) The interim injunction is discharged.
- (d) An order permitting the plaintiff to reinstate the fence to the condition it was in prior to the damage occasioned to it by the defendant on 2 October 2014. The work is to be undertaken, both as to labour and materials, at the cost of the plaintiff.
- (e) An order permitting the plaintiff, his servants and agents, to enter onto and occupy [Property 2], Harwood, in the driveway adjacent to the driveway fence between that property and [Property 1], Harwood, on 3 or 5, 10 and 11 June 2017, solely for the purpose of reinstating the fence and removing the damaged portions of it currently lying on the driveway to [Property 2].

- (f) Leave is reserved to the plaintiff to seek further access to the driveway of [Property 2] if weather conditions do not permit the reinstatement of the fence by 12 June 2017.

[86] The defendant fails in his counterclaim reliant on s 8(2) of the Act for the reasons set out above.

### **Costs**

[87] The plaintiff seeks costs in respect of the injunction proceedings and these proceedings. This afternoon Mr Paine has made oral submissions on behalf of the defendant, the thrust of which is that the Court should exercise its discretion and not award costs against the defendant, primarily on the basis that the parties will continue to live together and that an order for costs is likely to increase tensions between them. Mr Paine also points out the personal circumstances of the defendant, 72 years of age and retired.

### *Discussion*

[88] The plaintiff was successful in obtaining an interim injunction. It was necessary because of the defendant's ultimatum that he would remove the portion of the driveway fence which encroached onto his land if the plaintiff did not. That such relief was required is demonstrated by the fact that the defendant, prior to the expiry of his deadline, damaged the driveway fence. In respect of these proceedings, the plaintiff was successful and the defendant's counterclaim failed.

[89] I agree with the submissions of Mr Andersen for the plaintiff that there is no reason why the usual rules should not apply and costs follow the event.

### *Costs Result*

[90] I allow the plaintiff costs on the injunction proceedings and these proceedings, including the defendant's counterclaim, on a 2B basis, with disbursements to be fixed by the Registrar. The plaintiff does not seek an order for

costs in respect of his surveyor. I consider that appropriate given the defendant also incurred surveying costs.

M B T Turner  
District Court Judge