IN THE DISTRICT COURT
AT BLENHEIM

I TE KŌTI-Ā-ROHE
KI TE WAIHARAKEKE

CIV-2021-006-000115
[2023] NZDC 24802

IN THE MATTER OF	Enforcement of an Easement
UNDER	THE PROPERTY LAW ACT 2007
BETWEEN	JOANNA MARY PRESCOTT Plaintiff
AND	JUDY BLAKE-BARLOW and DAVID BLAKE-BARLOW Defendants

Hearing: 20 June 2023

Appearances: M P Davis for the plaintiff
S J Marshall for the defendants

Judgment: 20 November 2023

JUDGMENT OF JUDGE L I HINTON

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[1] Mrs Prescott seeks in this proceeding a permanent injunction broadly in relation to the prospect of interference she believes presents concerning her right of access to her property under an easement affording her passage over land of Mr and Mrs Blake-Barlow. That prospect of interference centres on work the Blake-Barlows proposed to do on a retaining wall on the Blake-Barlows' land, within the easement area.

[2] The Blake-Barlows wanted to do the work to facilitate heavy vehicle access in relation to their then proposed construction of a home. Mrs Prescott and her late husband feared any work on the retaining wall would impair their access.

[3] On 30 June 2021 the Prescotts obtained an interim injunction:

(a) prohibiting the Blake-Barlows from undertaking any further works on the right of way/easement as set out in the Easement Certificate; and

(b) directing the Blake-Barlows to comply with the dispute resolution provisions in the Easement Certificate.

[4] Following the grant of the interim injunction, the matter subsequently came before Judge Barkle on 15 September 2021 on the Blake-Barlows' application to rescind the interim injunction. That application also sought orders that certain parts of the Prescotts' evidence was inadmissible. The Judge declined the application to rescind the injunction and issued directions to facilitate optimal progress on the case as it then stood.

[5] At the commencement of his judgment, Judge Barkle said this:

> [1] A sad story of lack of communication and some misunderstanding of legal rights has resulted in two retired couples, who are adjoining occupiers of properties, asking the Court to resolve their dispute. Each party no doubt accepts that their somewhat limited resources would be far better utilised in more fruitful and rewarding endeavours.

[6] Judge Barkle summarised the dispute in this way:

> [6] The nub of the dispute between the two parties is the belief of the Prescotts that any interference with the retaining wall would result in the land behind the retaining wall then falling onto the right of way and preventing them access to their property. In contrast, the position of the Blake-Barlows appears to be that would not happen.

[7] Judge Barkle helpfully expressed his view on further information that might be usefully provided to the Court.

[8] This matter subsequently came before me for hearing when I heard not lengthy but purposeful evidence from each of Mrs Prescott and Mrs Blake-Barlow. That served to telegraph and highlight the salient issues that needed to be acknowledged.

[9] Helped by that focus, and with the benefit of submissions from Mr Davis and Mr Marshall, there is not much I need to cover in this decision. Frankly, I have considered the utility of a conference with counsel to see if there were currently a prospect of settlement along the lines Mr Davis, on behalf of Mrs Prescott, had in fact offered to the Blake-Barlows. But I thought that might in the circumstances be otiose.

[10] As well, I should note that the issue of this decision has been unavoidably delayed because of my personal circumstances. That has been conveyed to counsel. I regret that that has occurred and re-state my apologies.

[11] There is much detail that it is not necessary to cover. My focus is on necessary background and the actual threat Mrs Prescott sees now and seeks protection on; and Mrs Blake-Barlow's current stance; and whether in the circumstances the injunction which is sought should issue. I will refer to submissions of counsel that are relevant in the event.

Easement

[12] First, Mrs Prescott has a right-of-way over the Blake-Barlows' property which affords access to her property. The Easement Certificate includes this, in relation to dispute resolution:

> Method of resolving disputes
>
> (a) All difference and disputes which shall arise between the dominant tenement and the servient tenement hereto or their successors in title or any of them touching or concerning easements hereby created or any act or thing to be done suffered or omitted pursuant hereof or touching or concerning the constructions of these presents shall be defined by notice by the party raising it to the other party and shall forthwith be discussed (on a "without prejudice" basis) by the parties in an attempt to resolve their difference amicably…
>
> The parties must attempt to settle disputes by discussion.
>
> If it appears that the matter cannot be resolved after initial discussion, the parties are to adjourn for at least two days and then again attempt to resolved the matter by discussion.
>
> (b) Only after discussion between the parties fails to produce agreement between them on the matter in dispute shall the matter be referred to arbitration in terms of the remaining provisions of this clause…

[13] So the Easement Certificate evidently provides for a mechanism for resolution of disputes and reference to arbitration.

[14] The concern prompting the injunction application was described in this way by Mrs Prescott at paragraph 21 of her affidavit dated 30 June 2021:

> I am greatly concerned that our neighbours are undertaking the works on the retaining wall/ROW without proper engineering advice, and this is going to cause significant damage to the ROW and may result in our sole access to the Property becoming unavailable. We have no other access to the Property. Our understanding is that our neighbours intend to remove the retaining wall which is retaining significant earth from the ROW. If this is removed, we are concerned there will be subsidence onto the ROW that either damages it or renders it unusable. This is why we have suggested they obtain engineering advice before undertaking these works.

[15] In an affidavit in support of an application to set aside the injunction, Mrs Blake-Barlow included this:

> 16. We've had an engineer on site. I am not aware of any engineer having concerns with our proposed works.
>
> 17. The plaintiff have given us no evidence why our proposed works are unsafe. It is not our job to prove our proposed works are safe.
>
> 21. If we cannot commence the works to remove the retaining wall and green space, we cannot build on our land. This is stopping us building a home on our land.

[16] The issue of (provision of) engineering advice was contentious, and is referred to in Mrs Prescott's reply affidavit:

> 2. In response to paragraph 16, the defendants' lack of engineering advice has been a particular point of contention in this dispute. All along, all we have wanted is to ensure that the proposed works were done safely. On a few occasions Judy and/or David have mentioned having engineering advice; however, they refused to provide this to us. I do not believe they have obtained any engineering advice.
>
> 3. In response to paragraph 17, I would think that the party undertaking works to remove a retaining wall would have the duty or obligation to ensure that this is done safely. Here, they are the parties proposing to remove the retaining wall.

[17] In any event, following Judge Barkle's decision, in response to the Judge's request, further affidavits were filed.

[18] In an affidavit dated 9 September 2022 Mrs Blake-Barlow confirmed that:

> The respondents did not have "any intention to conduct any works on or around the retaining wall while this court case is ongoing"
>
> The respondents "do not have current plans to build on the land" for reasons which were stated;
>
> The [precise] scope of any works to be done on the retaining wall would depend on vehicle movements required to build a house and there were no final plans in that regard.

[19] In relation to the obtaining of a consent for work on the retaining wall, Mrs Blake-Barlow stated:

> I note that Mr East has given an opinion that structural works on the retaining wall are likely to require a building consent. Before doing any structural work on or around the retaining wall, our intention would be to contact Council to find out if a building consent is required. If a building consent is required, we would not do any works until the required building consent is maintained.

[20] Mrs Prescott's response outlined concerns:

> That the stated intention to conduct no works seemed limited to the injunction period;
>
> That further work might be done without a requisite building consent, in respect of which equivocal wording is used in Mrs Blake-Barlow's affidavit.

[21] Importantly, Mrs Prescott's affidavit contains the following:

> 6. On 16 September 2022, our solicitor emailed their solicitor with a letter containing an open offer to settle matters. Annexed and marked "**A**" is a copy of the email and letter.
>
> 7. In the letter, I offered to withdraw our claim in the District Court and consent to the interim injunction being lifted in exchange for the defendants providing an undertaking that:
>
> > a. The defendants would not commence any structural works on the retaining wall without first obtaining a building consent for the works or a letter from the Council that a building consent was not required; and
> >
> > b. Before applying to the Council, providing a copy of the application to us with a chance to comment on the application in the first instance.
>
> 8. The offer also provided that costs would lie where they fall.
>
> 9. This offer was not accepted, and we put forward a second open offer on 22 September 2022, which was identical except that the undertaking would

> lapse if either party ceased to own and occupy the respective properties. Annexed and marked "**B**" is a copy of the email containing the offer.
>
> 10. This offer was also not accepted. The fact that the defendants are unwilling to undertake to obtain a building consent and share the application with us makes me seriously question whether they will actually obtain the building consent at all if the interim injunction is removed.

[22] At the hearing before me Mrs Prescott was cross-examined at reasonable length by Mr Marshall, and she handled some detailed, and sometimes unexpected, questions calmly, pleasantly and well. It was apparent that Mrs Prescott has an acute awareness and detailed recollection of the issues faced by her and her late husband in relation to the right of way. I had no reason to doubt her sincerity.

[23] Mrs Prescott stated in answer to my question of her that the removal of the retaining wall remained her abiding current concern, because she would not have access. Nothing had changed in her view.

[24] Mrs Blake-Barlow also gave evidence, and was cross-examined by Mr Martin. Mrs Blake-Barlow was also pleasant and forthright and showed familiarity with the issues from the respondents' perspective, including with relevant documentation and contact with the plaintiff. At times she seemed defensive, but not argumentative.

For Mrs Prescott

[25] It was submitted to be still appropriate and necessary, in the prevailing circumstances, to grant a permanent injunction prohibiting the defendants from undertaking works the subject of the notice of dispute without compliance with the dispute resolution provision. The defendants' assertion they no longer wish to build (a home on their property) or undertake any works (previously) in dispute, or that the precise work scope is not known, should simply support the permanent injunction, preventing any future breaches of the easement certificate (with respect to the works that are subject to the notice of dispute).

[26] The issue is put pithily in Mr Davis' submissions in these terms:

> 33. Here, the plaintiff has established she has a legal right under the Easement Certificate and that the defendants have violated that right. Accordingly, the plaintiff is entitled to a permanent injunction to prevent the recurrence of that violation.

[27] Further, it is submitted that if the Court refuses the injunction there is a risk the defendants will undertake the disputed works in breach of the easement certificates dispute resolution provision, rendering illusory Mrs Prescott's rights under the disputes resolution regime.

[28] Mr Davis submitted that it was more likely than not the works would have caused damage – he referred to Mr East's affidavit that work on the retaining wall required a building consent. He noted, in that regard, that Ms Blake-Barlow had conceded in evidence that the retaining wall was within the easement area.

[29] So Mr Davis submitted that there was a live issue here although it might *"seem to be not a live issue"* because here *"its bound to come up again in the future"*. As I interpreted it, the plaintiff was saying realistically there is a live issue here because of recent history, the positions taken by the Blake-Barlows to date and a discomforting likelihood of repetition or worse.

[30] As Mr Davis saw it Mrs Blake-Barlow's view was that Mrs Prescott had no rights and the Blake-Barlows do not have to consult them – signifying a significant risk for Mrs Prescott moving forward.

[31] Precisely, it was submitted there was an existing breach here, entitling the plaintiff to relief, and the plaintiff sought to arrest a further breach as opposed to a potential future feared breach but, notwithstanding that, even if viewed through the lens of a *quia timet* injunction, it was appropriate to grant the injunction.

For Mr and Mrs Blake-Barlow

[32] Mr Marshall submitted that the terms of the Easement Certificate cannot be interpreted to mean that once any dispute were raised touching on the easement, that any works at all must cease. That proposition was said to encompass the fundamental submission for the Blake-Barlows. It is possible I must say, up to a point, to agree

with Mr Marshall on that. A minor dispute and a mischievous one on first principles should not attract injunctive relief.

[33] Further, if the plaintiff's view was that the right being protected was the right to follow the disputes procedure in the Easement Certificate, then no right to date had been breached. Again correct, to a degree, but that was in reality not the only (narrow) issue, where serious work was proposed, with a not unreasonable prospect of prejudice.

[34] In relation to any retaining wall works, there was no actual risk of any such works eventuating, on the sworn affidavits of the respondents. That submission evidently too had some merit.

[35] Mr Marshall submitted there was no evidence before the Court that any retaining wall work, in any event, was likely to cause relevant damage. There might be evidence only (from Mr East) of a likely building consent requirement. But otherwise there was no admissible evidence as to what is likely to occur. No suggestion of an adverse inference from Mr Blake-Barlow's failure to give evidence should be drawn – the Prescotts have decided to obtain no evidence of their own from an engineer.

[36] Mr Marshall noted, for completeness, that the plaintiff's right was narrow and limited to a right to pass and re-pass over the land. There is no right, for example, to a retaining wall or to have the land configured in any particular way, which Mrs Prescott did not in any event argue for.

[37] I should note that in a particular discussion with me, Mr Marshall suggested the Prescotts simply proceeded on an incorrect assumption access would be affected if the defendants proceeded with their acknowledged intention. That intention included removal of the retaining wall and smoothing of the surface to facilitate truck movements. However, there had been apparently no advice or (which I thought put it too widely) indication by the Blake-Barlows that access would be impaired. Nevertheless, Mr Marshall fairly conceded, and it was sensible to do so, that the Prescotts subjectively had a real concern at least at the time, albeit not based on any

hard evidence before the Court there likely is any problem. The concern counsel referred to was, as Mr Marshall put it, a real concern that removing the retaining wall would cause or interfere with easement rights to pass and repass over the land.

Discussion

[38] Infringement of a legal or equitable right, whether continuing, likely to be repeated, or threatened, is a prerequisite to the granting of injunctive relief. There is an attendant over-riding approach that the Court seeks to do *"justice"* to put it concisely and broadly.

[39] I agreed broadly with Mr Davis' analysis of the relevant provision of the Easement Certificate and that Mrs Prescott has a contractual legal right which she could, and did, legitimately seek to protect, in the prevailing circumstances.

[40] A contrary argument that any minor or less than minor work proposed on the right of way could be enjoined automatically pending an arbitration outcome is not realistic. Such down-tooling, as Mr Marshall put it, would realistically be the case only in more serious instances of likelihood of damage/loss, and not necessarily where the putative minor works were proposed sans any evidence as to effects, or where an application was otherwise deficient or perhaps mischievous.

[41] Indeed, in cases of alleged likely imperilling of right of way access, preservation of access (if necessary by down tooling) appeals as sensible from a legal and policy perspective, pending resolution by arbitration or otherwise, notwithstanding not every permutation is spelled out in the Easement Certificate.

[42] It is material that the Blake-Barlows rightly accept that the Prescotts reasonably feared an adverse outcome, on a subjective footing. Mr Marshall did add, in that regard, that the Prescotts made the wrong assumption (as to the likelihood of impairment of their access). But nothing else or more was known to the Prescotts then, and is not now known about their circumstances to Mrs Prescott as I understand it.

[43] That aside, it is material now that the Court is faced with testimony from Mrs Blake-Barlow to the effect that:

> The Blake-Barlows have no intention to build a home which was the reason works were proposed;
>
> There is no intention to do any works on the right of way;
>
> If there ever were any future intention to do any works a building consent would be obtained if it were necessary.

[44] I concluded that there is presently little if any risk that Mrs Prescott faces of any loss of use of her access rights. I did not overlook that Mrs Blake-Barlow initially refrained from unequivocally agreeing to obtain a building consent for any work on the retaining wall. I thought her referring to her own engineer's role in that was actually understandable. I noted anyway that she was a little more forthcoming, and in fact definite, in re-examination by Mr Marshall.

[45] I should note too that I did not consider, as I believe Mr Davis may have submitted, that Mrs Blake-Barlow exhibited a failure to recognise Mrs Prescott indeed did have rights. I did think Mrs Blake-Barlow a tad defensive and perhaps overly stern in asserting the Blake-Barlows own perceived rights, but I did not think she was unreasonable in that regard so far as Mrs Prescott is concerned.

[46] It is frankly difficult to hurdle clear evidence that no works are proposed. I must accept that evidence.

[47] In the absence of that evidence I would have been more inclined to grant the injunction notwithstanding the lack of more expert evidence in relation to the retaining wall. Of course the position is now that, based on Mrs Blake-Barlow's evidence which I accept, there is no intention to build or more importantly, no house plans available and relevant with respect to building activity and ultimately the retaining wall.

[48] And I am also assuming, I believe reasonably, that there is no intention on the part of the Blake-Barlows to do any work at all in relation to the retaining wall. I note that the only occasion that has arisen for such work is in the context of possible home construction, which is not proceeding.

[49] Mr Marshall advised of concerns in relation to the plaintiff's evidence, covering opinion, hearsay and privilege, and indeed the too wide injunction sought and/or granted, which matters it is not necessary to cover in this decision. I should note that some concerns were technically valid in my view, but none would have prevented the issue of an injunction (necessarily redrafted in part), were I minded to do so.

[50] This matter in my view should simply have settled with undertakings being given by the Blake-Barlows along the lines suggested by Mrs Prescott.

[51] The settlement proposal suggested by Mr Davis was reasonable and would have then addressed the matter in the best interests of the parties, on an acceptable platform for the future.

[52] I hope that this decision will instead help to create that platform.

[53] I take positives, and there were indeed positives, from the evidence of both Mrs Prescott and Mr Blake-Barlow. I fully expect that the Blake-Barlows will keep Mrs Prescott informed on any house building plans or proposal which might arise in relation to the retaining wall or otherwise affecting access on the right of way.

[54] I do not see why the Blake-Barlows would not do that, given what has transpired. Proceeding without reasonable notification/discussion, or provision of relevant plans/advice would not be desirable and would risk an unnecessary re-run and unnecessary return to the Courts.

[55] For now, there seemed to me no continuing or likely to be repeated wrong that justified the grant of a permanent injunction. As well it was a giant and not principled leap in my view to conclude there was an existing threatened wrong.

[56] To the contrary, it seemed to me a peaceable state in fact existed albeit between determined participants who will, with reference to Judge Barkle's observations, have now a greater understanding of their respective rights and incentive to communicate.

[57] I expect the Blake-Barlows accept that the Prescotts honestly had genuine concerns and that the Prescotts acted reasonably in prosecution of their rights and later in making the settlement offers.

Result

[58] The result is that Mrs Prescott's application for the permanent injunction is declined.

[59] My present view is that at the least costs would lie where they fall in relation to this application, but if either party seeks costs, the registrar should be advised and I will timetable submissions accordingly.

L I Hinton
District Court Judge