IN THE DISTRICT COURT
AT NORTH SHORE

CIV 2014-044-000722
[2015] NZDC 20667

BETWEEN	REID DANIEL QUINLAN, SARAH JANE QUINLAN AND DG TRUSTEE COMPANY LIMITED AS TRUSTEES Applicants
AND	JOHN COCROFT TRUSTEE COMPANY LIMITED AND MERVYN KENRICK BISHOP AS TRUSTEES Respondents

Hearing: 13-14 October 2015

Appearances: Mr N Geiger for Applicants
Ms J-M Trotman for Respondents

Judgment: 19 October 2015

DECISION OF JUDGE G M HARRISON

The setting

[1] The applicants own a residential property situated at 4 Moreton Drive, Manly. The respondents, similarly, own a residential property at 6 Moreton Drive, which adjoins the applicants' property. Both are clifftop properties enjoying extensive views of the Hauraki Gulf and its islands.

[2] The applicants (the Quinlans) commenced living in their house in August 2010. They embarked upon a renovation programme which is still ongoing.

[3] The respondents (Mr Bishop) have occupied the house at number 6 since 2000. He developed an interest in creating a rock garden which has been in the course of construction for some years next to the boundary with number 4, which is the eastern boundary of the latter property, and I will refer to it as such throughout this decision.

[4] Mr Bishop decided to construct a fence between the two properties. In para 23 of his affidavit of 16 July 2014 he said that the contractors commenced digging holes for the fence on 8 November 2014, but it is clear from invoices from the contractors annexed to his affidavit and other material that work on the fence commenced in November 2013.

[5] The fence has been described as a Brustics fence which has timber framed panels which are filled with natural brushwood, creating a fence of solid appearance restricting any view through it. The fence as constructed obscured the view the Quinlans had previously enjoyed to the northeast comprising Manly and Tindalls beaches.

[6] The views from both properties, being clifftop settings, are spectacular and extensive, with the sweeping curve of the vista previously available from number 4 now punctuated by the fence I have described.

The application

[7] By notice of application dated 16 May 2014 the Quinlans seek an order pursuant to s 333 of the Property Law Act 2007 (the Act) directing Mr Bishop to modify the fence by removing part of it and lowering some of it to a height of one metre. At the conclusion of the hearing Mr Geiger advised that the Quinlans wished to modify their application by seeking the removal of only the northernmost panel, with the next three panels being reduced to a height of one metre, and the remaining panels at the southern end of the fence to remain as they are.

[8] Mr Bishop's notice of opposition raises as its first ground that this Court does not have jurisdiction to order the removal or alteration of the fence because it is an authorised structure under the requirements of the Auckland Council District Plan (Rodney Section) 2011. I turn now to consider that ground of opposition.

Jurisdiction

[9] There does not appear to be any reported case authority concerning the removal or alteration of fences pursuant to the relevant sections of the Act, all reported cases being concerned with trees.

[10] This could be because of the Fencing Act 1978 which, as its name suggests, makes provision solely for fences. "Fence" as defined in s 2 of that Act says, in part:

> ... A fence, whether or not continuous or extending along the whole boundary separating the lands of adjoining occupiers ...

[11] Mr Bishop did not have the fence constructed on the boundary. It was built solely on his property. It may be that in doing so Mr Bishop was implementing a commonly held view that if a fence is not constructed on the boundary then the provisions of the Fencing Act will not apply to it, meaning in particular that any disagreement from a neighbouring owner as to the style or dimensions of the proposed fence could not be the subject of a dispute which would have to be resolved either in the Disputes Tribunal or this Court.

[12] I do not accept that a landowner can bypass the requirements of the Fencing Act merely by constructing a fence to his own liking a few centimetres on his side of the boundary. I am reinforced in that statement by s 24(1)(h) of the Fencing Act which defines the jurisdiction of the Court as including "the removal of a fence that is not erected on the proper boundary". That would encompass a fence wrongly erected on the neighbour's side of the boundary, but could equally apply to a fence erected by a landowner on his side of the boundary in the mistaken belief that a fence not erected on the boundary is not subject to the Act. Without deciding the point it may be that a fence not erected on the boundary is not a legal fence.

[13] I say no more on that issue because no proceedings were brought by the Quinlans under the Fencing Act, but under the Property Law Act which I now consider.

[14] I begin by referring to s 362 relating to the jurisdiction of District Courts. It provides:

(1) Every District Court has jurisdiction to hear and determine the following matters, or to make the following orders:

...

(e) An order under s 333 for the removal or trimming of a tree or the removal or alteration of a structure.

[15] Section 333 falls within Subpart 4 of the Act. It is headed:

Trees and unauthorised improvements on neighbouring land.

[16] Section 332 provides:

This subpart applies to –

(a) Any structure that was erected on any land except a structure that –

(i) Was erected with a building permit or building consent issued by the relevant territorial authority; or

(ii) ...

[17] Subparagraph (b) applies to "any tree, shrub, or plant (tree) growing or standing on any land".

[18] Miss Trotman's simple point is that while the erection of a fence does not require a building permit or building consent issued by the relevant territorial authority, it is nevertheless a structure that complies with the Auckland District Plan and is therefore not an unauthorised structure, or improvement, and is exempted from the application of subpart 4.

[19] I do not accept that submission.

[20] Section 332(a)(i) applies Subpart 4 to any structure erected on land, except a structure that was erected with a building permit or building consent issued by the relevant territorial authority.

[21] In this case the fence had neither a building permit nor consent.

[22] Section 41(1)(b) of the Building Act provides that a building consent is not required in relation to any building work described in Schedule 1 for which a building consent is not required (see s 42A).

[23] Section 42A provides that a building consent is not required for building work in the following categories:

(a) Building work described in Part 1 of Schedule 1.

[24] In turn, that provides under Item 21 that "fences and hoardings" do not require a building consent.

[25] In an email of 10 July 2014, Mr Michael Nielsen, a planning advisor for resource consents at Auckland Council, advised Mr Bishop:

> As requested I have attached the pages of the Rodney District Plan 2011, which described the standard boundary fence height. I will explained (sic) these as follows:
>
> (1) Any structure over 1.8 metres high above natural ground level is considered to be a "building" (Chapter 3 – Definitions).
>
> (2) No "building" can be located within the yard setback areas (Chapter 8, Rule 8.10.5.6).
>
> (3) Therefore, by default, the maximum height for a fence/structure on the boundary is 1.8 metres.
>
> This is subject to:
>
> - The Fencing Act 1978;
> - Any covenants on the Certificate of Title;
> - Any building code requirements;
> - Except some special zones in Rodney have reduced front fence height for urban design purposes.

[26] The reference to a fence on the boundary will be noted, being consistent with the Fencing Act definition.

[27] Leaving the boundary issue aside, Mr Bishop quite responsibly proceeded to construct the fence in the understanding that he was entitled to do so.

[28] Without referring to the various rules of the District Plan, building is defined as including any structure, and includes any fence or wall, but excludes any such structure which is less than 1.8 metres in height.

[29] Miss Trotman's proposition then is that because neither a building permit nor consent is required for the fence, and that it is excluded from the definition of "building" in the District Plan, it is therefore an authorised structure. This is where I disagree. In my view, the fence may be a complying structure, leaving aside the boundary issue, but it is not an authorised structure.

[30] The Shorter Oxford Dictionary defines "authorised" as – "give formal approval to; sanction" and "give legal or formal warrant to (a person or body) *to do*; empower, permit authoritatively."

[31] Reference must now be made back to the heading of Subpart 4 where it refers to "unauthorised improvements".

[32] It was not contended that the fence is not an improvement. The question is whether it was authorised. In my view it was not authorised despite the fact that it did not require a permit or consent before being erected. The whole point of excluding structures erected with building permits or building consents is that such structures are vetted closely by territorial authority officers to ensure that they comply with the Building Code, the District Plan and any other relevant requirements. Once this vetting process is complete, the territorial authority through its officers issues a building and/or resource consent, thereby authorising the erection of the structure. That is, the structure has been given formal approval by the controlling statutory body to be erected. A legal or formal warrant has been issued to do so.

[33] To apply that reasoning to the situation in this case, expert valuation evidence from Mr Peter Bates in particular was to the effect that the greatest value in the

Bishop property was its development potential. It is conceivable that a developer would acquire the site, demolish the existing house and erect a new structure. Such a structure would possibly require resource consent, but it would certainly require building consent. As an authorised structure it might intrude into the views available from the Quinlan property, but there could be no basis upon which the latter could seek to have such a building removed or modified because Subpart 4 of the Act would not apply to it by reason of the exemption in s 332(a)(i).

[34] For these reasons, even though the fence in question may be complying, it is not a structure authorised by the territorial authority and so is subject to the provisions of Subpart 4. Consequently, I find that this Court has jurisdiction to consider and determine the application.

Is there an undue obstruction of the view?

[35] Section 334 provides that an owner of land may apply for an order under s 333. That section provides that the Court may order the owner of land on which the structure is erected to remove, repair or alter the structure. This order may be made whether or not the structure is causing a legal nuisance and could be the subject of a proceeding otherwise than under that section. That indicates that the Quinlans are not constrained to take proceedings pursuant to the Fencing Act, but may proceed with this application.

[36] Section 335 sets out matters for consideration in determining the application under s 333. Summarised, those matters are:

(i) The order is fair and reasonable;

(ii) The order is necessary to remove an undue obstruction of a view that would otherwise be enjoyed from the applicants' land;

(iii) A refusal to make the order would cause hardship to the applicant greater than the hardship that would be caused to the defendant;

(iv) In determining whether to make an order, the Court must have regard to all relevant circumstances and, 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 of the land.

(v) Subsection 3 provides a broad discretion to depart from the last stated requirement if, in all the circumstances, the Court thinks it fit to do so.

[37] In *Yandle v Done* [2011] 1 NZLR 255 Lang J, in interpreting the word "undue" in s 335(1)(b), said:

> [36] Parliament has therefore chosen to use the words "undue" in s 335(1)(b) deliberately. In doing so, it has imposed an obligation on the Court to evaluate the degree of obstruction having regard to relevant and often competing interests.

[38] He said further:

> [39] For this reason it is not necessarily appropriate to approach the issue solely from the perspective of the party whose view has been obstructed. Had that been Parliament's intention, it would not have used the word "undue" in s 335(1)(b). It would have used another adjective such as "significant" instead. That would have required the Court to focus solely on the degree or extent to which the view was being obstructed. It would not have permitted the Court to also have regard to other competing interests, including those of the landowner on whose property the obstruction is located.

[39] Consideration of the word "undue" had earlier been given by Judge Joyce QC in *Judge v Rhodes* [1995] DCR 25. Section 129C of the Property Law Act 1952 was then in force, and was broadly to similar effect to Subpart 4 of the 2007 Act. At p 28 he said:

> As to "undue", 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 and helpful synonym. This will come down to questions of fact and degree.

[40] I am of the view that the northern part of the fence amounts to an undue obstruction of the view from the Quinlan property in that it goes beyond what is appropriate, or warranted, and is excessive. As stated at para [5] of this decision,

that part of the fence amounts to an abrupt, and apparently unwarranted, obstruction of the sweeping views from the Quinlan property to the north and east which would be available if the front or northern part of the fence was not there, or modified to preserve that valuable feature of the property.

[41] Both parties called valuers. It is not necessary for me to determine whether their respective assessments of loss of value are precise. Both valuers accepted that the existence of views adds value to properties and that the obstruction of such views will inevitably result in a reduction in value.

[42] In these circumstances I accept that the presence of the northern part of the fence impacts negatively on the value of the Quinlan property. If the front part of the fence was removed, I do not accept that Mr Bishop's property would suffer any loss of value. His property is situated at a lower level than the Quinlan property which, in turn, has properties further to the west which are higher again. All of these properties overlook the grassed area at the rear of Mr Bishop's property whether the fence is present or not. Furthermore, there is little if any desirable view from Mr Bishop's property to the northwest consisting, as it does, of rising terrain containing the rear sections of the properties above it, and trees at the top of or partway down the cliff face at the southern extremity of both of the properties in question. As the valuers concede that loss of view devalues a property, some hardship is caused to the Quinlans with no corresponding hardship suffered by Mr Bishop.

[43] Mr Bishop opposes the application on three grounds, essentially. He does not accept that the fence constitutes an undue obstruction and says that it was built by him necessarily to preserve his privacy, security and shelter for his rock garden.

Privacy

[44] As just described, the land to the west of Mr Bishop's property rises. The rear grassed area can be seen from the second level of the Quinlans' house and their bedroom in particular. That was always the case and, although the bedroom windows have been enlarged as part of the ongoing development, the purpose behind

that was to take advantage of the sweeping views available from that level of the house and are not oriented in such a way as to focus on the grassed area.

[45] Mr Bishop is concerned that his bedroom windows can be seen from the Quinlan property. That is not necessarily so from either level of their house or the entertainment patio on the ground level. The southern part of the fence and vegetation on Mr Bishop's side of it prevents that. A casual observer standing near the boundary and forward of that position would be able to see Mr Bishop's bedroom windows but, again, the orientation of the Quinlan property does not lend itself to a permanent over-viewing of that sensitive part of Mr Bishop's house and to the extent that that part of it is visible from the boundary where an observer might otherwise be attracted to the view is of no particular relevance in assessing this application, because such an occurrence would be relatively rare.

Shelter

[46] Mr Bishop claims that the fence is required to provide shelter for his rock garden. He is concerned about windburn of the plants within it. He called no evidence to support that contention either from an expert or by way of photograph or other means to demonstrate that windburn had occurred before the fence was erected.

[47] If the fence was lowered in part to a height of one metre, again, there was no evidence that the shelter available from a fence one metre in height would be significantly different from the existing fence.

[48] For those reasons I do not accept that the desire for shelter is sufficiently significant to defeat the making of an order.

Security

[49] Mr Bishop referred to instances in the past when the Quinlans' children strayed on to his rock garden, although he does not seem to have regarded that as possibly damaging the growth but, rather, that the children should not hurt

themselves on the rocks. They are now older than when these incidents have occurred in the past and there was no evidence of any particular recent incident prior to the fence being erected. There is, in any event, possible access from one property to another around the northern end of the fence just above the cliff face, and so the fence does not provide complete security. An existing stairway down that cliff face has been repaired and extended by Mr Quinlan. Mr Bishop is concerned that that makes access by members of the public on to his property easier than in the past although, again, there was no evidence of any such occurrence. Mr Quinlan agreed that if intrusion by outsiders became a problem a gate controlled by a combination lock, installed on the fence, would be an effective means of preventing such a problem.

[50] Mr Peter Bates, the valuer called for the Quinlans, also noted that there is ease of access for members of the public on to Mr Bishop's property from the esplanade reserve adjoining its southern boundary. Once again, there was no evidence of any intrusive incidents and I consequently discard the issue of security as a relevant consideration.

Coming to the risk

[51] A further ground of opposition was that when the Quinlans purchased their property there was always the risk of a fence being erected on the boundary. It seems at that time a stake and wire fence existed but it was in poor repair and relatively ineffective as a fence. It certainly caused no obstruction to the views from the Quinlans' property.

[52] Miss Trotman relied upon the decision of Judge Moore in *Shakespeare v Kirker* [1997] DCR 1105 as supporting this ground of opposition. However I distinguish it on the basis that the applicants in that case developed their house on a property in a coastal subdivision in such a way as to take maximum advantage of views through the respondents' property to the sea. The applicants did not consult the respondents when designing their home and the defendants' responded by planting a hedge of trees along the boundary to ensure privacy particularly of the outdoor living areas. The Judge said (at p 1112):

> Here, the plaintiffs were never entitled to expect or require that the defendants maintained their rear yard as open space across which the plaintiffs could enjoy uninterrupted views (from ground floor level) (which views the defendants but not the plaintiffs had bought the ability to enjoy unobstructed) regardless of the impact of that upon the privacy of the defendants.

[53] That is an entirely different set of circumstances from those in the present case, and I distinguish that decision accordingly.

Conclusion

[54] Having dealt with the matters required by s 335 to be considered, is it fair and reasonable to make an order pursuant to s 333?

[55] The original proposal by the Quinlans was to have the two northern panels of the fence removed and the remainder reduced to a height of one metre.

[56] After I had viewed the properties, at the request of the parties, and at the conclusion of his closing submissions, Mr Geiger advised that Mr Quinlan wished to modify his application further. He now seeks the removal only of the northern panel of the fence and that the next three panels, when viewed from north to south, be reduced in height to one metre. He accepts that the remaining southern panels need not be the subject of an order.

[57] That seems to me to be a fair and reasonable compromise by the Quinlans removing, as it will, the principal obstruction to their view, but maintaining to some extent the aspirations of Mr Bishop with regard to the fence.

[58] Section 337(2) provides that the reasonable cost of any work necessary to give effect to an order made under s 333 must be met by the applicant, unless the Court is satisfied having regard to the conduct of the defendant that it is just and equitable to require the defendant to pay the whole or any specified share of the cost of the work.

[59] The Quinlans seek an order that Mr Bishop bear the cost of undertaking any work. I am not satisfied that it is just and equitable that Mr Bishop undertake that cost. He did discuss the proposed fence with the Quinlans although no agreement

could be reached. He made inquiries of the authorities to determine what was legal and, clearly, endeavoured to act according to what he understood to be his legal rights. I see no basis in those circumstances for reversing the statutory requirement that the applicants undertake the cost of the work.

[60] I therefore order that within 20 working days the applicants at their cost may remove the northernmost panel of the Brustics fence adjoining the boundary between numbers 4 and 6 Moreton Drive, Manly. The three adjoining panels may be reduced to a height of one metre above existing ground level. No work is to be undertaken on the remaining panels at the southern end of the fence. The applicants and their contractors and workmen may enter Mr Bishop's property to the minimum extent necessary to complete this work, making good at their expense any damage that may occur to the rock garden or any other part of Mr Bishop's property. I reserve leave for any further application to be made.

[61] This being a dispute between neighbours, I do not regard it as appropriate to make any award of costs. The orders I have made are in terms of an amendment to the application made at the conclusion of the hearing. As I have already stated, I accept that Mr Bishop believed that he was acting within his legal rights in erecting the fence and that he did not deliberately set out to obscure the view from the Quinlan property. In these circumstances, in my view costs should fall where they lie. I leave open the right of either party to submit a memorandum seeking costs if, despite my indication, some different outcome is sought.

G M Harrison
District Court Judge