

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**CIV-2014-409-553
[2015] NZHC 1325**

BETWEEN

BLAKESFIELD LIMITED
Plaintiff

AND

AYLEATH VERONICA FOOTE AND
LEE FOOTE AND SCOTT FRANCIS
WHITAKER
Defendants

Hearing: 25-28 May 2015

Appearances: K Clay and G Cooper for Plaintiff
R Raymond and G J Ryan for Defendants

Judgment: 11 June 2015

JUDGMENT OF MANDER J

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Introduction

[1] The plaintiff, Blakesfield Limited (Blakesfield) developed a residential subdivision at Prebbleton. It is the owner of three sections intended for sale which share a boundary with the property of the defendants, Ayleath and Lee Foote (the Footes).¹

[2] Along this boundary stands a line of eucalyptus trees (the trees) which encroach onto the Blakesfield land, and which, Blakesfield claims, interferes with the use of its property and constitutes a nuisance.

[3] Blakesfield seeks a declaration or injunction to the effect that the trees be removed or cut back as is necessary to remove the encroachment. The Footes dispute the claimed nuisance and Blakesfield's entitlement to relief.

Background

[4] In 2010, a corporate predecessor to Blakesfield, was granted a planning change allowing land the subject of a proposed development to be rezoned from rural, to deferred residential. In October 2012, a resource consent was granted, permitting it to subdivide the property into residential sections.

[5] As a condition of the resource consent, a five metre wide landscape mitigation strip was required to be developed along various boundaries of the subdivision. This included the boundary with the Footes' property. The planting requirements stipulated the planting of deciduous trees of a minimum height of 1.5 metres at 10 metre spacings and native shrubs to form a continuous screen to achieve a mature height of approximately 2.5 to 3 metres.

[6] Blakesfield has sold all but four of the sections in the subdivision. Three of the lots that have not been sold border the Footes' property, along which lie the trees.

¹ The defendants are described in the statement of claim as the registered proprietors of the property contiguous with the Blakesfield land.

[7] The Footes' property is a 2.5 acre lifestyle block which they purchased in November 2008. They built a house on the property, and have resided there since December 2010. At the time they purchased the property, it was surrounded by shelterbelts typical of Canterbury, comprising mature gums and poplars. One of these shelter belts lies along their boundary with the Blakesfield land. It substantially comprises the eucalyptus trees about which Blakesfield complains. It has been under-planted with shrubs and there are other trees, including deciduous and eucalyptus trees, that stand back from the boundary which are not the subject of this proceeding.

[8] The Blakesfield and Footes' land is separated by a post and wire fence which, as with the trees, was present before either party purchased their respective properties. The Footes have always treated the fence as the notional boundary. As a result of this dispute, however, the boundary and the location of the trees were the subject of a survey by a registered surveyor. This exercise revealed that the fence does not correctly delineate the legal boundary between the two properties. The survey plan is attached, marked Annexure A. The survey plan also identifies and numbers each individual tree. In this judgment I refer to the trees by their allocated numbers.

[9] Apart from the presence of some exposed roots, the accuracy of the survey was not disputed by the Footes. It shows the position of each of the trees relative to the boundary, and the extent to which the trunks of the trees encroach onto Blakesfield land. Three of the trees' trunks do not encroach over the boundary.² With the exception of one tree, all the trees were planted on the Footes' side of the boundary.³

[10] The survey also plots what is described on the plan as the approximate "drip line" of the trees. This "drip line", which variously extends some 4.4, 4.9 and 5.3 metres respectively over the three neighbouring sections, represents the extent to which branches encroach onto the Blakesfield land. The survey plan further plots

² The trunks of trees 1006, 1007 and 1020 do not encroach onto Blakesfield land.

³ The exception is tree 1025.

the location of exposed tree roots, which Blakesfield contends encroach across the boundary and breach the surface of the Blakesfield land.

[11] There are 38 trees in the line that runs along the boundary between the Footes property and the subdivision. Blakesfield's proceeding is limited to 27 trees, all but one of which is directly adjacent to its land. That tree is on the boundary with a neighbouring property, however, Blakesfield claims its land is still affected by its branches.⁴ The remaining 11 trees are positioned along the Footes' boundary, but are now adjacent to neighbouring sections which have been sold. As Blakesfield is not the owner of the adjoining land, these trees are not the subject of this proceeding.

[12] Blakesfield maintains the encroachment of the trees onto its three sections interferes with the use of its land and, further, that there is physical damage to the land occasioned by the encroachment of the trees' roots. The effects of the encroachment are alleged to include shade, the fall of branches and other debris onto its land, and health and safety concerns arising from possible tree failure. It further submitted these factors have made the sections unattractive for sale. Blakesfield also argued that, as a result of the encroachment of the branches and roots, it is not able to successfully establish the five metre landscape buffer zone.

[13] The parties have been unable to reach agreement regarding a solution to the trees' encroachment. Resort by Blakesfield to the remedy of abatement, at least in respect of the encroaching branches, is not available. The expert evidence of arborists is that cutting the branches back to the boundary, in general terms, is not a viable solution. Such an exercise, described as "flat siding", would have a deleterious effect on the health of the trees, likely to render them unhealthy and unsafe.

[14] In the course of the hearing, the Footes formally acknowledged, on the advice of their expert arborist witness, that Mr Christopher Walsh, 14 of the trees would voluntarily be removed. These particular trees were categorised by Mr Walsh as poor specimens, the growth of which was suppressed by the other trees.⁵

⁴ Tree 1031.

⁵ Trees 1005, 1008, 1014, 1015, 1016, 1017, 1018, 1019, 1021, 1022, 1023, 1026, 1027 and 1029.

Accordingly, I proceed on the basis of that formal acknowledgment that those trees will be removed and need not form part of this judgment.

[15] For the purpose of the following analysis, I also presently leave to one side the tree which is not adjacent to Blakesfield's land.⁶

Preliminary matters

[16] There are two preliminary matters to be disposed of, before identification of the issues requiring determination. The first is the Footes' submission that Blakesfield has deliberately sought to avoid the provisions of ss 332-338 of the Property Law Act 2007 (the Act), which deal with issues arising from the effect of trees and other structures on a neighbouring property. They allege the resort by Blakesfield to an action in nuisance is to avoid a number of considerations under the provisions of the Act which would ordinarily count against an application for relief in the present circumstances. In a type of policy argument, it was submitted that to allow a nuisance action to succeed when it would not otherwise be successful under the Act should not be countenanced.

[17] I doubt whether the potential availability of a remedy under the Act can limit a common law action in private nuisance in the absence of any explicit statutory prohibition to such effect. In any event, in the absence of the sections having been sold and the unlikelihood of buildings being erected within a foreseeable reasonable time, it is not at all clear that the provisions of the Act could be utilised by Blakesfield to obtain relief.⁷ Blakesfield is not prevented from relying on the law of nuisance because of the Property Law Act provisions.

[18] The second preliminary matter is that Blakesfield's action is pleaded on the basis of alternative causes of action. The first is described as being one of encroachment and the second in nuisance. Encroachment itself is not a cause of action, but a form of nuisance.⁸ Blakesfield did not contest the point. Essentially Blakesfield's reliance on encroachment is subsumed in its nuisance claim.

⁶ Tree 1031.

⁷ Property Law Act 2007, s 333(3) and (4).

⁸ *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321.

The issues

[19] In order for Blakesfield to succeed in its claim for a declaration or injunction it must prove there is an actionable nuisance. It is therefore necessary for me to determine whether the encroachment by the trees' trunks, the branches and/or roots gives rise to a nuisance.

[20] The second issue is the question of estoppel. The Footes submit that, even if the encroaching trees constitute a nuisance, Blakesfield is estopped from requiring the trees to be removed because of its reliance upon the shelterbelt, and the representations it made in respect of the trees, for the purpose of obtaining approval to rezone the land and allow the development of the subdivision.

[21] The third issue is that, in the event that an actionable nuisance is proved, from which Blakesfield should not be estopped from obtaining a remedy, what is the appropriate relief?

The relevant principles of the law of nuisance

[22] An action for private nuisance protects a person's right to the use or enjoyment of an interest in land.⁹ Actionable harm for interference in the right to the beneficial use and enjoyment of land may include encroachment onto the land, as where a tree or its branches grow on to neighbouring land, or tree roots grow into a neighbour's soil.¹⁰

[23] *Clerk and Lindsell on Torts* differentiate between a nuisance by encroachment closely resembling a trespass and the causing of physical damage to a neighbour's land or building.¹¹ In the former category, the archetypal example of a nuisance is where trees overhang a neighbour's land.¹² Similarly, roots which grow

⁹ Bill Atkin "Nuisance" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [10.2.02], citing *Read v J Lyons & Co Ltd* [1945] KB 216 (CA) at 236.

¹⁰ *Lemmon v Webb* [1895] AC 1 (HL); *Woodnorth v Holdgate* [1955] NZLR 552 (SC); *Darroch v Carroll* [1955] NZLR 997 (SC); *Morgan v Khyatt* [1964] NZLR 666 (PC); *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321.

¹¹ Michael Jones (ed) *Clerk & Lindsell on Torts* (21st ed, Thomson Reuters, London, 2014) at [20-02] and [20-07].

¹² *Smith v Giddy* [1904] 2 KB 448 (KB); *Lemmon v Webb*, [1895] AC 1 (HL).

into a neighbour's land is also cited as an example of an encroachment but one that is also capable of causing physical damage to land, or something erected upon it. Examples include the blocking of a drain, or the breaking up of a concrete paved drive.

[24] It is well established that an owner or occupier of land is not responsible for damage or interference with a neighbour's land caused through natural agencies resulting from the lawful use of his or her own land. The inconvenience of windblown leaves or the shedding of other debris, such as acorns or pine needles, do not, despite the annoyance that may be caused, constitute a nuisance.¹³ The principle that no remedy lies from the consequence of a natural use of the land, such as growing trees, is, of course, premised on the trees not encroaching onto the neighbour's property.

Does the encroachment by the trees constitute an actionable nuisance?

Trunks

[25] Of the 12 remaining trees, three of the tree trunks do not encroach.¹⁴ One tree encroaches a mere one centimetre at a height of 10.41 metres.¹⁵ Such encroachment is de minimis and is incapable, in the circumstances, of itself constituting an actionable nuisance. Similarly, an encroachment of five centimetres by another tree trunk at a height of five and half metres I also consider to be de minimis.¹⁶

[26] There is one tree which is on the Blakesfield's side of the boundary. It grows from a position, according to the survey plan, which is on Blakesfield's land.¹⁷ Another tree has its trunk well over half a metre inside the Foote boundary until it reaches a height of 10 metres, before veering across the boundary, over into

¹³ *Molloy v Drummond* [1939] NZLR 499 (SC); *Matthews v Forgie* [1917] NZLR 921 (SC).

¹⁴ Trees 1006, 1007 and 1020.

¹⁵ Tree 1011.

¹⁶ Tree 1012.

¹⁷ Tree 1025. Section 2 of the Land Transfer Act 1952 provides the trees and timber are part of land for the purposes of that Act. As the tree has grown from the Blakesfield's land, it would appear to be owned by Blakesfield.

Blakesfield land by some 70 centimetres.¹⁸ Cutting the tree trunk at the approximate height of 10 metres would remediate the encroachment, at least by the trunk of the tree.

[27] Of the five remaining trees, the encroachment by the trunks range between no more than 17 centimetres at approximately two and a half metres height, 44 centimetres at 10 metres height, and 28 centimetres at 15 metres in height.¹⁹

[28] I have concluded that while five of the tree trunks encroach onto the Blakesfield land, that encroachment alone is not, in the circumstances, capable of constituting a nuisance. The analysis of the tree trunks in terms of encroachment is somewhat academic. It is the branches and the roots which are the source of the real difficulty. I record, however, that because of the height at which any discernible encroachment by the tree trunks occurs, the minimal nature of that encroachment, and the fact the encroachment is not onto any usable part of Blakesfield's land, except for the purpose of the planting of the five metre landscape mitigation strip, no actionable nuisance arises from the encroachment by the tree trunks.

Branches

[29] The branches extend a number of metres over the boundary. The Footes submit that the encroachment by the branches is either trivial, in the case of minor encroachments at a high level, or remediable, on the basis that the lower branches can be trimmed. They place emphasis on the five metre strip which is required to be planted, and upon which no building can be erected. They submit the trees are overhanging space which is both practically and legally unusable, other than for the establishment of the planting strip. The overhanging branches can be cut back, and the overhanging space lifted, to facilitate the growth of this landscape mitigation strip.

[30] The deleterious effects identified by Blakesfield from the encroaching trees included the extent to which the trees shade its property. The trees lie to the northwest of the Blakesfield land. Naturally enough, having regard to the height of

¹⁸ Tree 1028.

¹⁹ Trees 1009, 1010, 1013, 1024 and 1030.

the trees, some of which stand some 19 metres high, they block the sun. This is particularly so in the afternoon, to varying degrees, depending on the time of the year. The Footes submit that shading will be the inevitable consequence of the requirement to plant the landscape buffer strip, and that, in any event, at the time of the planning considerations, the local authority considered there was adequate light to each residential section as part of its assessment of the application for the resource consent allowing the subdivision. The Footes also make the point that shading is a natural feature of the surrounding environment, of which the shelterbelts were an existing part.

[31] I accept that the effect and length of the shade on Blakesfield's sections arises from the natural use of the trees on the Footes' land. The shadow cast by the shelterbelt does not give rise to an actionable nuisance per se. However, the overhanging branches which constitute that part of the encroachment create a dense amount of vegetation above the Blakesfield land, and to that extent is a contributor to the limited light which, at least, the rear of the Blakesfield sections are able to receive. If the encroaching branches were taken back to the boundary, it would improve the light available to the Blakesfield land. It would not, however, materially change the length of the shadow which the shelterbelt casts.

[32] Blakesfield also contended that the effect of the encroachment prevented the Blakesfield property from drying out, particularly during winter months. There was insufficient evidence put forward to support that assertion. Again, if the trees have that effect, it is the likely consequence of the natural use of trees on an adjoining property. I accept, however, that the overhanging branches, preventing light to the rear of the Blakesfield sections naturally, would hinder the drying of the ground.

[33] Blakesfield submitted that the overhanging foliage caused branches and other debris to fall straight down onto its land. While the Footes submitted that there was little direct evidence of such debris falling onto the Blakesfield's property, I am bound to observe that this is the natural and ordinary consequence of having branches encroaching over a neighbour's property. While the natural distribution of leaves and other natural debris associated with trees growing within the confines of a neighbouring property cannot give rise to an actionable nuisance, it is clear the fall

of such debris from overhanging trees does give rise to an actionable nuisance. It is a natural consequence of the branches encroaching onto Blakesfield's land.

[34] Blakesfield sought to place emphasis on health and safety risks arising from the encroachment of the tree branches. In particular, it made reference to a tree failure on a property adjacent to another section. Mr Walsh, the arborist called by the Footes, observed that it was likely this tree had failed because of the removal of a number of rows of trees adjacent to the boundary, exposing a tree which had previously been well sheltered. I do not conclude that the encroachment of the branches, of itself, constitutes a health and safety risk.

[35] Blakesfield submitted that the three sections adjacent to the Footes' property were unattractive for sale as residential sections. There was some evidence of difficulties negotiating with prospective purchasers because of the effect of the trees, and conflicting submissions made by the parties regarding the effect of the trees on the value of the sections.

[36] In my view, it is clear that the overhanging branches, which conservatively extend some four metres onto the Blakesfield property, detract from the amenity and attractiveness of the sections, even with the five metre planting buffer. This has the potential to impact on the value of the properties. The drawback, however, for any prospective purchaser from the shadow cast by a tall stand of neighbouring trees situated to the northwest cannot be sourced from the encroachment but rather results from the established shelterbelt. Similarly, it is the extension of the foliage over the Blakesfield land and not the minimal growth of the trunks across the legal boundary and into the air space of the three sections, that is the source of the deleterious effects. Put simply, if the trees had grown straighter, or followed a slightly different upward path, putting them some centimetres on the other side of the legal boundary, the shadow cast across the sections would have been the same.

[37] Having made these observations, I accept the branches which extend across the legal boundary into the Blakesfield property constitutes an actionable nuisance. Blakesfield is entitled to a remedy that remediates that encroachment.

Roots

[38] The survey plan plots nine locations where roots of the trees have become exposed at the surface of Blakesfield land very close to the boundary. They are exposed no more than half a metre across the boundary and are largely concentrated in one area. There was evidence that the digging of the ground and the preparation of the soil for the purpose of the five metre planting strip was rendered more difficult because of the presence of the trees roots which extended underground onto the Blakesfield land.

[39] In relation to the most obvious encroachment at the surface by an exposed root, it was the evidence of the Footes' arborist, Mr Walsh, that this root could be ground back to the boundary without adversely damaging the tree.²⁰ In effect, the remedy of abatement is available in respect of that particular exposed root.

[40] The Footes submitted that in order for an actionable nuisance to be established as a result of encroaching roots, it was necessary to prove "actual and sensible" damage had resulted from the encroachment.²¹ They submitted that no actual or potential damage to pipes or drains had been proven, nor any evidence of a substantial interference with gardening operations on the Blakesfield land.

[41] I find there is presently no realistic foreseeable or potential damage to pipes and drains from the roots. Because of the presence of the landscape mitigation strip, a related prohibition on building within five metres of the boundary, and the direction of any subterranean services which when laid would run towards the road, damage from encroaching roots is not presently realistic.

[42] I accept the mere underground encroachment by roots is insufficient, either to constitute damage to land, or an actionable nuisance for encroachment. There must, at least, be some detrimental consequence to the neighbouring landowner from what would otherwise be the natural consequence of planting trees or, indeed, any vegetation inside the border of a neighbouring property. Insofar as exposed roots along the boundary line have been identified by Blakesfield, I accept that the

²⁰ Tree 1020.

²¹ *Woodnorth v Holdgate* [1955] NZLR 552 (SC); *Roud v Vincent & Anor* [1958] NZLR 794 (SC).

disruption to the surface of the soil is capable of constituting an interference with land, and is capable of constituting physical damage to land.

[43] Each case, however, needs to be considered in its own circumstances. The nine instances of exposed roots, isolated by themselves, do not give rise to an actionable nuisance. I come to that conclusion based upon their very close proximity to the boundary and the limited extent of the encroachment, but primarily because of the presence of the five metre planting strip. By themselves, these exposed roots do not prevent the cultivation of that area, nor, given the planting that is to occur, will they be visually unsightly or detract from Blakesfield's use and enjoyment of its land. The presence of the exposed roots, however, needs to be considered as part of the wider consideration of the effect of all the roots on the ability of Blakesfield to develop the five metre landscape strip.

[44] In *Roud v Vincent & Anor*, an injunction was granted to prevent roots encroaching onto a neighbouring property that were considered to be causing actual and material damage to land on which vegetables and flowers were being grown.²² In that case, the Court was satisfied the evidence established the neighbour was experiencing considerable difficulty, or inconvenience, as a result of roots from an adjoining property interfering with the cultivation and use of his ground. As a result, it was found there was material damage caused to the plaintiff's property.

[45] Blakesfield relies on that authority and evidence it adduced of the difficulty of establishing the five metre planting strip because of the presence of encroaching roots from the trees.

[46] As I have already made reference, there was a contest between the parties as to the extent to which the encroachment by the trees (the branches and the roots) affected the ability of Blakesfield to cultivate the planting strip. In my view, however, there was common ground between the witnesses, expert and lay, that the roots and overhanging branches impeded the cultivation of the required landscaping strip, and had a deleterious effect not just on the establishment of plants, but also their subsequent cultivation and growth. There was evidence of competition for

²² *Roud v Vincent & Anor* [1958] NZLR 794 (SC).

water and nutrients, the effect of shadow and limited light was acknowledged, and the difficulty of digging the ground.

[47] Equally, however, it is apparent that such difficulties are not insurmountable, and to some degree can be compensated by ensuring an adequate water supply for the planned plantings, generous mulching, and the lifting of the height of the overhanging branches. There was evidence that a number of specified plants can successfully be cultivated in the five metre strip, notwithstanding the presence of the trees. If need be, application can be made to the local authority to amend the planting specifications to include a wider range of plant species.

[48] Having made those observations, I must be cognisant of the fact that the responsibility for the establishment of the landscape mitigation zone lies with Blakesfield. I am satisfied that, having regard to the use to which Blakesfield wishes to put, and, indeed, is required to put, that part of its land, its use of the land is materially qualified as a result of the encroachment.

[49] The Footes place reliance on the Blakesfield's landscaper's reference in his evidence to being "reluctant" to proceed with the planting strip as being insufficient to constitute actual and sensible damage, or a substantial interference with the appellant's gardening operations. While I accept the evidence may not go so far as establishing actual damage in the sense of blocked pipes or cracked paths, the encroaching roots do create difficulties to Blakesfield's use and enjoyment of its land, if only for the purpose of establishing the five metre planting strip. When this is coupled with the effect of the overhanging branches, the combined effect of the encroachment is capable of constituting an actionable nuisance.

Estoppel

[50] The Footes rely upon the law of estoppel. They claim that as a result of representations made by Blakesfield during the planning process, it ought not be allowed to succeed in its claim to remove the trees.

Principles of equitable estoppel

[51] The principles of equitable estoppel were reviewed by the Court of Appeal in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*.²³ The elements of estoppel were succinctly set out in that case as follows:²⁴

- (a) A belief or expectation by [A] has been created or encouraged by words or conduct by [B];
- (b) To the extent an express representation is relied upon, it is clearly and unequivocally expressed;
- (c) [A] reasonably relied to its detriment on the representation; and
- (d) It would be unconscionable for [B] to depart from the belief or expectation.

[52] In considering the application of these principles, the Court of Appeal observed that the focus of the inquiry is on what is necessary in all the circumstances to satisfy the equity arising from a departure from the expectation engendered by the relevant assurance, promise or conduct. An assessment of the nature and extent of the element of unconscionability forms part of the analysis.²⁵ The Court will adopt a flexible approach in determining the appropriate relief where an equitable estoppel is established, although a principled approach is nevertheless required.²⁶ Where “expectation-based” relief is sought, the remedy should be designed to fulfil the expectation that is relied upon. Where a reliance-based remedy is pleaded, it would need to put the person in the position he or she would have been in if the representation had not been made and relied upon.²⁷

[53] The Court of Appeal identified the three main elements relevant to relief which stem from the ingredients necessary to establish equitable estoppel in the first place.²⁸ These elements are as follows:

- (a) The quality and nature of the assurances which give rise to the claimant’s expectation. Generally, the clearer and more explicit the

²³ *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567.

²⁴ At [44].

²⁵ At [73].

²⁶ At [75].

²⁷ At [77].

²⁸ At [114].

assurance is, the more likely it is that a Court will be willing to grant expectation-based relief. This is because a clear assurance is more likely to engender an expectation by the promisee that it will be fulfilled.

- (b) The extent and nature of the claimant's detrimental reliance on the assurances. The greater the degree and consequences of detrimental reliance by the claimant, the more likely it is that the Court will be prepared to hold a promisor to their promise, rather than make an award of a more limited nature designed to compensate for reliance-based losses.
- (c) The need for the claimant to show that it would be unconscionable for the promisor to depart from the assurances given. Unconscionability is the element which attracts both the jurisdiction of a court of equity and "moulds the remedy".²⁹

[54] The Court of Appeal, in *Wilson Parking*, observed that when assessing the appropriate remedy all the relevant circumstances are to be considered in order not to necessarily satisfy the claimant's expectation but to satisfy the equity that has arisen in the claimant's favour.³⁰ While observing that some authorities continue to refer to relief as being the minimum necessary to satisfy the equity, the Court of Appeal considered that the emphasis should be on a broad assessment of all the relevant circumstances and a broad consideration of the relief necessary to achieve a just and proportionate outcome.³¹

The competing contentions regarding estoppel

[55] The basis for the Footes' defence of equitable estoppel are representations made by Blakesfield's corporate predecessor when seeking planning permission for

²⁹ At [116], citing *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7, (1988) 164 CLR 387 at [18]-[19], 419.

³⁰ At [116].

³¹ At [117]-[118].

the subdivision.³² The Footes submit that reliance was placed by Blakesfield on the existing characteristics of the rural environment, in particular the shelterbelts of which the Footes' trees are an example, to mitigate potential adverse effects of the subdivision. Reference was made in various reports to the proposed landscape buffer zone "reinforcing" the existing shelterbelts to provide delineation between the existing rural residential environment and the proposed urban development. It was submitted that the landscaped strips were to be in addition to, or to supplement, the effect already provided by the existing trees.

[56] The Footes submit that it was reasonable for them to rely on these representations. The Footes' evidence was that as a consequence of their reliance on those statements, they acted to their detriment by not objecting to the proposed zone change. They say that, had they known that Blakesfield would seek to take a different approach regarding the retention of the shelterbelts, they would have made a submission objecting to the proposed rezoning of the land in protection of their interests.

[57] Blakesfield submitted that the defence of estoppel is not available to the Footes. The statements in the planning documents, in its submission, are not sufficiently clear, or unequivocal, to justify the Footes' interpreting them as a representation by Blakesfield regarding the protection or retention of the shelterbelts. Blakesfield submitted that where the shelterbelts are referred to in the material submitted in support of the zoning change application, it is only for the purposes of describing the existing environment. Such statements, it submitted, are not capable of constituting a representation that the shelterbelts would not be removed, nor are they capable of providing a basis for such an expectation.

[58] Blakesfield submitted no detriment to the Footes has been proven, because the outcome of the planning process should the Footes have filed an objection to the

³² Neither party has put in issue the fact the consent was applied for, and obtained by, the corporate predecessor of Blakesfield. The association between the original company and Blakesfield was the subject of some cross-examination. Blakesfield did not raise any issue in relation to the estoppel argument that the representations in the planning documents were sourced from the original company.

rezoning application is unknown. There is nothing in the evidence to show that the outcome would have been any different.

[59] Finally, Blakesfield submitted in response to the claim of estoppel that no unconscionability arises on its part when the statements contained in the planning reports regarding the shelterbelts are compared with its right to resort to the common law to abate a nuisance. It is not unconscionable conduct for Blakesfield to rely on the law that governs the relationships between neighbours.

The rezoning application documents

[60] It is necessary to review relevant passages of documents submitted by Blakesfield in support of its planning application, which the Footes point to as giving rise to the assurances upon which they relied. The first document is a landscape assessment report lodged in support of the application for a zone change. It was provided to local residents, including the Footes, who could potentially be affected by the change.

[61] In a landscape assessment completed in November 2008, under the heading “Site Appraisal”, the land the subject of the rezoning application is described:

- 2.12 The Application Site is typically framed to its rural edges with post and wire fences. Surrounding shelterbelts appear to be predominantly located on adjoining properties, beyond the boundary fence line. To Site boundaries with residential neighbours the boundary is generally demarcated with more solid timber fences or with occasional hedges or corrugated iron fences.

[62] The report includes a photograph described in the landscape assessment as illustrating the open field of the site contrasting with the stated “residential area beyond, which appear[s] heavily tree covered from this perspective”. Other photographs were referred to which showed the open field of the application site with shelterbelts through adjacent rural residential areas, including along the northwest site boundary.

[63] Under the heading “Visual Catchment and Viewing Audience”, the view towards the application site is described in the following terms:

- 3.7 There are no long distance views towards the Application Site from within the surrounding landscape due to intervening screening provided by residential buildings, fences and field boundary shelterbelts across the flat plains landscape. This means the full scale of the wider landscape is often obscured and that features, buildings, rivers or other landmarks, can be hidden from view.

[64] Under the heading “Actual and Potential Effects”, and the subheading “Visual Effects (Effects on Neighbouring Properties and Roads)”, the visual effects of the proposed development on neighbouring properties is described:

- 5.6 Visual effects are an interrelated subset of landscape effects. Visual effects relate to changes that arise in composition of available views as a result of changes to the landscape and peoples [sic] response to change, and to overall effects with respect to visual amenity.
- 5.7 The visual effects of the proposed development are limited to the extent of the Application Site that is visible from surrounding locations. The existing shelterbelts surrounding the Application Site are both an identifiable rural vegetation pattern and effective screening that subdivides the landscape into smaller visual units.

[65] Under the subheading “Appropriateness of Site for Proposed Development”, the following observations are contained in the report:

- 5.25 Different densities compared with adjacent rural-residential properties and landscape buffer treatment along the Application Site’s north-west boundary will ensure a clear distinction remains between the Site’s larger size lots and neighbouring properties thus ensuring a clear urban edge on this boundary.

[66] A further relevant passage relied upon by both parties is under the heading “Avoiding, Remediating and Mitigating Effects”:

- 7.1 To ensure appropriate integration of the Application Site’s proposed rezoning for residential development the following mitigation measures are recommended:

Visual Effects and Boundary Treatment

- From rural views into the Site the combined use of vegetative screening and building setback (five metres from the north-western boundary and Blakes Road) will reduce the apparent density of development from these perspectives. It is considered that this five metre setback, providing further separation from neighbouring rural residential houses, aids in preventing these different zones visually merging;
- ...

- The majority of existing shelterbelts that border the Application Site are located on neighbouring properties. Landscape buffer planting to the rural residential boundary of the Application Site will reinforce the screening provided by this existing planting. This buffer planting will comprise of a mix of deciduous tree species (to negate shading concerns) underplanted with evergreen shrub species (to approximately 2.5-3 metres in height).

[67] In the formal request to the local planning authority for a District Plan Change, there was a further report which made reference to the shelterbelts on which the Footes submit they relied. This included a description of the existing environment:

- 5.5 ... A number of substantial trees and hedges define the sites boundaries along the western and northern extremities. As to be expected, residential activity is limited in the Rural (Inner Plains) Zone, with the majority of buildings and structures being directly associated with its productive purpose.

[68] Under the heading “Landscape and Visual Effects”:

- 5.15 The principle viewing catchment will be from a small number of public spaces and adjoining houses. Notwithstanding the latter, the majority of adjacent houses have been assessed as receiving very low levels of visual effects, due to screening provided by intervening garden vegetation and fences.

[69] Under the heading “Effects on Amenity”:

- 5.17 Retaining a clearly demarcated boundary between rural and urban land uses is also considered important to establish a definite outer edge to the development. Hence the proposed introduction of a landscape buffer and a ‘no build’ zone along the common boundary with the Rural Inner Plains Zone.

[70] Under the heading “Existing environment and the rural-urban boundary” it is stated:

- 5.21 Retaining a clearly demarcated boundary between rural and urban land uses is one of the intentions of the PDP, as expressed in some of the objectives and policies addressed in Section 7 below. In respect of the rural-urban boundary in the vicinity of the subject site, the northern-most aspect of the common boundary is presently demarcated by a substantial row of Blue Gum trees and other trees/hedges, which run perpendicular to Blakes Road. To be consistent with the intention of the PDP, the proposed rezone site

should thus exhibit physical characteristics that represent a distinct boundary. ...

Analysis of the estoppel argument

[71] Blakesfield accepted that a focus in the documents prepared for the purpose of the rezoning application was the need to retain the character of the surrounding area as far as possible, and the importance of establishing a demarcation between the existing environment and the planned subdivision. However, it sought to emphasise the mitigating importance of the landscape buffer zone and the level of detail with which that was required to be addressed.

[72] In terms of the reliance placed on the existing shelterbelts, to meet those concerns, Blakesfield's evidence was that its five metre vegetation strip would provide that demarcation. This was an essential element of the proposal because it had no control over what adjoining neighbours may do with the shelterbelts. In respect to the references to the shelterbelts in the rezoning application, and supporting landscape assessment document, Blakesfield's position was that such references were in explanation of the existing environment. There was an obligation on it to provide a suitable landscape buffer zone at the borders of the development to ensure sufficient demarcation between rural zones and the proposed residential development. The shelterbelts were a secondary consideration to this priority. In that regard, reference was made to the first bullet point at 7.1 of the landscape assessment report, referring to the use of vegetative screening and building setback to reduce the apparent density of the development, and provide further separation from neighbouring rural residential houses.³³ It also referred to other parts of the report as providing that context.

[73] In my assessment, the existing shelterbelts were referred to in the application for a zoning change for the purpose of supporting the submission that the visual effects of the proposed development would be limited. Blakesfield was required to describe the existing environment, and how existing features, including buildings and shelterbelts, already obscured the wider landscape. Insofar as passages of the

³³ See [66] above.

documents addressed those matters, they do not assist the Footes in their estoppel argument.

[74] I am also satisfied that the primary means by which demarcation between the existing rural residential environment and the planned subdivision, and the visual screening of that development from the surrounding rural land, was to be achieved was by providing the landscape mitigation zone which Blakesfield was proposing. The landscape assessment report made specific reference to the landscape buffer treatment along the northwest boundary as ensuring a clear distinction between what is described as the sites larger lots and neighbouring properties, thereby ensuring a clear urban edge on this boundary.

[75] Aside from a description of the existing landscape, the existing shelterbelts were referred to in the application documents for the purpose of highlighting how the lines of trees would *reinforce* the screening that was to be provided by the landscape buffer planting.

[76] The Footes' estoppel argument rests on an acceptance that they had a reasonable expectation, created by the content of the application and its supporting documents that the shelterbelts would not be in jeopardy as a result of the planned subdivision. Insofar as the shelterbelts assisted the effect of the landscape buffer planting, that may have been a reasonable implication to draw from the statements. It could not, however, extend to, or be interpreted as, constituting a guarantee that the shelterbelts or the trees that made up the surrounding shelterbelts were inviolate, or would not become an issue for the developer, or subsequent owners of the residential sections in the future.

[77] Clearly the statements relied upon by the Footes cannot constitute an express representation that the developer was surrendering its rights as a landowner to protect its interest in the use and enjoyment of its own land and the amenity value of its property. In my view, that is not capable of even being implicitly represented. Nor is it the implied effect of the statements made in the application documents regarding the shelterbelts that border the subdivision's boundaries.

[78] I am, however, prepared to accept that the reference in the supporting documentation to the shelterbelts as reinforcing the intended effect of the landscape buffer zone did provide some reassurance or succour to the surrounding landowners, including the Footes, that the developer would not seek to, at least in the short to medium term, remove the trees after securing the zoning change, at least not until the landscape buffer zone had become more mature, providing adequate screening and the required demarcation which was of concern to the local planning authority. To that extent, it was reasonable for the Footes to rely on what had been represented by the developer, at least insofar as the application and the landscape assessment document had identified the existing utility of the shelterbelts for the purpose of Blakesfield's development.

[79] The detriment claimed by the Footes as a result of their reliance on the statements contained in the report is that they did not object to the rezoning of the land. The detriment therefore is the apparent lost opportunity to be heard in opposition to the development. As was acknowledged by the Footes, whether their formal opposition to the development would have been to any effect is unknown and, indeed, is speculative. They would, however, at least have had the peace of mind of knowing they had taken that step; the opportunity would not have been lost. That is the highest it can be put. The detrimental reliance therefore is limited, and somewhat remote.

[80] The Footes nonetheless argue that it would be unconscionable for Blakesfield, in the wake of the statements made in support of its application to rezone the land, to be granted its pleaded remedy for nuisance. There are various countervailing factors which, in my view, are in play when assessing the question of unconscionability. The first is that Blakesfield was required to establish the landscape buffer zone, in order to provide assurance that it could mitigate the effect of the subdivision on the surrounding rural environment. The surrounding shelterbelts were "prayed in aid" and in reinforcement of the landscape buffer zone's intended effect. Now, Blakesfield seeks the complete removal of a line of trees relied upon as at least assisting the mitigating effect of the landscape strip offered in support of its rezoning application. This included photographs of the trees which

were considered as aiding the important demarcation between the subdivision and the surrounding rural residential environment.

[81] Against that, however, is the ordinary right of a landowner to the use and enjoyment of its land without suffering nuisance from a neighbouring property. Removal of the trees will still leave other trees on the Footes' property, set back from but still providing some barrier along that border with the Blakesfield land.

[82] In examining the elements of estoppel, I have concluded that the Footes have not made out the defence of estoppel as pleaded. I accept some expectation on the part of the Footes was created by the developer's supporting documentation. There was therefore some reasonable reliance placed on the content of the statements in the application documents by the Footes, to their detriment. However, neither the nature of the claimed assurance, nor the Footes' detrimental reliance, is sufficient to estop Blakesfield from seeking to reasonably remediate an actionable nuisance caused by the trees. It is not therefore unconscionable for Blakesfield to seek to do so.

[83] I am, however, prepared to recognise the support, albeit narrow in terms of scope and effect, garnered by the developer from the presence of the existing shelterbelts which was put forward by it for the purpose of its rezoning application. To the extent that the remediation sought by Blakesfield, in response to the actionable nuisance sourced from the trees, would be unreasonably inconsistent with the implied assurance regarding the utility of the shelterbelts to its development, I am prepared to extend some limited equitable relief to the Footes. If it is possible to accommodate Blakesfield's established need to ameliorate the nuisance, short of complete removal of the trees, it should be entertained, and some adjustment made to the relief that it may otherwise have been entitled.

Remedy

[84] The parties are agreed that flat-siding the trees does not provide an appropriate remedy to remove the branch encroachment. It would cause the trees to become unhealthy and create a hazard. The Footes referred to an English decision of

Dayani v London Borough of Bromley.³⁴ In that case, Recorder Moxon-Browne QC observed that there must be limits on abating a nuisance. A complainant cannot cut back overhanging trees, or fell such trees, without regard to the consequences to his neighbour, which may be disproportionate in comparison to the encroachment. As I understood the Footes' argument, that case was put forward as a counter to Blakesfield's argument that, in the absence of the branches being able to be cut back to the boundary, there was no alternative but to remove the trees.

[85] The observations made in *Dayani* relate to the self-help remedy of abatement. I would think it a matter of commonsense that the right of abatement must be limited by the need to avoid creating a greater hazard or causing disproportionate consequences when abating a nuisance, lest a greater mischief be created. It is not, however, in my view, apposite to the situation where a plaintiff has come to the Court for an order seeking relief in respect of an actionable nuisance when it has responsibly appreciated that abatement is not available to it.

[86] The view I have come to is that Blakesfield is entitled to a declaration that some of the trees are to be removed. That is subject to a limited estoppel which prevents removal of all the trees, insofar as that would be contrary to its representation of the way in which the shelterbelt was to work in combination with the landscape mitigation strip. The Footes were entitled, at least to some extent, to rely on that implicit representation when considering whether to object to the zoning change. Such assurance, sourced from Blakesfield's corporate predecessor, did, to some degree, cause them to act to their detriment. I accept such detriment is of a limited kind and arguably remote, but, in my view, is sufficient to provide some mitigation from what would otherwise be the wholesale removal of the trees.

[87] The evidence of the arborists was that the encroachment by the branches could be reduced by 50 per cent, with the trees still left reasonably healthy. Similarly, the expert evidence was that the crown of the trees could be lifted by approximately six metres. This would give a clear trunk to that height. By this process, greater light would be allowed through the trees. The arborists, however, disagreed about the effect of removing some of the trees, and the ability of the

³⁴ *Dayani v Bromley London Borough Council* [2001] BLR 503 (TCC).

remaining trees, as I understood it, to withstand new, or different, wind forces as a result of the protection of other trees having been removed.

[88] Mr Walsh on behalf of the Footes was of the view there would be no detrimental effect on the remaining trees, whereas Mr Holland, the arborist, who gave evidence for Blakesfield, raised concerns in that regard. It is difficult for the Court to prefer one expert's opinion, in respect of this discrete issue, over the other. I note, however, that Mr Walsh is a highly experienced and qualified arboriculturist and horticulturist with some 25 years experience. Importantly, he is a licensed, quantified tree risk assessment practitioner, and the current president of the New Zealand Arboricultural Association. Both experts gave good evidence, however, I am prepared to accept Mr Walsh's opinion regarding the viability of tree removal, and the remaining trees ability to withstand increased wind loading.

[89] I have concluded that all trees are required to be removed with the exception of trees 1028, 1020, 1012, 1011, 1007 and 1006. In respect of those trees, the canopy is to be lifted to a height of six metres above the ground. The overhang of branches across the boundary is not to exceed 2.5 metres. There is to be no encroachment by branches below the height of 6 metres from the ground. In respect of tree 1028, it will be necessary to prune, or cut the tree, to prevent its trunk breaching the boundary, as shown in the survey plan, at a height of 34.60 metres (above mean sea level). Tree 1025, as I have already remarked, is growing on Blakesfield land. It therefore appears to be its tree and is free to deal with it as it sees fit.

[90] As a result of the parties being unable to resolve their dispute, the matter has been left for determination by the Court. As a result of my findings, it has been necessary for me to select trees that may remain and those which are to be removed. This was always a potential result, but one which carries with it the risk that the parties, after receiving further expert advice, may actually agree cannot practically be implemented. I make this observation with particular regard to the effect of wind force on the trees that I have identified can remain. I have largely proceeded on the basis of Mr Walsh's views expressed in respect of the trees the Footes have acknowledged will be removed. That evidence, however, was given in relation to

what were considered poor and suppressed specimens which were likely to be protected by larger trees. Mr Walsh's expert opinion may be different or modified in respect of the trees that I have identified can remain.

[91] It is necessary therefore for me to provide the parties with the opportunity to consult with their respective experts regarding what I propose to order in terms of relief in favour of Blakesfield. If amendment of the declaration, regarding removal of individual trees and the pruning of the remaining trees, is required, it would be the Court's expectation that the parties would take expert advice, and then attempt some compromise based on the content of the proposed declaration. Leave is granted to seek variation of the declaration in that event.

[92] In the absence of the parties' agreement to the content of the declaration being feasible, or a suitable variation thereof, it will be necessary for the Court to reconvene for the purpose of hearing the parties further regarding possible amendment. The parties should be on notice that any further argument will be limited to the ambit of the declaration in the terms presently ordered, which gives effect to my findings of fact and law. It may be that all the trees will have to be removed, or that a particular grouping of trees should be retained and others that I have nominated to remain be disposed with.

[93] There are two other issues. The first is the claim for damages which Blakesfield clarified in opening is limited to the cost of the removal of the trees. It makes no claim beyond that. The claim for damages in that limited sense is curious. It has not claimed for damages at all, but rather for an order that the Footes be responsible for the costs associated with the removal and pruning of the trees in the terms I have now identified. The Footes accept responsibility for the removal or management of any actionable nuisance that I find established. They will be responsible for ensuring the remaining trees' branches comply with the terms of this judgment. Accordingly, the more appropriate course is for me to make an order to that effect. To facilitate the discharge of that responsibility it will also be necessary for the Footes to have reasonable access to the Blakesfield land. Given that the three sections which constitute the Blakesfield land for the purpose of this proceeding are unoccupied, that should not create any difficulty.

[94] Secondly, there remains the residual issue relating to tree 1031 which does not sit adjacent to or on the boundary with the Blakesfield land. As with all the other trees, there was little, if any, specific evidence relating to this particular tree. It is not the source of an exposed root, however, it appears that its branches extend over the Blakesfield property. The normal rules of encroachment apply. In order to abate the nuisance, it is not necessary to flat-side the tree. To the contrary, it would appear, if only from examination of the survey plan, that a limited amount of the tree's foliage would be required to be removed in order to ensure the trees branches were clear of the Blakesfield land. Accordingly, I do not include tree 1031 within the scope of the declaration.

Costs

[95] Costs are reserved. If the parties are unable to agree costs, they may serve and file memoranda (not more than five pages) addressing the issue. Upon receipt of Blakesfield's memorandum, the Footes have 15 working days to file their memorandum in response.

Outcome

[96] I formally record that the defendants have acknowledged, for the purposes of this proceeding, that they will remove trees 1005, 1008, 1014-1019, 1021-1023, 1026-1027 and 1029.

[97] I declare that:

- (a) trees 1009, 1010, 1013, 1024, 1025 and 1030 are to be removed;
- (b) trees 1006, 1007, 1011, 1012, 1020 and 1028 are to remain, subject to these conditions:
 - (i) the canopy of the trees are to be raised to six metres above ground level (ie, six metres of clear tree trunk above ground level); and

- (ii) no branches from any of the remaining trees are to protrude across the plane of Blakesfield's boundary more than 2.5 metres;
- (c) tree 1031 may remain, but is to be pruned so that it does not encroach across the plane of the Blakesfield's boundary to any extent whatsoever.

[98] I order:

- (a) that the defendants are to give effect to the declarations granted at [97], at their expense; and
- (b) for this purpose, Blakesfield are to provide them with access to its three properties (the land) on the following conditions:
 - (i) between Monday-Friday, the defendants may access the land between 7.00 am and 7.00 pm;
 - (ii) on Saturday, the defendant may access the land between 8.00 am and 6.00 pm;
 - (iii) Blakesfield is not obliged to grant access on a Sunday; and
 - (iv) the defendants are to ensure that, once the work is complete, all debris and cut foliage are removed from the land;
- (c) If the parties are unable to agree on costs, they may file memoranda in accordance with the directions at [95].

Solicitors:
Cavell Leitch, Christchurch
White Fox and Jones, Christchurch

ANNEXURE A

