IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

514 NZLR

No. AP51/90

IN THE MATTER of the District Courts Act 1947

A N D

IN THE MATTER of an Appeal from a Judgment of the District Court at Dunedin

NOT RECOMMENDED

BETWEEN IVAN WILLIAM WALTER HANNING and GWENDOLEN ELLEN HANNING

Appellants

470

A N D GRAHAM PETERSEN COOKE, ANNA MARGARET MOORE, HENDRICKUS KOCH and ELEANOR ANNE KOCH

Respondents

Hearing: 19 March 1991

Counsel: C.S. Withnall Q.C. for Appellants
J. M. Conradson for Respondents

Judgment: Reserved delivered 28.3.91
Deputy Registrar.

JUDGMENT OF HOLLAND, J.

These proceedings commenced in the District Court in 1985 when the appellants, as plaintiffs, sought damages of $10,000 against the respondents together with an injunction restraining them from leaving open gates on an unformed road

going through the plaintiffs' property. The respondents, as defendants, counterclaimed for damages of $10,000 against the appellants alleging that the gates had been erected without lawful justification. There was a subsequent joinder of the Dunedin City Council followed by a dismissal of the Dunedin City Council as a party.

The substantive dispute between the appellants and the respondents was first heard in the District Court in Dunedin on 21 December 1987. The Judge in an oral decision decided that although the gates across the road had been lawfully erected and maintained pursuant to s.344(1) of the Local Government Act 1974, no term could be implied affecting the use of the gates by others, nor was there any duty on the respondents to close the gates after opening them. It would appear that the Judge took the view that as no by-laws had been made by the local authority, any remedy that the appellants might seek should be from the local authority. He then went on to say:-

> "Counsel has been invited to express a view on whether or not the consequence of the findings I have just made inevitably affect questions of damages. He accepts, in my view very properly, that they do and that the Court, having found that the plaintiff does not have the necessary legal right, cannot therefore complain at the defendant' alleged infringements of it. There can therefore be no damages and I think the proper course is to give judgment for the defendants on the plaintiff's claim. The defendants do not pursue their counterclaim but

> I think in fairness to them, and in case this case goes further, I ought properly at the defendants' request, non suit the defendants on that matter."

There then followed an appeal to this Court. It was heard on 10 August 1988. The respondents did not proceed with the counterclaim. The appeal was allowed. This Court held that notwithstanding the absence of any by-laws that it was "a necessary consequence without further stipulation that the permitholder can require that the gate be left in the position in which a person lawfully using the road found it". This Court then went on to indicate that the expressed concern by the District Court about the wording of the injunction was unjustified. The judgment of this Court on appeal concluded:-

> "It was conceded by all counsel before me that if that was the decision I reached it was appropriate that the matter should be referred back to the learned District Court Judge. The question of damages and the exact nature of the injunctive relief are matters which will require additional argument and that can more appropriately be dealt with before the Judge who is fully appraised of this interminable wrangle."

In accordance with this decision on appeal, the matter came back before the District Court Judge in hearings which took place on 23 January 1989 and 31 January 1990. The Judge reserved his decision which was delivered on 14 May 1990. He referred to an obligation on a plaintiff to mitigate damages and said in relation to the plaintiffs' claim:-

> "However, such a claim must be subject to the normal requirement to mitigate and is lost altogether if the plaintiff is misusing the right possessed for some ulterior purpose or can be said to. On the facts as I have found them to be, this is just such a case. Whatever meaning one gives to the term mitigation, it involves the avoidance of the consequences of a wrong. As I have previously determined, the plaintiffs could have avoided all of the consequences which resulted from the leaving open of the gates by agreeing to one of the several solutions which were offered by the defendants and at little, or in some cases no, expense to the plaintiffs."

He then concluded that the claim failed entirely and entered judgment for the defendants together with costs, disbursements and witnesses expenses to be fixed by the Registrar on a claim of $12,000. I interpose that following the hearing of the appeal the plaintiffs had filed an amended statement of claim seeking general, aggravated, and exemplary, damages of $12,000. There is no record of any objection to that amended statement of claim and as the Judge went on to hear evidence from the parties in relation to damages there was no doubt no injustice in that increase of the claim.

Not surprisingly the appellants have again appealed against the dismissal of their claim by the District Court Judge. I do not consider it necessary to set out in detail the history of what this Court earlier described as an interminable wrangle between the parties.

The respondents purchased a property adjoining a small farm property owned by the appellants. The respondents' property was on the coastal side of Otago Peninsula. It had

previously had on it a crib, the owners of which had obtained access by licence over the property of another adjoining owner.

When the respondents purchased this property the licence was revoked. There were then proceedings in this Court seeking a right of access by prescriptive right. The respondents failed in those proceedings. They then brought proceedings under the Property Law Act seeking relief on the basis that their property was land locked. This relief was refused primarily because of the existence of the "paper road" over the appellant's property giving legal access to the respondents' land.

The respondents may or may not have been aware of the paper road over their property but had had use of their farmlet property without being in any way inconvenienced by the existence of the paper road. They obtained a permit under s.344 of the Local Government Act 1974 to erect a gate across the road because in the opinion of the local authority it was not practicable or reasonable to fence the road. The respondents exercised their rights under that Act to object to the road to the local authority concerned, the Dunedin City Council. The respondents failed in their objection, but the appellants were required to erect a proper "swing gate" rather than a Taranaki gate.

Although there are important differences in the evidence by way of emphasis and inference, there is very little dispute as to the primary facts.

One of the appellants, Mrs Hanning, maintained a diary of the number of times that the gates were left open during the period since 19 March 1985 until the judgment of the High Court making it clear that the respondents were obliged to close the gates or leave the gates in the same condition as they found them. Her evidence was that either she or her husband had been required to shut one of the gates during that period over 10,000 times and to shut the other gate some 23,000 times. The respondents acknowledged in evidence that they had frequently used the gates, and Dr Cooke in particular acknowledged that he used them several times a day. The respondents agreed that until the decision of the High Court given on 18 August 1988 they had opened the gates for use but did not close them after using them. It was also acknowledged by the respondents that sometimes these gates had been opened by the use of a motor vehicle, and Mr Koch, one of the respondents, acknowledged that on one occasion he had lifted the gate off its hinges carrying it to the bottom of the hill. The respondents also acknowledged that on occasions stock had wandered off the property down to a public use road. On the other hand, there was evidence that stock had from time to time escaped from the appellant's property because of inadequate fencing. That finding, however, may have arisen from stock having first been allowed to escape from one paddock that was adequately fenced, through a gate being left open, down to another paddock which might have had some defects in its fencing, but which might at the time have not been intended by

the appellants to be used for grazing sheep. It was equally apparent that although there was no challenge to Mrs Hanning's evidence as to the number of times the gates had to be closed, it was not always the respondents or any of them that had left the gates open. Other members of the public used the road from time to time and in particular patients of Dr Cooke who called at his home to visit him.

The Judge heard evidence at the hearing resumed for the purpose of assessing damages and defining the terms of the injunction. The latter function became unnecessary because between the hearing of the appeal and the conclusion of the resumed hearing in the District Court the Dunedin City Council had revoked the authority for gates to be placed on the road. The Judge quite correctly said that the question of an injunction was no longer relevant or required and the only matter left for determination was the claim for damages.

I have some difficulty in following the reasons expressed by the Judge when he refers to the earlier decision on appeal. He referred to the fact that Mr Withnall had submitted that the only question was the assessment of damages and that the findings of Robertson J. on appeal were conclusive of the crucial question of liability. The Judge then referred to the allegation in the amended statement of claim which was an allegation that the respondents wilfully or negligently in breach of a duty owed to the plaintiffs left open the gates and continued to damage the gates. The Judge then said:-

> "I do not agree with counsel's submission. The decision of Robertson J. was given in the matter of the application for a permanent injunction, coupled with a claim for damages associated with that application. What is now before the Court in these surviving proceedings is not a claim for an injunction coupled with damages at all. It is a claim at common law for damages, the basis for which I will examine later. This claim formed no part of the earlier decision of this Court and therefore was not and could not have been in the contemplation of His Honour in the High Court when he dealt with the appeal from that decision. The claim presently before the Court therefore is untrammelled by any binding pronouncements of the High Court."

It is this passage in the judgment of the District Court Judge which has caused me the greatest concern. He was bound to apply the law as it was found to be in this Court. The proceedings before this Court on the earlier appeal arose from the dismissal by the District Court of a claim for damages by the appellant together with a claim for an injunction. The power of the District Court to grant injunctions under s.41 was an ancillary one granting the Court jurisdiction to grant injunctions which it did not otherwise have "as regards any cause of action for the time being within its jurisdiction". It followed that in order to have jurisdiction to grant an injunction the Court must have before it a cause of action in damages within the jurisdiction of the District Court.

For the purpose of these proceedings that issue may not be very material. The High Court on appeal had found that the respondents were under a duty to close the gate after use. The District Court was bound by that finding and was dealing with a matter which had been referred back to it for the

assessment of damages. The fact that an injunction was no longer in issue did not change the position.

With regard to damage to the gates, the Judge indicated that he preferred the evidence of the defendants. That was a conclusion to which, as the trial Judge, he was entitled to come. He then said:-

> "I find that the plaintiffs have not proved on the balance of probabilities that the defendants damaged these gates."

I have difficulty in seeing how he reached that conclusion on the evidence. On the admitted evidence of the respondents, at least Dr Cooke used his vehicle for the purpose of pushing these gates open from time to time, and Mr Koch acknowledged physically taking the gate off. The Judge recognised this but said that there was no loss. It would appear to me to be clear that there was undisputed evidence of damage, although obviously the quantum of that damage was not large. Had the matter been before me at first instance, I should certainly have awarded some definite compensation for the damage caused to the gates, but it would have been small and in the matter of this appeal I regard it as de minimis.

The Judge found that the respondents acknowledged that on many occasions they had left the gates open, although it was impossible to say which of them was responsible for any particular occasion. He then referred to the fact that the gates were badly constructed without in my view paying sufficient regard to whether the state of the gates was not

caused by the way in which they were treated by at least one of the defendants, that the fences were deficient, but nevertheless concluded that stock would not have wandered off the property on the scale that it did with the gates left open.

The legal position as found by Robertson J. was that the respondents should have closed the gate each time they used the gate when they found it in a closed position. They did not. As a result of gates being left open by the respondents and others, one or other of the appellants had on no less than 33,000 occasions had to close a gate which they would not otherwise have had to do. It was argued by counsel for the respondents that the closing of the gates actually created no right to damages because there was no loss to the appellants. This was not a claim for breach of contract, but even if it were, I should have thought that the mere fact of 33,000 visits from a house to close a gate caused by breach of contract of another person would have sounded in damages.

A great deal of time before the District Court Judge was spent on categorising the cause of action. It was undoubtedly a cause of action in tort. Both counsel for the appellants, and the District Court Judge, regarded the right which the appellants had to have the gates left in the same condition as they had previously been as being a right in rem relating to property. In the course of argument I suggested to counsel for the appellants that it appeared to me that this was much more related to the respective rights of users of a public road. By virtue of the Local Government Act, the appellants

had the right to fence the road and as a consequence of that right to expect other users of the road to leave the gates in the way in which they found them. The respondents had a right along with other members of the public to use this road for passage and repassage, but because there was a lawfully erected gate across the road their obligation was to leave the gate in the same position in which they found it. The right to use a public road which exists in the public is a right to do so so long as the user does so in a manner with reasonable care for others who have rights to use the highway.

I am satisfied that the respondents in this case owed a duty of care to the appellants to leave the gates in the situation in which they found them, unless that result could not reasonably be achieved. There was no evidence that the latter was the case. Undoubtedly the respondents found it inconvenient to close the gates after they had used the road and that inconvenience was compounded by the slope of the land and the situation of the gates. It may well be that if there was an acute emergency, leaving a gate open on the occasion of that acute emergency may not have been a breach of the duty owed by the respondents to the appellants, but the mere fact that the respondents found it inconvenient and time consuming is insufficient.

I turn now to the question of mitigation of damages which was the basis on which the Judge declined to award damages. It is quite apparent from the evidence that there was an on-going dispute between the parties as to these gates, and indeed the matter was twice referred by the respondents to

the Dunedin City Council, the local authority. On the first occasion the Dunedin City Council upheld the appellants' right to maintain the gates across the road. On the second occasion in December 1988, the Dunedin City Council decided that the gates would have to be removed. The evidence shows that there were many proposals made by the respondents to the appellant, including in particular the substitution of cattle stops for gates. This was rejected by the appellants because in their view a cattle stop would not be effective in that the slope of the road in the position where the gates were was of such an acute nature that stock would merely jump over the cattle stop.

There were other alternatives put before the appellants to avoid gates, but none were acceptable to the appellants. The Judge said in relation to this:-

> "The much more important contention advanced by the defendants is that the plaintiffs are solely the author of their own misfortunes. They say, and it is amply proved that for the whole of the period covered by these claims, they offered to supply to the plaintiffs a fully effective alternative to the gates in the form of stock gratings across the roadway to coincide with internal fencing. The defendants were prepared to pay half the costs of this work. The proposal was rejected out of hand by the plaintiffs.
>
> It was then proposed by the defendants that a roadside fence be provided at no cost to the plaintiffs and for the installation of a self-opening gate at the main road entry. There were two proposals for the financing of this work by the local inhabitants who relied upon Dr Cooke's services and when that was rejected by the plaintiffs the defendants then agreed to pay for the work. This overture also was rejected without any discussion or attempt at compromise.

In addition to these proposals it was the defendants who had paid for the cost of upgrading the road, at least in part to the benefit of the plaintiffs and their family. That cost has to date amounted to approximately $16,500.

On the basis of the foregoing I have come to the conclusion that such rights as the plaintiffs thought they may have from the council's misguided decision to order the erection of the gates were not exercised bona fide. The plaintiffs were concerned to make the defendants' use of the public road so difficult as to force them to make other arrangements. Unhappily for the plaintiffs (and defendants), there was no other access available to the defendants and they have been forced to continue this war of attrition to the point where the council was driven to recognise its folly in placing this means of oppresion into the plaintiffs' hands. In expressing this view I am conscious that the council might have been trying to avoid friction by ordering the swing gates to replace the original Taranaki gates.

Having seen and heard the witnesses I have come to the firm conclusion that the plaintiffs were resting on what they took to be their rights not to protect their stocking policy but for the ulterior purpose of making life as difficult as they possibly could for the defendants and, in particular, Dr Cooke and his patients. Any inconvenience suffered by the plaintiffs was solely the result of their own intransigence in rejecting all reasonable offers of compromise."

The Judge then went on, after referring to the nature of the appellants' right as being a right in rem, to say:-

"I am prepared to assume without deciding that what counsel submits is correct. Had this been an application for an injunction to require the defendants to keep the gates closed, then it would have no doubt been necessary to scrutinise the plaintiffs' argument with some care, guided by the limited assistance to be offered by the decision of Robertson J. I say limited because there is nothing in His Honour's judgment to

indicate that the High Court was invited to approach the matter as suggested by Mr Withnall in these proceedings. It may be that the plaintiffs might have been entitled to some sort of order of the Court in the nature of an injunction or declaration, but quite different considerations apply where the claim sounds in damages. Where the claim is for compensatory damages then the normal canons of assessment apply. This is such a claim. It would be quite wrong in my view in the absence of a claim for punitive or exemplary damages to use the award of money as the means of vindicating the right claimed by the plaintiffs. To the contrary, the sole purpose in awarding a sum of money is to compensate the aggrieved party (as nearly as money can) for the consequences of some invasion of that person's rights by a wrongdoer."

He followed this further with a passage towards the end of his judgment in relation to what is commonly described as a duty to mitigate. He said:-

"However, such a claim must be subject to the normal requirement to mitigate and is lost altogether if the plaintiff is misusing the right possessed for some ulterior purpose or can be said to. On the facts as I have found them to be this is just such a case. Whatever meaning one gives to the term mitigation it involves the avoidance of the consequences of a wrong. As I have previously determined the plaintiffs could have avoided all of the consequences which resulted from the leaving open of the gates by agreeing to one of the several solutions which were offered by the defendants and at little or in some cases no expense to the plaintiffs. Any one of those solutions would have left the plaintiffs in a better position than the course they elected to follow. Their stock would have been better restrained and the years of friction and unhappiness for all concerned avoided. It was the plaintiffs' stubborn adherence to what they took to be their 'rights' coupled with a determination to make life difficult for the defendants which was the sole cause of the worry and inconvenience which they say they have suffered. In those circumstances they cannot look to the defendants to foot the bill. It follows from that finding that the question of aggravated damages cannot arise because

> there is nothing to which it can attach. The claim fails entirely and there will be judgment for the defendants, together with costs, disbursements and witness expenses to be fixed by the Registrar on a claim of $12,000. If counsel applies I will certify for an appropriate number of extra days."

With respect to the District Court Judge, I am satisfied that he erred and was confused because of the attention paid to the categorisation of this right and the conclusion that it was a right in rem, coupled with the doubt as to whether the breach of such a right, could result in damages, without proving actual damage to the land.

There is a general confusion created by the common usage of the term of the duty to mitigate. A plaintiff who has done no legal wrong is under no duty to mitigate anything. In so far, however, as a claim is brought against a wrongdoer or a contract breaker for damages, the law will not permit the recovery of damages which have not in the circumstances been reasonably incurred. Hence, if a plaintiff unreasonably creates damage he will not be able to recover it from the wrongdoer to the extent that the damage has been created by the unreasonable act or omission of the plaintiff.

The situation is well explained by Sir John Donaldson M.R. in The Solholt (1983) 1 Ll. Rep. 605 where he said:-

> "A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so

> acting. A defendant is only liable for such part of the plaintiff's loss as is properly caused by the defendant's breach."

I am unable to agree with the District Court Judge that the appellants were under any duty to give up the right that they had been given by the Dunedin City Council under the Local Government Act to erect a gate across the road. The respondents had a right to place their objections to the gate to the Dunedin City Council. They did so. On the first occasion, the Dunedin City Council refused to uphold their objection. With respect to the Judge, he was entitled to have his own opinion as to whether the decision or decisions of the Dunedin City Council were misguided or were acts of folly, but it might have been preferable for him not to have expressed his views in his judgment. The lawful authority for determining whether the gate should be across the road or not was the Dunedin City Council and it had also the lawful authority to consider any objections to the erection of that gate. As indicated earlier, I am unable to agree with the Judge that in those circumstances the act of the appellants in refusing to accept alternative proposals of the respondents was such an act as disentitled them to damages for the undoubted tort or torts committed by the respondents. If categorisation of the tort is required I prefer to describe it as a breach of a duty of care owed by the respondents to the appellant in the circumstances.

The Judge also concluded, without much reference in his judgment to the facts in that regard, that the plaintiffs were using the gate "for the ulterior purpose of making life as

difficult as they possibly could for the defendants". There was undoubted animosity between the appellants and the respondents. Nevertheless, the evidence makes it quite clear that the purpose of the gates and the use of the gates was for the protection of the appellants' stock, and I am unable to agree that the Judge's conclusion as to the purpose of using the gates as expressed in his judgment was justified on the evidence.

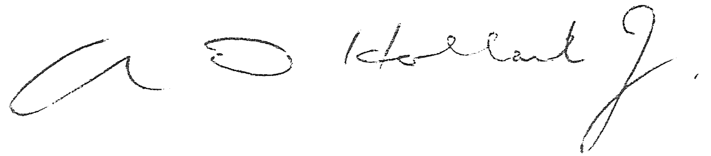
It was acknowledged by all counsel that in the event of my allowing the appeal it was desirable that this Court should determine the damages and undoubtedly it is in a position to do so. There is not really a great conflict of fact in this regard. There was no direct financial loss, but the appellants are undoubtedly entitled, by way of general damages, to compensation for the inconvenience caused to them in this large number of unnecessary trips to the gates to close them. Although aggravated and exemplary damages were claimed, I am satisfied that the evidence does not support an award on that account. I am in no doubt that the breaches of duty on behalf of the respondents were deliberate, but they were made in an on-going dispute and I am prepared to accept their assertions, as did the District Court Judge, that they did not believe that they were obliged to close the gates after having opened them. It is significant that once the High Court ruled that the appellants were entitled to an injunction this conduct ceased.

The onus of proof that the damage was caused by the respondents rests on the appellants. There are clear and admitted breaches by both the male respondents. There is no such evidence in respect of the two female respondents. There is also difficulty in assessing the number of occasions that the appellants had to close the gates as a result of use by others. I am satisfied that the leaving open of the gates was at least 50% caused by both male respondents. That reduces the number of trips to the gates for which compensation should be allowed to 16,500. I am also satisfied that Dr Cooke offended at least three times as much as Mr Koch.

The assessment of damages is a difficult task, and all that the Court can do is endeavour to fix a global sum which in money terms will compensate the appellants for the inconvenience to which they have been put. In the circumstances I fix the damages as to $4,500 to be paid by the respondent, Graham Petersen Cooke, and $1,500 to be paid by the respondent Hendricus Koch, making a total of $6,000. The claim against the respondents Anna Margaret Moore and Eleanor Anne Koch is dismissed but without costs.

The appellants have been forced to bring proceedings twice in the District Court and twice by way of appeal. In all the circumstances it appears to me appropriate to make a global award of costs in respect of all proceedings. The appellants are entitled to costs in the sum of $4,000, of which $3,000 is to be paid by Graham Petersen Cooke and $1,000 by Hendricus Koch. The appellants are also entitled to

disbursements, witness expenses and other necessary payments to be fixed by the Registrar to be paid as to 3/4 by Graham Petersen Cooke and 1/4 by Hendricus Koch.



Solicitors:

Caudwells, Dunedin, for Appellants
Paterson Lang, Dunedin, for Respondents