

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

**CIV 2007-404-296**

BETWEEN	BRUCE LESLIE DUNCAN ALISON LESLEY DUNCAN BRUCE CYRIL MCNIECE AS TRUSTEES OF THE BL AND AL DUNCAN FAMILY TRUST Plaintiffs
AND	ROBIN ERIC TAYLOR First Defendant
AND	LORRAINE KATHLEEN ELDER WYNDHAM TRUSTEES LIMITED Second Defendants
AND	RAYMOND FREDERICK DEN OTTER SONIA EDWARDS Third Defendants
AND	THE AUCKLAND CITY COUNCIL Fourth Defendant
AND	THE REGISTRAR GENERAL OF LANDS Fifth Defendant

Hearing: 17-19 August and 6 November 2009

Counsel: KF Gould for Plaintiffs  
SA Grant and K Dawson for First - Third Defendants (17-19 August)  
AF Grant and EA James for First - Third Defendants (6 November)  
No appearance for Fourth and Fifth Defendants

Judgment: 31 May 2010

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**JUDGMENT OF RODNEY HANSEN J**

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*This judgment was delivered by me on 31 May 2010 at 3.30 p.m.,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date: .....*

Solicitors: Bruce C McNiece, P O Box 99, Shortland Street, Auckland for Plaintiffs  
Barrie Hopkins, P O Box 106-027, Auckland for Defendants

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## **Introduction**

[1] The plaintiffs and the first, second and third defendants are the owners of flats on land at Baddeley Avenue, Kohimaramara. Each has an interest in the fee simple of the land and is party to a registered cross-lease. (I will refer to the first, second and third defendants as the owner defendants in order to distinguish them from the fourth and fifth defendants who took no active part in the proceeding.

[2] The owner defendants' flats are in a multi-level structure built in the 1950s which was converted into flats in the 1970s. The plaintiffs' flat (Flat 4) is a substantial stand-alone, two-level residence with carport built on an elevated site at the rear of the main building. It was built without the consent of the remaining owners in 1985 to replace a small one-bedroom cottage. The new structure exceeds the footprint of the existing flats plan (the plan) and, in two areas, encroaches on common property.

[3] Flats 1 and 3 (owned by the second defendants and first defendant respectively) also encroach on common property. The original plan did not accurately depict their structure and subsequent alterations have led to the encroachment.

[4] In this proceeding, the plaintiffs seek orders under the Property Law Act 2007 (the Act) for the creation of a new plan that accurately reflects the structures of the flats which exceed the existing footprint. They also seek a contribution from the first, second and third defendants to the cost of repairing a failed retaining wall on common property.

[5] The owner defendants oppose the plaintiffs' claim to relief. They seek removal of the encroaching parts of the plaintiffs' building and compensation for their unlawful occupation. If there are to be amendments to the plan to recognise the encroachments, the defendants seek compensation and costs from the plaintiffs. They also seek damages for trespass to common property.

## **Background facts**

[6] The land on which the structures are built lies between Baddeley Avenue and Siota Crescent. The land slopes upward from east to west from its frontage on Baddeley Avenue. When the cross-lease development occurred in 1976, there were two buildings on the land. At the eastern, or Baddeley Avenue end, there was a two-storied house built in the 1950s. Behind, and sited in about the middle of the property, there was a small cottage, originally built in 1961 as a storeroom and workshop and later converted for residential use. The cross-lease development involved partitioning the house into three flats (Flats 1 – 3) and designating the cottage as a fourth flat. Flat 1 is a studio flat, Flat 2 has two bedrooms and Flat 3 has one bedroom.

[7] There is a common area surrounding the house and a common right-of-way along the southern boundary which, prior to the re-development of Flat 4, permitted access by the occupiers of Flats 1, 2 and 3 to the Siota Crescent end of the property. The evidence is that on occasions the occupiers would use that area of the land for picnics. It was grassed and permitted pleasant views of the Hauraki Gulf and Rangitoto.

[8] As required under the Unit Titles Act 1972, which permitted the cross-lease form of ownership, the fee simple in the land is owned by the occupants of the flats as tenants in common (the owner of Flat 2 as to two-fifths and the others as to one-fifth each) and all tenants join in leasing each flat to its occupant for a period of 999 years. Clause 9 of the Memorandum of Lease of each flat prohibits structural alterations to the flat without the consent in writing of a majority of the lessors. It provides:

### **No structural alterations**

- (1) The lessee shall not (without the consent in writing of the lessors or a majority of them for that purpose on every occasion first had and obtained) make any structural alternations to the flat or to any partition walls therein or to any passageway or stairways leading thereto nor take any action which might constitute danger or risk to the said building.

[9] Clause 11 of the leases makes provision for each lessee to have the right of exclusive occupation of the flat and for each to have use of common property. It reads as follows:

**Lessee's right to exclusive occupation**

The lessee performing and observing all and singular the covenants and conditions on his part herein contained and implied shall quietly hold and enjoy the flat without any interruption by the lessors or any person claiming under them together with the use in common with the other lessees of flats in the said building of the drives, paths, and grounds on the said land and of any stairways, balconies, and verandahs in the said building for access only from such flats.

All owners are required to pay one-quarter of the cost of repairs, maintenance and other charges in respect of common property.

[10] To the rear of Flat 4 is an area of land, designated Area B, to which the lessee of Flat 4 has exclusive access. This is achieved by cl 13(a) in Schedule C of the lease of Flat 4 which provides as follows:

The Lessor doth hereby covenant and agree with the lessee that the Lessor throughout the term of this lease shall not use or occupy nor shall the lessor permit any lessee of the said land (other than the Lessee hereunder) to use or occupy for any purpose whatsoever that part of the said land marked "B" on Deposited Plan 80295 to the intent that this restrictive covenant shall for ever appurtenant to the estate and interest of the Lessee under this lease.

The lessee of Flat 4 is required to pay all expenses relating to Area B.

**Relevant history**

[11] Mr Duncan bought Flat 4 as a single man in 1981. At this time Flats 1, 2 and 3 were all owned and occupied by single older women. To begin with all four owners enjoyed an amicable relationship.

[12] In 1984 Mr Duncan married. He and his wife wished to extend the cottage to effectively create a new dwelling. The owners of Flats 1 – 3 would not consent to the structural alterations. Mr and Mrs Duncan, nevertheless, applied for consent (by way of a specified departure) to the development. Their application was actively opposed by the other owners. The grounds of their opposition included:

- Their refusal of consent under the cross-lease.
- The proposed dwelling was inappropriate for the site, too large and too close to the boundaries and would affect their privacy and enjoyment of their homes.
- Extensive earthworks would be required which would jeopardise the stability of the land and destroy an existing retaining wall.
- The building would reduce the amount of open space to an unacceptable extent.
- The building would infringe on common areas.

[13] Notwithstanding the opposition of the other occupants and other objections, the Auckland City Council granted consent in March 1985. An appeal was lodged but later withdrawn, apparently due to lack of resources.

[14] The Duncans proceeded to build a large house and carport and to demolish part of the cottage on the Flat 4 footprint. Its footprint expanded from the 32 square metres occupied by the cottage to approximately 200 square metres. Most of it extended over Area B (the area to which Flat 4 had exclusive access). As part of the Council's requirements on the grant of resource consent, a retaining wall was built on the southern side of the house. The common area between the house and the southern boundary was also terraced with timber retaining walls and gardens. As a result of these developments, the occupants of Flats 1 – 3 no longer enjoyed effective access along the southern boundary and to the elevated area at the western end of the property.

### **Encroachment**

[15] It is not disputed that the house and carport built by the Duncans exceeds the footprint on the plan and encroaches on both Area B and, in two areas, on common property. There is an aerial encroachment by the carport, amounting to 3.05 square

metres, and by the southern eave of the house to the extent of approximately a further 3.0 square metres (there is disagreement as to the precise area). The house itself encroaches on the common area to a maximum depth of 838 millimetres.

[16] Flat 1 encroaches on common property as a result of the erection of a conservatory and an entranceway which encroach by 13.0 and 6.2 square metres respectively. Flat 3 also encroaches on common property to the extent of 1.9 square metres as a result of the erection of a conservatory. Additionally, there is an error in the flat plan of Flat 3 in that a laundry, marked on the plan as half-owned by Flat 1 and Flat 3, is in fact a bedroom in Flat 3.

[17] Since 2001, there have been a number of attempts to reach agreement on a basis for rectifying the titles. Agreement has proved impossible.

### **Right to relief – wrongly placed structures**

[18] Mr and Mrs Duncan seek relief under ss 321 – 325 of the Act which permit the Court to grant relief for a wrongly placed structure. The defendants oppose relief. Relying on the plaintiffs' breaches of their lease and a claim in trespass, they counterclaim for a mandatory injunction to require the plaintiffs to remove the offending structure and for damages for trespass.

[19] Section 321 sets out the following definitions of the relevant terms:

#### **Interpretation**

In this subpart,—

#### **land—**

- (a) means any piece or area of land; and
- (b) includes the airspace over that land; and
- (c) in the case of land actually occupied by a wrongly placed structure, also includes any land reasonably required as curtilage and for access to the structure

**land affected** means any land on which a structure is actually situated

**land intended** means any land on which a structure was intended to be situated

**structure** includes—

- (a) a partially built structure; and
- (b) any part of a structure

**wrongly placed structure** means a structure that—

- (a) is situated on or over the land affected, not being the land intended for the structure (whether or not the land intended adjoins the land affected); or
- (b) is situated on or over the land affected but was not placed there—
  - (i) by, on behalf of, or in the interest of a person who was, at the time, the owner of the land affected; or
  - (ii) under a contract made with, or by way of a gift made to, a person who was, at the time, the owner of the land affected.

[20] Section 322 specifies who may apply for relief. They include the Duncans as persons who have an interest in the wrongly placed structure.<sup>1</sup>

[21] Sections 323 and 324 deal with the power of the Court to grant relief. They provide as follows:

**323 Court may grant relief for wrongly placed structure**

- (1) A court may grant relief for a wrongly placed structure—
  - (a) to any person entitled to apply for relief under section 322; or
  - (b) to any other party to the proceeding for relief.
- (2) The court may grant relief if the court considers it is just and equitable in the circumstances that relief should be granted.
- (3) However, the court must not grant relief if the wrongly placed structure for which relief is sought is a fence and all questions or disputes concerning it can be resolved by an exercise of the jurisdiction conferred by section 24 of the Fencing Act 1978.
- (4) The granting of relief does not deprive any person of any claim for damages that the person would otherwise have against any other person for any deliberate or negligent act or omission in relation to—

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<sup>1</sup> s 322(1)(d).



- (a) the placing of a wrongly placed structure; or
  - (b) the fixing or ascertaining of any boundary of the land affected by the structure or the land intended for the structure.
- (5) In making any award of damages, the court must take into account any relief granted under this section.

**324 Matters court may consider in determining application for relief**

- (1) In determining an application, under section 322, for relief under section 323, the court may have regard to—
  - (a) the reasons why the wrongly placed structure was placed on or over the land affected; and
  - (b) the conduct of the parties; and
  - (c) the extent to which any person has been unjustifiably enriched at the expense of the person seeking relief because the owner of the land affected has become the owner of the wrongly placed structure.
- (2) Subsection (1) does not prevent the court from granting relief merely because the person seeking relief knew of the true boundaries or ownership of the land affected at the time that the structure was placed there, or at the time when that person became the owner of, or acquired an estate or interest in, the land affected, the land intended, or the structure.

[22] Mr Grant, who presented closing argument on behalf of the owner defendants, argued that the house built by Mr and Mrs Duncan did not come within the definition of wrongly placed structure. He relied on the decision of Judge Couch in the District Court at Christchurch in *Aitken v Mitchell*.<sup>2</sup> Judge Couch decided that a structure that had been deliberately placed on another’s land did not come within the definition of “wrongly placed structure”. His reasoning is set out in [34] – [38] of his judgment which I set out in full:

[34] Turning to the second part of the definition of “*wrongly placed structure*” the question is whether the places in which the encroaching parts of the retaining wall are situated are “*not the land intended for the structure*”. Giving these words their plain meaning, the effect of this aspect of the definition is that relief is not available for structures deliberately placed on another person’s land.

[35] That is consistent with the context of the definition in this subpart of the Act. I note s 323(2) which provides that relief should be granted “*if the court considers it is just and equitable in the circumstances*”. It would very rarely if ever be equitable to grant relief to a party who had knowingly created the very situation from which relief was sought.

[36] In the context of this subpart, I also have regard to s 324(2) which provides that relief ought not to be refused merely because the applicant knew the location of the boundary at the time the structure was put in place. It might be suggested that this provision exists to provide for cases where the structure is knowingly erected over the boundary and that to construe the definition of “*wrongly placed structure*” so as to exclude such cases would deprive s 324(2) of purpose. The scope of s 324(2) is much wider than that. It also encompasses cases where, although the applicant knew the location of the boundary, the structure was erected over the boundary by mistake. In those cases, the structure would not have been placed on the land intended for it and the structure would fall within the plain meaning of the words in the definition. In my view, those are the cases to which s 324(2) is intended to apply and that they give it ample purpose.

[37] This construction is also consistent with the predecessor of this part of the Act which was s 129 of the Property Law Act 1952. It included a condition on the grant of relief that “*the encroachment was not intentional and did not arise from gross negligence*”. It may be suggested that the omission of this express condition from the provisions of the 2007 Act indicates an intention to widen the scope for relief but, given that the current provisions very largely reflect the principles embodied in s 129 of the 1952 Act, this seems unlikely.

[38] I find there is no reason to depart from the plain meaning of the words used in the definition of “*wrongly placed structure*” in s 321 of the Act. If the structure was intentionally placed on the affected land by the applicant, it does not fall within the definition and relief is not available.

(Emphasis added)

[23] I am unable to agree with Judge Couch’s reasoning or his conclusion. In concluding that a structure deliberately placed on land cannot be a wrongly placed structure, he focused on the first limb of the definition of “*wrongly placed structure*”. (When he discusses “the second part of the definition” in [34], it is clear from [34] itself, and the earlier discussion which I have not quoted, that he is referring to para (a).) He does not consider the alternative meaning in para (b) which encompasses any structure that was not placed on land by, or with, the authority of the owner. There is nothing in that part of the definition to suggest that the structure would not be wrongly placed if the person placing it on the land acted deliberately, with knowledge that he or she was not entitled to place the structure there. The definition is apt to cover both intentional and inadvertent acts.

[24] This interpretation is confirmed by the provisions governing the grant of relief. Section 323(4) plainly presupposes that relief may be granted despite the wrongly placed structure having been deliberately placed on the land. To similar effect, s 324(2) stipulates that relief may be granted even though the person seeking relief knew of the true boundaries or ownership of the land affected at the time that the structure was placed there.

[25] Judge Couch did not think that s 324(2) was inconsistent with his preferred interpretation of “wrongly placed structure” because it extended to cases where the structure was erected by mistake. In my respectful view, that is not an answer. The point is that s 324(2) is wide enough to permit relief when a structure has been deliberately placed on another’s land.

[26] Subject only to the restriction in s 323(3), ss 323 and 324 permit relief in any case where the Court considers it just and equitable to grant relief. There is nothing in either section which requires a restrictive interpretation of the definition of “wrongly placed structure” or of the power to grant relief. Contrary to the view taken by Judge Couch at [37] of his judgment, I consider that in omitting words of qualification, such as those in s 129 of the Property Law Act 1952, the new Act evinces a clear intention not to restrict the power to grant relief to exclude deliberate acts of encroachment.

### **Just and equitable relief**

[27] The defendants argue against permitting the encroaching building to remain. Mr Grant pointed out that having been refused permission to build, the Duncans carried on regardless. They deliberately took for themselves a large area of the land on which to build their house unlawfully. The defendants complain that they have shown no remorse and, to add insult to injury, seek a contribution to maintenance costs on another wrongly placed structure – the retaining wall. It is submitted that the intentional placement of the structures and the plaintiffs’ conduct and unjust enrichment weigh heavily against the grant of relief by way of an amended flats plan.

[28] While I accept that it is reprehensible that the Duncans should have ridden roughshod over the rights and wishes of their neighbours, I am satisfied that it is just and equitable to grant them relief, subject to conditions as to compensation and costs. It would be harsh and unduly burdensome for them to be required to remove the offending structure. It is over twenty years since they built the house. While the owners withheld their consent (as they were fully entitled to do), they did nothing to stop construction. After unsuccessfully objecting to the application for a specified departure, they took no further steps in opposition. In a very real sense, they acquiesced in the illegality. While that does not excuse the Duncans' conduct, it is a weighty factor in considering whether to grant relief.

[29] I also take into account that the greater part of the encroachment is on land (Area B) to which the Duncans enjoyed exclusive rights of access. It is relevant also that the present owners of Flats 1 – 3 all acquired their interests after the house was erected with knowledge of the illegality.

[30] These considerations weigh against the grant of a mandatory injunction as sought by the owner defendants, as does my view that damages by way of compensation under the Act will be an adequate remedy.

[31] This conclusion makes it unnecessary to determine the limitation defence raised by the plaintiffs to the defendants' counterclaim based on breaches of cl 9 (requiring consent for structural alterations) and cl 11 (granting each lessee use of the common property). However, it is appropriate that I should indicate my view on the availability of the defence.

[32] I agree with Mr Gould's submission that the counterclaim for breach of cl 9 is statute-barred as it involved a single "once and for all" breach which occurred when the infringing construction work was done. In contrast, cl 11 creates a permanent right to use of common property. The defendants can rely on continuing breaches of the covenant.<sup>3</sup>

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<sup>3</sup> For a discussion of the distinction between covenants which give rise to a single breach and those where contravention will involve a continuing breach, see *New Zealand Conveyancing Law and Practice* (online looseleaf ed, CCH) at 43-140.

## **Compensation**

[33] By s 325(1)(f) of the Act, the Court may require:

... any person to whom relief is granted under paragraphs (a) to (e) to pay to any person specified in the order reasonable compensation as determined by the Court.

[34] The defendants claim an entitlement to compensation on two bases:

- In respect of the appropriation by Mr and Mrs Duncan of the additional land used for their house.
- For loss of amenity being the effect of having a much larger dwelling house adjacent to their flats and the associated loss of light, heat, privacy and aesthetic considerations.

### *Additional land*

[35] Since 1976 the maximum allowable building coverage of the entire site has been 35%. The extension to Flat 4 increased coverage from 22.6% to 40.7%. It appears that the Auckland City Council erred in approving the Flat 4 extension in 1984 by failing to include the upper level, carport and deck areas of the building. A planning consultant called by the owner defendants, Mr James Hook, said that as a consequence of the extension to Flat 4, the owners of Flats 1 – 3 are now severely inhibited from undertaking any further development of their properties.

[36] Mr Patrick Foote, a valuer who gave evidence for the owner defendants, said that the development of Flat 4 had increased the value of the property from \$425,000 to \$790,000 made up as follows:

	<b>Land</b>	<b>Improvements</b>	<b>TOTAL</b>
Value before development	\$385,000	\$40,000	\$425,000
Value after development	\$560,000	\$230,000	\$790,000
Increase in value	\$175,000	\$190,000	\$356,000

[37] Mr Foote agreed with Mr Hook that in circumstances where they were not required to sell, the owners of Flats 1 – 3 could reasonably have suffered loss by the restrictions placed on the future development potential of their properties. He assessed the loss as equivalent to the increase in value of the footprint of Flat 4 with the loss to each flat determined by pro rating the increase in value in accordance with the owner’s shares in the freehold land. On that basis, Flats 1 and 3 would have suffered a loss of one-fifth and Flat 2 a loss of two-fifths. The respective sums would be \$35,000 and \$70,000 if the loss is assumed to be \$175,000.

[38] The valuer called by Mr and Mrs Duncan, Mr Andrew Buckley, assessed the current land value of the area occupied by Flat 4 at \$500,000. In cross-examination he acknowledged that its value “could” decrease by 50% if the footprint were reduced to its former size. His concession was equivocal and an unsatisfactory basis for a finding that the loss in value is \$250,000. I propose to adopt Mr Foote’s evidence on this issue.

[39] While acknowledging that the value of the footprint of Flat 4 increased, Mr Buckley stoutly resisted the proposition that there was a corresponding detriment to the other owners. He did not believe the increase in the coverage effected by the extension to Flat 4 affected the value of the other flats because he did not think it would be practicable for any of the owners to extend their flats beyond their existing footprints.

[40] Mr Gould argued that Area B should be excluded altogether for the purpose of valuing the loss of any future development opportunity. He submitted that, as the owner defendants have no right to use or occupy the area, their interest is no more than nominal. He cited *Briggs v Currie*<sup>4</sup> in support. In that case, the plaintiffs

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<sup>4</sup> (1994) 2 NZ ConvC 191,837.

sought a boundary adjustment pursuant to s 129 of the Property Law Act 1959 as part of their house had been built on neighbouring land in which the opposing party, the Hayes, owned an undivided one-quarter share as tenants in common, pursuant to a cross-lease. Fisher J held that the Hayes' interest in the area of land to which (like the defendants in this case) they had no right of access under the lease was "purely notional" and that a boundary adjustment could not prejudice their interests. He said at 191,843:

The short point for present purposes is that merely to appear on a Certificate of Title as one of the legal owners of the fee simple of land does not of itself confer any advantages whatsoever. It is the beneficial and contractual rights and interests which matter.

[41] In my view, *Briggs* is distinguishable in two important respects. The first is that in *Briggs* the co-owners of the fee simple did not have the right to prevent structural alterations to the buildings of other lessees. This is an important beneficial and contractual right which the opposing party did not possess in *Briggs* and on which Fisher J commented at 191,844. He said:

... [The opposing party] has not been able to show that on the particular terms of this cross-lease, and for present purposes, their stake in area B, is more than purely notional. **They have no power to limit the erection of further buildings upon area B.** Consequently, any boundary adjustment could not prejudice their interest. (Emphasis added.)

In contrast, cl 9 of the lease in this case expressly grants the defendant lessees this valuable right.

[42] The second point of distinction between the present case and *Briggs* is that the detriment complained of by the opposing party in *Briggs* was a loss of amenity. They complained that the effect of the boundary adjustment would be adverse to them because it would in some way bring their property closer to the construction of the other buildings.<sup>5</sup> The opposing party could not point to the loss of development potential which had been caused to the co-owners in this case.

[43] In my view, the owner defendants are entitled to be compensated on the basis contended by Mr Foote. They had two valuable rights which were violated by the

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<sup>5</sup> At 191,843.

plaintiffs when they unilaterally extended the footprint of Flat 4 to cover Area B. One was the right to withhold their consent to the development. The other was the right to seek a permission to extend the footprint of their own property. They are rights which they could have bargained away for their value to the plaintiffs.

[44] The benefit which has accrued to the plaintiffs is an independent factor requiring consideration. In granting relief under s 323 (which includes the payment of reasonable compensation under s 325(1)(f)), the Court may consider the matters specified in s 324(1). All three weigh in favour of an award of compensation on the basis sought by the owner defendants. The structure was wrongly placed in order to achieve a material advantage for the plaintiffs; it was placed with knowledge that it contravened the rights of the other owners; it has unjustifiably enriched the plaintiffs. (Section 324(1)(c) refers to unjustifiable enrichment in somewhat different circumstances but the Court is not confined thereby; matters specified in s 324(1) are those the Court “may” consider.)

[45] If the plans are amended to conform to the footprints of the existing buildings, the plaintiffs will effectively have appropriated to themselves the freehold of Area B. The benefit represented by the increase in land value is no less than \$175,000. While the other owners may not have suffered a corresponding detriment, they have been denied valuable rights. It is just and equitable that they should be compensated on the basis set out in [37] above.

#### *Loss of amenity*

[46] I accept that there is a material loss of amenity to the owners of Flats 1 – 3 as a result of the construction of a much larger house on the western half of the land. That includes, as accepted by the plaintiffs’ expert, some loss of privacy and also the effective loss of the open space at the north western corner of the property to which owners previously had access. There was no issue taken with Mr Foote’s assessment of the loss of amenity being \$12,500 for Flat 2 and \$8,500 for each of Flats 1 and 3.



*Encroachments on common area*

[47] The house and carport each encroached on the common area by approximately three square metres. (There was a small and, in my view, inconsequential difference in the calculations of the surveyors as to the precise area.)

[48] Mr Foote, for the defendants, placed the land value of each area of encroachment at \$6,500. He fixed the value of improvements at \$6,500, giving a total of \$19,500 as the total increase in value to Flat 4 of the encroachment. Mr Buckley, for the plaintiffs, put the total value of the encroaching development at \$18,089.

[49] Mr Foote maintained that compensation for the loss of development potential should be based on the gross increase in value of Flat 4 arising from the encroachment. He argued for a premium based on the benefit derived by the owners of Unit 4 from the encroachment. However, the value of improvements must be reduced by their cost in order to calculate the net benefit to the owners of Unit 4. Further, I have difficulty accepting that the hypothetical owner of Unit 4 would pay more than the value of the land. I see no reason to differ from the approach used in valuing the encroachment on Area B.

[50] On this basis, I assess the compensation payable for the loss of development potential at a total of \$13,000 to be apportioned, as previously stated, to reflect the ownership of the fee simple. On that basis, Flats 1 and 3 would each receive \$2,600 and Flat 2 \$5,200.

[51] Mr Foote, acknowledged that the detriment to Flats 1, 2 and 3 arising from a loss of amenity is difficult to quantify but is real nonetheless. He estimated the loss in market value at 1-2% of the value of each unit, adopting a mid-point in each case, specifically of \$3,750 for Flat 1, \$5,000 for Flat 2 and \$7,500 for Flat 3. Mr Buckley said there was no loss of amenity because the area of encroachment is removed both physically and visually from the other flats.

[52] In my view, some allowance is appropriate. It is, after all, the combined effect of the encroachment – both on Area B and the common land – which has had adverse impacts on the other flats. The encroachment on the common land has contributed to the loss of enjoyment of access along the northern boundary and use of the elevated site in the north west corner. I propose to adopt the values placed by Mr Foote on the loss of amenity from encroachments on the common land.

[53] I decline the defendants' counterclaim for a mandatory injunction to require the plaintiffs to remove the encroaching portions of the house and carport. Generally, for the reasons given in relation to the encroachment of Area B, I do not think that is an appropriate remedy.

*Just and equitable compensation*

[54] Mr Gould submitted that it would not be just for the defendants' compensation to be based on current values when their loss occurred in 1984 and their predecessors in title had failed to act over the intervening years. He also pointed to the fact that the defendants had each purchased their properties with knowledge of the defects to the title. They paid market value for the properties and did not seek any adjustment for the matters now complained of. Mr Gould said it would not be just and equitable to compensate them.

[55] It is the case that all defendants bought their properties with knowledge of the unresolved issues affecting the titles. In the case of the first defendant, who bought from his mother, \$50,000 was deducted from an expert's valuation to take account of the likely costs of litigation. The third defendants were optimistic; they said they bought expecting that the outstanding issues would be resolved amicably, quickly and to the mutual advantage of the parties.

[56] It may be that an award of compensation will come as something of a windfall for the defendants but I do not think I can assume that. The only basis on which I can safely proceed is that all contingencies were factored into the purchase price. They would include, on the one hand, the potential to recover compensation and, on the other, the risk of an adverse judgment and the costs of litigation. It

would not be right to deny the defendants an award of compensation because they acquired their interests with knowledge of the outstanding issues. Nor would it be right to permit the Duncans to be unjustly enriched by reason of a perceived risk that one or more of the defendants may receive an unforeseen benefit.

*Encroachment by defendants*

[57] There are wrongly placed structures arising out of alterations to Flats 1 and 3 which are not reflected on the flats plan. As already mentioned, a small conservatory was added to Flat 1 which encroached upon the common area by 1.9 square metres. A conservatory was added to Flat 3 by glazing in an existing deck and an entranceway was covered in which resulted in an encroachment on the common area totalling 19.2 square metres. There is also the discrepancy already discussed between the plan and the structures of Flats 1 and 3. The plan shows the two flats share a laundry. In fact the area shown as a laundry is, and appears always to have been, a bedroom in Flat 3. The owners of Flats 1, 2 and 3 agree the plan should be rectified to show the true position.

[58] The plaintiffs' valuer, Mr Buckley, assessed the increase in value of Flat 1 by virtue of the erection of the conservatory as \$11,913. He considered the detriment to the Duncans to be in the range \$0 – 3,000; he said he did not see how the conservatory affected them to any great extent. He assessed the detriment to the third defendant (the owner of Flat 2) as being between \$3,000 and \$5,000. Mr Foote did not assess any increase in value of Flat 1.

[59] Mr Buckley assessed the increase in value of Flat 3 at \$19,320 by virtue of the encroachments. The corresponding detriment to the Duncans and the third defendants was assessed at between \$12,500 and \$20,000. Mr Foote valued the improvements at \$16,500. This was the average produced by two approaches. The first, the value of the land occupied by the conservatory and entranceway, was assessed at \$18,000. The second, the difference in value of Flat 3 before and after the erection of the conservatories, came out at \$15,000. Mr Foote assessed the loss of amenity to Flat 4 as \$6,000.

[60] The plaintiffs have not established any material detriment as a result of the encroachment of Flat 1. I fix the detriment they have suffered by virtue of the encroachments of Flat 3 at the sum of \$6,000, as assessed by Mr Foote.

*Conclusion on compensation*

[61] At this point I summarise my findings on the various components of the compensation and show their net effect.

	<b>First Defendant Flat 3</b>	<b>Second Defendant Flat 1</b>	<b>Third Defendant Flat 2</b>	<b>TOTAL</b>
<b>In respect of Area B:</b>				
For the appropriation by the plaintiffs of the additional land used for the house	35,000	35,000	70,000	140,000
For loss of amenity	8,500	8,500	12,500	29,500
<b>In respect of encroachment on common property:</b>				
For loss of development potential	2,600	2,600	5,200	10,400
For loss of amenity	7,500	3,750	5,000	16,250
<b>SUBTOTAL</b>	<b>53,600</b>	<b>49,850</b>	<b>92,700</b>	<b>196,150</b>
<b><u>Less</u></b> Detriment to Flat 4 arising from encroachments by Flat 3.	6,000			6,000
<b>Net compensation payable by plaintiffs</b>	<b>47,600</b>	<b>49,850</b>	<b>92,700</b>	<b>190,150</b>

## **Retaining walls and gardens**

[62] The plaintiffs claim from each of the defendants a contribution of one-quarter to the cost of repairing retaining walls built on common land. The defendants counterclaim for a mandatory injunction to require the plaintiffs to remove the retaining walls. In the alternative, they seek damages for trespass.

[63] The plaintiffs' claim is made under cl 2(2) of the lease which provides:

The Lessee shall upon demand in writing by the Lessors or their duly authorised agent pay to the Lessors a one quarter share of the cost of the following payments for repairs, maintenance and other charges incurred or to be incurred in respect of the said land:

- (a) For care and maintenance of the grounds, paths, fences, gates and other amenities on the said land, excluding however grounds, paths, fences, gates and other amenities contained in the land marked "B" on Deposited Plan 80295.
- (b) All other expenses in respect of the said land jointly incurred by the Lessors and not relating solely to any particular flat.

[64] The retaining walls are built of timber poles on the sloping area of common land between the Duncans' house and the southern boundary of the land. The main retaining wall runs parallel to and close to the house and supports a raised path and, at its western end, a concrete driveway. Additional walls run between the main wall and the southern boundary, and above the path. All walls are failing to some extent. The amended statement of claim refers to "a failed retaining wall" (singular) but in his evidence Mr Duncan acknowledged that all retaining walls are failing and need to be replaced.

[65] The retaining wall closest to the house was built at the same time as the house. Mr Duncan said the others – the garden walls as they were referred to in evidence – were constructed about six months later for aesthetic purposes and to stop slippage. The gardens created as a result have been used and enjoyed solely by the Duncans.

[66] The Duncans paid for the installation of all walls. However, Mr Duncan said that they were erected at the insistence of other owners, particularly Mrs Alicia

Taylor, who was the then owner of Flat 3. Mr Duncan's evidence on this point was not directly challenged in cross-examination but he acknowledged that the house extensions necessitated the construction of the retaining wall. He said the retaining wall directly beside the house was necessary for the "absolute stabilisation" of the property and "the balance of what was done was done upon the insistence of those down below, they wanted everything done cosmetically".

[67] In his brief of evidence, Mr Duncan said that the retaining wall had failed due to age and the fact that his neighbours had consented to a large, multi-million dollar, two-townhouse development on the southern boundary without reference to the trust. He was obliged to revise his analysis in the course of giving evidence. A report by a consulting engineer, commissioned by Mr Duncan, makes it clear that the retaining walls are failing mainly because they were not installed properly in the first place. The report reads in part:

Overall we consider the reason for deflections and rotation of the timber pole retaining walls is as follows:

- (a) The poles and walers to the 150 diameter pole wall adjacent to the house appear to be of adequate size. However they have rolled over up to 75 mm and this is likely to be due to the combination of creep of the downhill slope and/or rotation of poles due to inadequate depth in the ground and/or inadequate footing size and/or surcharge of the uphill garden retaining walls.
- (b) The raised garden poles appear to be of inadequate size for the higher walls and have rolled over up to 200 mm. In our opinion this movement is probably due to a combination of inadequate size of pole and/or inadequate size of footing and/or inadequate depth of embedment and/or size of footing and/or poor soil strength of the earth fill in which the piles have been placed and/or soil creep downhill and/or rotation of lower walls.

[68] There is nothing to indicate that the development of the neighbouring property has contributed to the failure of the retaining walls. The plaintiffs' were kept fully informed of that development as the owner sought to negotiate with them, and the defendants, an amendment to an easement over the property in order to permit a larger development. Mr and Mrs Duncan consented to amendments to the easement in return for significant benefits and on condition that the defendants also consented.

[69] The position is then that the retaining walls were built by the plaintiffs solely for their benefit. They were not consented to by the owners of Flats 1 – 3. At best the then owners acquiesced in their construction (as they did the building extensions) in order to preserve the stability of the land. The plaintiffs have effectively treated the western portion of the land as if they possessed absolute rights to its development. For 25 years now they have had the sole use and enjoyment of that part of the common property. In these circumstances, it would seem contrary to justice if they could require the defendants to contribute to the cost of reinstating walls which have failed because of shortcomings in the way they were built in the first place.

[70] In my view, the plaintiffs cannot invoke cl 2(2) of the lease to require the defendants to contribute. It must necessarily be implied that the grounds, paths and other amenities referred to in cl 2(2) have been placed on the land in accordance with the lease. That requires compliance with cl 20 which sets out the procedure to be followed when some but not all lessors wish to do anything:

- (1) ... which the lessors are empowered or required to do whether under these presents or as lessees of the said land or lessors of the said building or which may be considered to be necessary or desirable for the efficient and harmonious administration of the said land and/or the said building the following procedure shall be observed:

Clause 20 goes on to lay down a procedure for giving written notice of what is proposed and for majority decisions. There is provision for reference to arbitration if a majority disapprove of what is proposed.

[71] The plaintiffs did not act in accordance with cl 20. They constructed the retaining walls in breach of the lease. They cannot avail themselves of cl 2(2) to require the defendants to contribute to the cost of structures they had no right to put there in the first place.<sup>6</sup> As submitted by Mr Grant, this accords with the general principle which applies when a tenant in common carries out repairs to a property without the agreement of the co-owner. As stated by Sir Baliol Brett MR in *Leigh v Dickeson*:<sup>7</sup>

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<sup>6</sup> See the judgment of Fisher J in not dissimilar circumstances in *Smallfield v Brown* (1992) 2 NZ ConvC 191,110 at 191,119.

<sup>7</sup> *Leigh v Dickeson*, [1881-1885] All ER Rep 1099 at 1100 – 1101.

... it is perfectly clear that the law is, and always has been, that if the plaintiff in the action has expended money in a merely voluntary payment, he cannot make the defendant repay it even by alleging and proving that it was done for his benefit. If, however, the defendant is at full liberty, either to accept or reject the benefit of the money so expended by the plaintiff, and he elects to accept it, then he adopts and ratifies the acts of the plaintiff and becomes liable. But if the defendant is of necessity obliged to accept it, and has no choice in the matter, then the plaintiff must suffer for his own generosity.

## Trespass

[72] It remains to consider the owner defendants' claim for damages for trespass.

The pleaded claim is as follows:

17. On or about 19 March 1985, the plaintiffs without the consent of the first to third defendants, wrongfully:
  - (a) Appropriated to their own use part of the common area, depriving the first to third defendants of the use of that part;
  - (b) Erected retaining walls and gardens on that part of the common area; and
  - (c) Built a substantial dwelling, part of which is situated on the common area as shown on the plan attached.
18. By reason of the trespass, the value of the plaintiffs' property has increased and the first to third defendants have suffered loss and damage.

[73] The pleaded loss is not recoverable in a claim for trespass to land. Compensatory damages are recoverable under two heads, conveniently summarised in *Roberts v Rodney District Council*:<sup>8</sup>

[11] ... The first is, whether there has been actual damage to the plaintiff's land or the chattels thereon; the measure of damages is the cost of reinstatement: *Mayfair Ltd v Pears*<sup>9</sup> at 465. In some circumstances, where reinstatement is not possible for example, the diminution in the value of the land may be awarded in lieu thereof. See *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd*<sup>10</sup>

[12] The second measure of damages usually applies where there has been some wrongful use made of the plaintiff's land. Where a trespasser has wrongfully made use of the plaintiff's land, the

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<sup>8</sup> *Roberts v Rodney District Council* [2001] 2 NZLR 402, 405-406.

<sup>9</sup> *Mayfair Ltd v Pears* [1987] 1 NZLR 459 (CA).

<sup>10</sup> *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22 (CA).



plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use: *Laws NZ*, Tort para 218 ...

[74] The defendants do not assert damage to the land. At the hearing they sought an award for wrongful use on the principle that “if one person has without leave of another been using that other’s land for his own purposes, he ought to pay for such user”.<sup>11</sup> It is not necessary for the claimants to prove loss. Compensation under the user principle requires determining “the reasonable price which a person would pay to purchase a right allowing him to do that which would otherwise be a trespass”.<sup>12</sup>

[75] The defendants’ expert valuer, Mr Foote, said the value of use rights should be based on the value of the land at the time the trespass first occurred. He advocated applying a percentage generally adopted for the purpose of determining ground rents in Auckland; he suggested a range of 5 – 6.5%. He did not say what that value might be. In closing submissions, the defendants used a value of \$175,000 and a percentage of 5%. Over the period of 24 years since Flat 4 was extended, the rental value works out to \$210,000.

[76] Apart from the obvious deficiency in proof of damage, Mr Gould for the plaintiff, raised two matters in opposition to an award. The first was that the claim is barred by the Limitation Act. The second is that, as co-owners, the defendants cannot maintain an action for trespass.

[77] The Limitation Act will apply to bar a claim for trespass to the land six years after the cause of action accrued.<sup>13</sup> The cause of action arises when the trespass is committed. However, in the case of a continuing trespass, as has occurred in this case, a new cause of action accrues every day.<sup>14</sup> The defendants can recover then for trespasses that have occurred since the date six years before the claim was made but not for the preceding period.

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<sup>11</sup> *Whitwham v Westminster Brymbo Coal and Coke Company* [1896] 2 Ch 538,543 quoted in *Roberts v Rodney District Council* at [26].

<sup>12</sup> *Roberts v Rodney District Council* at [31].

<sup>13</sup> Section 4(1)(a).

<sup>14</sup> *Holmes v Wilson* (1839) 10 A&E 503.

[78] In support of his submission that the defendants, as co-owners, cannot maintain an action for trespass against the plaintiffs, Mr Gould relied on a passage from Todd, *The Law of Torts in New Zealand* which states that:<sup>15</sup>

... since each co-owner is entitled to be present on the land and to make normal use of it, neither can sue the other for trespass...

[79] However, the passage goes on to qualify the proposition in cases where one h/co-tenant expels the other from the land or destroys the subject-matter of the tenancy. Among the authorities cited in support of the qualification are *Harris v Pedersen*<sup>16</sup> where a co-owner was able to recover for the cutting of trees by a co-owner and *Ferguson v Miller*,<sup>17</sup> in which McMullin J quoted the following passage from the judgment of Denning LJ in *Bull v Bull*:<sup>18</sup>

... but there is plenty of authority about the rights of legal owners in common. Each of them is entitled to the possession of the land and to the use and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take more than his proper share the injured party can bring an action for an account. If one of them should go so far as to oust the other he is guilty of a trespass: see *Jacobs v Seward*.<sup>19</sup>

[80] There is no doubt that an ouster has occurred in this case, technical in nature in relation to Area B (as the defendants had no right to possession) but real and substantial in the way the plaintiffs have appropriated to their own use the strip of common land between their house and the southern boundary. Their occupation of that area is an ongoing act of trespass.

[81] However, I have not been provided with any reliable basis for determining damages. Mr Foote effectively valued the right to build on Area B in 2008 at \$175,000. I have no equivalent value as at 2001, six years before the claim was made. I would, in any event, have had reservations about assessing damages for wrongful use by determining a notional ground rent. The plaintiffs had the right to exclusive occupation of Area B regardless. Their wrong was to exercise their right

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<sup>15</sup> (5<sup>th</sup> ed, Brookers, Wellington, 2009) at [9.2.04].

<sup>16</sup> *Harris v Pedersen* (1914) 17 GLR 194.

<sup>17</sup> *Ferguson v Miller* [1978] 1 NZLR 819 at 824.

<sup>18</sup> *Bull v Bull* [1955] 1 QB 234; [1955] 1 All ER 253.

<sup>19</sup> Ibid. 237; 255.

to possession as if it gave them rights of ownership. In the circumstances, damages could be no more than nominal.

[82] The plaintiffs' occupation of the common property on the southern boundary is in a different category. They took it for their own use and excluded their co-owners. There is a benefit to the plaintiffs and a detriment to the owner defendants. An order for removal of the structures is impracticable; they are required to support the land. But I have nothing on which to assess the appropriate level of damages. There was no evidence of the value of that strip of land at any time over the relevant period.

[83] The defendants' right of action for trespass is made out but their claim for damages is not.

### **Relief**

[84] The plaintiffs are entitled to orders which will permit a new flats plan to be created and correct certificates of title issued for all flats. The orders will include provision for the plaintiffs to pay the defendants compensation in accordance with this judgment but their precise terms are otherwise left for future determination. I will consider a consent memorandum if agreement is reached on the terms of the orders. Otherwise, the Registrar should arrange a telephone conference for the purpose of making directions necessary to dispose of all remaining issues. These include the costs of implementing the orders and of this proceeding.