IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-89
[2018] NZHC 2303

UNDER	Section 333 of the Property Law Act 2007
IN THE MATTER	of an Appeal of a Judgment of the District Court
BETWEEN	IAN VICKERY and KAREN VICKERY Appellants
AND	CHRISTINE THOROUGHGOOD Respondent

Hearing: 8 August 2018; site visit 20 August 2018

Counsel: BP Molloy for appellants
TJG Allan for respondent

Judgment: 3 September 2018

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 3 September 2018 at 4 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Haigh Lyon, Auckland
Grove Darlow & Partners, Auckland

Introduction

[1] The parties are neighbours. Their rural properties share a boundary. Trees on the respondent Mrs Thoroughood's property grow along an embankment adjacent to the boundary. The appellants, the Vickerys, want the trees removed, saying they unduly obstruct their easterly views and unduly interfere with their wifi signal.

[2] Judge Mathers in the District Court declined to make an order removing the trees. Rather, she accepted an undertaking from Mr and Mrs Thoroughgood that they would continue their practice of trimming the trees to a reasonable level, to preserve the Vickerys' easterly views. The Judge also disagreed that the trees unduly interfere with the Vickerys' wifi signal, or otherwise unduly interfere with the Vickerys' reasonable use and enjoyment of their land.

[3] The Vickerys now appeal the District Court judgment and submit the Judge erred in several respects, namely she:

(a) wrongly found that the trees are required for soil stabilisation and are suitable for the site;

(b) wrongly accepted that the undertaking removes any undue obstruction from their easterly views;

(c) wrongly decided there was no undue interference with the wifi signal, by failing to consider adequately the evidence for the appellants on this topic; and

(d) failed to complete a comparative hardship assessment.

Background to the dispute

[4] The parties reside at adjacent properties on Kaipara Hills Road north of Warkworth. The properties share a boundary. According to the Vickerys, the trees in issue stretch approximately 45 metres along the boundary and are densely planted. The trees are on a three-metre downward-sloping bank, six or so metres from the

Vickerys' house. They consist of a variety of species, though the taller trees about which the Vickerys are primarily concerned are a mix of Manuka and Kanuka. In an interim decision issued in the proceedings, Judge Mathers said that the trees were one to three and a half metres tall, with dense foliage.[1]

[5] In January 2004, when the Vickerys purchased their property, the lot was empty. A house was not erected until 2008. The Vickerys say that no trees were visible on the boundary line in 2008 and that they were planted between October 2008 and October 2009. The Judge did not accept that and found in her interim decision that planting had commenced in October 2006 (though she noted some trees were not noticed until later, as they grew).[2]

[6] The Vickerys say that before building their house they consulted with Mr Thoroughgood to ensure they could take full advantage of the uninterrupted easterly views. They also discussed how to get the best internet connection at the property. They argued before the District Court that the trees would entirely obscure their view. They also claimed the trees interfere with wifi reception and attract bees, creating a nuisance.[3]

Procedural history and judgments on appeal

[7] Despite concerning a relatively confined issue, the proceedings have not progressed to the High Court in a straightforward or happy manner. A lengthy summary of the judgments of the District Court and convoluted procedural history is necessary to give context to the dispute.

[8] The proceedings were commenced by originating application on 13 November 2014. The Vickerys applied for orders requiring the removal of the trees, and limiting any replacement trees to a height not exceeding one metre. Other orders as the court may deem appropriate, for example the species of tree to be replanted, were also sought.

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1 *Vickery v Thoroughgood* [2017] NZDC 7885 at [4].
2 At [11].
3 The issue concerning bees was not pursued on appeal.

[9] The trial commenced before Judge Mathers in early November 2016. It extended over five days. On 13 April 2017, the Judge issued an interim decision.[4] The Judge explained the background to the proceedings and the relevant legal principles governing the Court's jurisdiction to order the removal or trimming of trees under the Property Law Act 2007 (the Act). The Judge's decision appears to have been final in respect of two aspects of the claim (bees and wifi) but interim in respect of the trees.

[10] The Judge found it would not be fair and reasonable to uphold the part of the claim that alleged bees were causing a nuisance. She reasoned that the trees that attracted the bees were part of New Zealand's heritage and any allergy to bees could be treated in the home like any other.[5]

[11] On the issue of wifi interference, the Judge preferred the evidence of the expert, Mr Lancaster, called by the Vickerys, who suggested there was no real wifi problem. She found that the trees had not "enhanced" any problem either.[6]

[12] It appears further evidence was given (either during or following the proceedings, but before the interim judgment) about an undertaking by Mrs Thoroughgood to trim the trees. The Judge observed:

> [22] Thirdly, I come to the trees which are the main issue. I revisited the property to understand the further evidence as to the undertaking by the defendant and her husband and the string line put up to demonstrate the trimming, the subject of the undertaking. The photographs in evidence also assist with evaluating the contesting views. Much was made by the plaintiffs as to the alleged unreliability of the pioneer trees and the risk in high winds of falling trees, branches or foliage. On the evidence that I heard I am satisfied and find as a fact that such trees are suitable, and in fact were recommended for soil stabilisation. While there may be some foliage dropping in high winds I do not consider this is significant.

[13] The Judge noted that the proposed undertaking would not restore the Vickerys' view completely.[7] However, she considered it removed "any undue obstruction" of that view. In making that finding, the Judge noted her preference for the Thoroughgoods' evidence and that of their experts. That evidence had been

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4 *Vickery v Thoroughgood*, above n 1.
5 At [19].
6 At [20].
7 At [26].

"confirmed by the various photographs and the benefit [the Judge] had of two site visits".[8] On that basis, the Judge was minded to accept a suitable undertaking and make orders accordingly. But she required a written undertaking to be filed with the Court and served on the appellants within 14 days, noting "It is not my intention that this will be a contested matter."[9]

[14] An undertaking was filed on 3 May 2017. On the following day, the Judge issued a Minute stating that an aspect of the undertaking was unsatisfactory because it lacked specificity. She called for the filing of an amended undertaking on 10 May 2017, because she was to take sabbatical shortly thereafter.

[15] Counsel for Mrs Thoroughgood filed a memorandum on 10 May 2017 informing the Court that regrettably a clarified undertaking could not be provided by the deadline. Thereafter, any hopes of resolving the issues in an uncontested fashion (as had been the Judge's aim) unravelled. Between 10 May and 21 July 2017, the following steps occurred:

(a) 11 May 2017: Mr Vickery filed a memorandum taking issue with actions of the Thoroughgoods and attempting to relitigate matters decided by the Judge in her interim decision of 13 April 2017.

(b) 11 May 2017: Counsel for Mrs Thoroughgood filed a memorandum in response.

(c) 11 May 2017: Mr Vickery filed a further memorandum in response.

(d) 12 May 2017: The Judge convened a teleconference, which was attended by Mr Vickery and counsel for Mrs Thoroughgood. The central issue was whether Mr Thoroughgood could enter the Vickerys' property to resolve issues about the string line used to measure the trees. A record of the teleconference was taken by the Judge's personal

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8 At [26].
9 At [27].

assistant. The Judge gave leave for a memorandum to be filed as to the outcome of the string-line issues within three weeks.

(e) 1 June 2017: Counsel for Mrs Thoroughgood filed a memorandum. It included a diagram showing the relationship between the string line and trees. It also recorded that Mr Vickery had that day served a trespass notice on Mr Thoroughgood.

(f) 2 June 2017: Mr Vickery sent an email disagreeing with the memorandum of the previous day, foreshadowing the filing of a formal memorandum.

(g) 15 June 2017: Mr Vickery filed a memorandum in response to the respondent's memorandum of 1 June 2017.

(h) 18 May 2017: Counsel for Mrs Thoroughgood sent Mr Vickery a letter responding to allegations made against counsel.

(i) 21 July 2017: Judge Mathers issued a Minute while on leave overseas. She recorded that no further resolution was possible until she returned and made directions for a hearing upon her return in November.

(j) 9 November 2017: A conference was held before Judge Mathers.

(k) 21 November 2017: A new undertaking was filed by the Thoroughgoods.

[16] The Judge issued a Minute on 1 December 2017, which clearly illustrates the regrettable turn the proceedings had taken since the interim judgment had issued:

> [1] The delay by one or both of the parties in providing what should have been a simple undertaking given by both Mr and Mrs Thoroughgood in court before me has become intolerable. In the way in which the undertaking was offered by both Mr and Mrs Thoroughgood, I agree with Mr Vickery that the phrase "while Mr and/or Mrs Thoroughgood retain an interest in the property" be included without the proviso that Mrs Thoroughgood remains married to Mr Thoroughgood. It is entirely unnecessary and, as I keep repeating, not in the spirit of what was offered in court and which I relied upon in my decision

> so far. Unless Mr and Mrs Thoroughgood are prepared to honour the undertaking given before me, and as I have set out above, then obviously this will be reflected in my final decision. If this change is made then I am prepared to accept the form of the undertaking despite the other matters raised by Mr Vickery, which I have nevertheless considered, but consider to be unnecessary.

[17] A further undertaking followed on 6 December 2017. But it was again followed by correspondence not contemplated by the Judge. On 11 December 2017, counsel for Mrs Thoroughgood filed a further memorandum raising an issue with the undertaking as filed. Mr Vickery responded on 13 December 2017.

[18] Also on 13 December, the Judge issued her decision.[10] She found the undertaking received on 6 December 2017 was sufficient. She effectively dismissed the claim but noted the Vickerys had "otherwise succeeded to the extent that the undertaking given provides them with a partial result."[11] On 15 December, however, the Judge recalled her decision by her own motion,[12] because she had not been referred to Mr Vickery's memorandum of 13 December 2017 prior to issuing judgment. But the memorandum, in the Judge's view, "reiterate[d] concerns and complaints which have already been raised" and raised other matters irrelevant to the decision. The final judgment was therefore reissued without change on 15 December 2017.

Legal principles

[19] The application was brought before the District Court under s 333 of the Act. Under that section, a court may order an owner or occupier to remove or trim a tree growing or standing on land, whether or not it constitutes a legal nuisance and could be the subject of a proceeding brought otherwise than under s 333.

[20] Section 335 of the Act lists the matters to be considered before making an order under s 333. In full, the section provides:

> **335 Matters court may consider in determining application for order under section 333**
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> (1) In determining an application under section 334, the court may make any order under section 333 that it thinks fit if it is satisfied that—

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10 *Vickery v Thoroughgood* [2017] NZDC 28344.
11 At [5].
12 Under r 11.9 of the District Court Rules 2014.

(a) the order is fair and reasonable; and

(b) the order is necessary to remove, prevent, or prevent the recurrence of—

(i) an actual or potential risk to the applicant's life or health or property, or the life or health or property of any other person lawfully on the applicant's land; or

(ii) an undue obstruction of a view that would otherwise be enjoyed from the applicant's land, if that land may be used for residential purposes under rules in a relevant proposed or operative district plan, or from any building erected on that land and used for residential purposes; or

(iii) an undue interference with the use of the applicant's land for the purpose of growing any trees or crops; or

(iv) an undue interference with the use or enjoyment of the applicant's land by reason of the fall of leaves, flowers, fruit, or branches, or shade or interference with access to light; or

(v) an undue interference with any drain or gutter on the applicant's land, by reason of its obstruction by fallen leaves, flowers, fruit, or branches, or by the root system of a tree; or

(vi) any other undue interference with the reasonable use or enjoyment of the applicant's land for any purpose for which it may be used under rules in the relevant proposed or operative district plan; and

(c) a refusal to make the order would cause hardship to the applicant or to any other person lawfully on the applicant's land that is greater than the hardship that would be caused to the defendant or any other person by the making of the order.

(2) In determining whether to make an order under section 333, the court must—

(a) have regard to all the relevant circumstances (including Māori cultural values and, if required, the matters specified in section 336); and

(b) if applicable, take into account the fact that the risk, obstruction, or interference complained of was already in existence when the applicant became the owner or occupier of the land.

(3) Despite subsection (2)(b), an order may be made under section 333 if, in all the circumstances, the court thinks fit.

[21] The key applicable principles in a case such as this are not in dispute and can be briefly stated.

[22] Two earlier High Court decisions in particular are instructive on the approach to trim and removal orders under s 333, being Keane J's judgment in *Warbrick v Ferguson*[13] and Lang J's more recent decision in *Yandle v Done*.[14] The following principles can be drawn from these cases:

(a) An appeal from a decision making an order under s 333 is an appeal from an exercise of discretion.[15]

(b) While at first blush s 333 appears to provide the Court with a wide discretion, that is not in fact the case, given the quite prescriptive approach a court must take to an application under s 333, as set out in s 335 of the Act.[16] The discretion is further constrained by the factors listed in s 336.[17]

(c) The discretion conferred by the legislation is accordingly an "intricate one", involving "the balancing of competing legitimate interests".[18]

(d) The jurisdiction to make orders under s 333 is accordingly to be exercised conservatively and cautiously.[19]

(e) Given the word "undue" in the legislation, it is not necessarily appropriate to approach the issue solely from the perspective of the party whose view has been obstructed.[20]

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13 *Warbrick v Ferguson* (2004) 5 NZCPR 520 (HC).
14 *Yandle v Done* [2011] 1 NZLR 255 (HC).
15 At [4]; and *Warbrick v Ferguson*, above n 13, at [13] and [35]. See also *Thomas v Broome* (2009) 10 NZCPR 757 (HC).
16 *Yandle v Done*, above n 14, at [20].
17 At [22].
18 *Warbrick v Ferguson*, above n 13, at [16].
19 At [16], [19] and [53]; and *Yandle v Done*, above n 14, at [25].
20 *Yandle v Done*, above n 14, at [39].

(f) Care is to be taken in any given case when applying the principles derived from the legislation as enunciated in other cases. All cases will to a large degree be fact specific.[21]

[23] Given the appeal is from an exercise of discretion, the parties agreed that for the appeal to succeed, the appellants need to satisfy the Court that the Judge made an error of principle, failed to consider a relevant factor, took into account an irrelevant factor or was plainly wrong.[22]

Arguments on appeal

[24] The first ground of appeal alleges the Judge erred in finding that the trees were necessary for soil stabilisation and were suitable for the site. Mr Molloy for the Vickerys argues the Judge wrongly disregarded real risks of uprooting and failed to consider expert evidence suggesting the trees are not in good health. It is argued this could contribute to *de*-stabilisation of the bank. Mr Molloy also submits the Judge failed to consider adequately alternative means of stabilising the soil.

[25] The second ground of appeal alleges the undertaking was inadequate and the Judge erred in accepting it. It is argued the undertaking does not provide sufficiently for the trimming of trees in certain areas, lacks specificity as to a maximum height for the trees, does not specify the frequency of trimming and lacks specificity as to the location of the "string line".

[26] The third ground argues the Judge failed to consider adequately the undue interference with the Vickerys' wifi signal. The Vickerys argue that *their* evidence shows the trees are having a detrimental effect on wifi strength. Options to remediate are limited by the trees — because alternative options require a clear, unobstructed line of sight. Wifi is essential for Mr Vickery's work and it is submitted the Judge failed to have regard to the importance of a good signal to the appellants' lives.

[27] The final ground argues the Judge failed to undertake a comparative hardship assessment. Specifically, the Vickerys argue they would be put to great hardship by

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21 At [50]; and *Warbrick v Ferguson*, above n 13, at [21].
22 *May v May* (1982) 1 NZLFR 165 (CA) at 170.

an order not being granted, but Mrs Thoroughgood would experience little to no hardship from an order being made. In brief, it is argued the Vickerys have lost considerable enjoyment of their property and cannot reside at the property without good wifi signal. There are alternative ways to stabilise the bank and to the extent it is relied on, the respondent's privacy "is not a legitimate concern".

[28] Mrs Thoroughgood opposes all grounds of appeal. At a broad level, her counsel, Mr Allen, takes issue with the way the appeal has been brought. He says only two points were specifically appealed (the scope of the undertaking and the Judge's findings on the wifi point) but the Vickerys have sought to run a general appeal. Mr Allen also says the appellants are inviting the Court to re-engage with substantive merits of the case at first instance, despite acknowledging this is an appeal against discretion.

[29] In summary, on the four grounds of appeal outlined above, Mrs Thoroughgood says the following:

(a) Regarding stabilisation and the suitability of trees: Mrs Thoroughgood was entitled to plant what she liked on her property and there were sound reasons to stabilise the bank. Assessment of the evidence and circumstances shows the Vickerys' claims of risk are overstated.

(b) The undertaking was never in issue when the Vickerys brought their case. They cannot now advance something on appeal that never formed part of the pleaded case. In any event, the District Court properly directed itself, especially in light of the fact the Court preferred the Thoroughgoods' evidence to that of the Vickerys.

(c) On the issue of wifi: The Judge preferred the evidence of an independent expert which objectively contradicted Mr Vickery's personal evidence. Mr Vickery purchased the house in an environment with variable signal strength and the evidence fell short of establishing that the trees even contributed to signal issues. Mr Vickery's wifi requirements exceed a reasonable level (even if the trees do cause

interference) and he therefore should have taken care to ensure there was good signal prior to purchasing.

(d) The Court was not required to undertake a comparative hardship assessment. But the Court nonetheless undertook an evaluative exercise as it considered the merits of the case. The outcome favoured Mrs Thoroughgood.

Discussion

[30] To assist with my consideration of the appeal and as appears common practice on an appeal of this kind, I attended a site visit at the properties.[23] I thank the parties for permitting me to do so. I found the visit very helpful, in terms of putting the evidence, exhibits, submissions and the District Court Judge's observations into their physical context.

[31] Having carefully considered the evidence, the parties' submissions, the judgment and my own observations from the site visit, I have come to the clear view that the Judge did not err in reaching the conclusions she did.

[32] Dealing first with two preliminary points:

(a) As noted above, Mr Allen took issue with the appeal to the extent it focuses on the undertaking, noting the undertaking did not form a part of the Vickerys' own case. However, the undertaking was a key factor in the Judge exercising her discretion in the manner she did. For that reason, although the undertaking did not form a part of the Vickerys' case (being offered, as it was, by the Thoroughgoods), I do not accept the submission that it cannot be considered on appeal.

(b) The Vickerys also raised as a ground of appeal that the Judge failed to take into account what is said to be the "very real risk uprooting poses to the appellants' property". In support of that submission, the

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[23] See for example, *Warbrick v Ferguson*, above n 13, at [12] and *Yandle v Done*, above n 14, at [42].

> appellants point to evidence of Mr Ganner, a qualified arborist, that in a windy environment, if the trees are in a poor condition due to excessive trimming they may partially uproot. However, an alleged actual or potential risk to the appellants' property pursuant to s 335(b)(i) was not a part of the Vickerys' original application in the District Court, which was focussed on alleged undue obstruction of their view; undue interference with the use or enjoyment of their land by reason of falling leaves and branches; and the suggested undue interference with their wifi signal. Mr Molloy quite properly did not press the risk to property on appeal.

[33] Turning to the substantive arguments raised on the appeal, I deal first with the wifi point.

[34] I am satisfied, and Mr Allan properly accepted, that undue interference with a wifi signal caused by trees could constitute an undue interference with the reasonable use and enjoyment of an applicant's land for the purposes of s 335(1)(vi) of the Act.

[35] From reviewing the evidence, however, I do not agree that the Judge erred in accepting independent expert evidence (in fact called by Mr Vickery) which objectively contradicted Mr Vickery's personal evidence on the issue as to wifi signal.

[36] The expert, Mr Lancaster, explained that Mr Vickery's wifi service is a "fixed wireless solution". He notes in his technical report that it works by having the internet service provider establishing a "broadcast site" in a prominent location and connecting to customers with clear "line of sight" to that broadcast site.

[37] In this case, the broadcast site (provided by Compass Wireless) is located on Moirs Hill Road. Mr Lancaster notes that "nominally the solution will service customers up to 30 kilometres away from the broadcast site subject to a clear unobstructed line of sight". In this way, Mr Lancaster confirms that trees *could* obstruct the otherwise clear line of sight.

[38] At present, the wifi transponder (or receiver) at the Vickerys' home is mounted on a pole a little distance away from the rear of the house. I viewed its location during my site visit and have reviewed the photographs in Mr Lancaster's report. With the transponder located in its present position (referred to by Mr Lancaster as "Location A"), Mr Lancaster states:

> There is currently a clear signal to the installed dish and other parts of the property, the signal has remained good for the past two years since installation.

[39] This current location, however, is not Mr Vickery's *preferred* location. He notes that the present location is in a particularly windy site and on one occasion the wind was so strong it blew the cable out of the back of the aerial. Mr Vickery also noted that another much larger stand of pine trees on the Thoroughgoods' land, some considerable distance away, are also impacting what is referred to as the "Fresnel zone" of the wifi connection in its present location.[24]

[40] Mr Vickery's preferred location is closer to and attached to the back of the house itself, where it would be easier for Mr Vickery to service the transponder. At this location however, Mr Vickery says the trees in issue will interfere with the signal.

[41] Mr Lancaster states in his report that he spent over two hours on site and only identified two other locations (other than the present location, Location A) which he would consider appropriate for an installation.

[42] The first of these alternative locations (Location B) is on the northeast corner wall of the home — Mr Vickery's preferred location. Mr Lancaster states "this is the location the Compass installers would have chosen by default and as a standard installation". In relation to Location B, Mr Lancaster states "it is obviously at risk due to close proximity to the existing tree/shrub planted boundary, being approximately three metres above ground level". He states that to retain adequate signal at this location, a window would be required in the shelter belt hedge — the trees in issue in this case.

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[24] Those trees were not, however, the subject of the Vickerys' application in the District Court.

[43] An alternative location identified by Mr Lancaster is Location C, at the top of the Vickerys' property. Mr Lancaster notes that it has an unobstructed view to the broadcast site to the east. Given the distance of this site to the house, he notes that it would be very challenging to maintain a short-range *wireless* link from Location C to the house. As discussed at the hearing of the appeal, trenching of a cable to Location C would therefore be required.

[44] Ultimately, Mr Lancaster concludes:

> The current pole location is adequate as is the proposed 'Location B' on the building wall.

[45] In light of the independent expert evidence, I do not accept the Judge erred in concluding there was no undue interference with the Vickerys' wifi signal. It is important to reiterate that not only does the expert evidence not indicate an interference, but the standard required by the legislation is an "undue" interference in any event. The expert evidence confirms this threshold has not been met.

[46] Accordingly, while it is true that Mr Vickery's *preferred* location for the wifi transponder would be on the wall of the home, there is clearly an alternative location which is currently being used and which is considered by Mr Lancaster to be adequate. There is also a further alternative and adequate location (Location C). And although this location would require cabling, this would not in my view be unreasonable in the circumstances.

[47] I accordingly do not consider the ground of appeal concerning wifi has been made out.

[48] Turning to the first ground of appeal (alleging the Judge erred in finding that the trees were necessary for soil stabilisation and were suitable for the site), I again do not consider there has been an error.

[49] First, under cross-examination, an arborist called by the Vickerys accepted that the trees *were* providing stabilisation (though queried whether this would be sustainable over the long term, given continued trimming may cause the trees' demise), and that the species were suitable for such a purpose.

[50] In terms of the evidence that continued trimming of the trees has an adverse effect on their health and may ultimately bring about their demise, I am not clear how this advances the Vickerys' appeal. The Vickerys, who would like the trees removed, would be the beneficiaries of the trees' ultimate demise.

[51] Second, the question of stabilisation is, in my view, somewhat of a red herring in any event. There did not appear to be any dispute, and Mr Molloy quite properly acknowledged in his oral submissions, that stabilisation is an appropriate purpose for planting on the bank in question. The issue is therefore not one of stabilisation itself, but whether the trees the Thoroughgoods have chosen to plant for that purpose cause an undue obstruction of the Vickerys' view (to which I return below). So long as no relevant regulations and laws are breached, a property owner may plant whatever species of tree they wish on their property.

[52] I accept that suitability for purpose might come into play when considering the parties' competing hardship for the purposes of s 335(1)(c). However, consideration of the parties' respective hardship would only be required if the court had first determined there was an undue obstruction or interference with those matters set out s 335(1)(b)(i)–(vi) of the Act. Accordingly, even if the Judge erred in finding that the trees were necessary for soil stabilisation and were suitable for the site, the point would not be causative of any error in the outcome of the judgment in any event, unless there was a finding that the trees were causing an undue obstruction of the Vickerys' view. It is to that issue to which I now turn.

[53] The Vickerys submit that the undertaking provided to the Court was inadequate and the Judge erred in accepting it.

[54] It seems that, absent the Thoroughgoods' existing and continuing practice of trimming the trees (as now encapsulated in the undertaking), the Judge would have found there would ultimately be an undue obstruction of the Vickerys' eastern views.[25] From my own site visit, I could see that if the trees were left to grow to their full

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[25] Stating at [26] of the interim judgment (*Vickery v Thoroughgood*, above n 1) that "I consider that the undertaking proposed by the defendant and her husband and as demonstrated by the string line does not restore the plaintiffs' views completely, but in terms of *Yandle* I consider it removes any undue obstruction of the plaintiffs' easterly views".

potential height, there would be obstruction of the easterly view, and at some point in the future, this would likely become an undue obstruction. However, it was also equally and very clear to me that the trees in their presently trimmed state do not create such an obstruction.

[55] Accordingly, so long as the trees continue to be trimmed in accordance with the undertaking, there is in my view no undue obstruction for the purposes of s 335(1)(b)(ii).

[56] The above conclusions apply equally to any suggested undue obstruction with the view from the master bedroom of the Vickerys' home. During the site visit, I inspected the view from inside the house, including from the master bedroom. Having done so, I am satisfied that the trees in their current state do not unduly obstruct the view from that bedroom. This includes looking in an easterly direction from where the bed is located and also in a more south-easterly direction from a couch also located in that room. While, in the south-east corner of the view from the room, some of the taller (untrimmed) trees are visible, they do not in my view unduly obstruct the primary view from that room. Accordingly, I do not consider that the Judge erred in not excluding the views from the master bedroom from her overall conclusion.

[57] I also do not agree the Judge erred in accepting the undertaking itself. Ultimately, any order under s 333 to trim trees will need to specify a measured height or a method by which the maximum tree height is to be ascertained. Of course, doing so will be straightforward in the case of trees planted uniformly on perfectly level ground. However, in many cases that will not be the case, including the present. The trees are planted on quite steeply sloping and uneven ground. Accordingly, a trim order could not simply specify that the trees be no higher than a fixed height from ground level.

[58] In my view, the concept of trimming to a stringline is appropriate and the Judge did not err in accepting that solution. Photographs accompany the undertaking and measurements are given for the stringline. I had requested that the Thoroughgoods be permitted access to the Vickerys' land for a short time prior to my site visit to reconstruct the stringline as they say it exists in accordance with the undertaking. This

would have assisted testing the practicality of the undertaking. The Vickerys ultimately declined to grant such permission (it of course being the Vickerys' right to decline to let particular parties on their property).[26]

[59] The Vickerys also argued on appeal that the undertaking does not specify the frequency or timing within which the trees must be trimmed. I do not consider that it needs to nor that the Judge erred in accepting an undertaking which did not contain this degree of specificity. Ultimately, the undertaking requires the trees to be trimmed to their Present Height (as defined), with further obligations on the Thoroughgoods to take steps to trim the trees lower and gradually to the stringline. The Thoroughgoods will therefore need to trim the trees as often as is necessary to comply with their legal obligations under the undertaking.

[60] Finally, given the existing practice of trimming the trees and the undertaking to continue to do so, the Judge concluded there was not an undue obstruction of the Vickerys' views, or any other undue interference with the reasonable use or enjoyment of the Vickerys' land for the purposes of s 335(1)(b). It was therefore unnecessary for her to go on to carry out a specific hardship assessment for the purposes of s 335(1)(c). In this context, Mr Molloy quite properly accepted that unless the Vickerys were successful in passing the "threshold" in s 335(1)(b), s 335(c) would not be relevant. Ultimately, they did not pass that threshold.

Result

[61] For the above reasons, I am not satisfied the Judge erred in the manner suggested by the appellants. The appeal is therefore dismissed.

Costs

[62] My preliminary but non-binding view is that costs ought to follow the event in the ordinary way, on a 2B scale basis.

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[26] There was a stringline present at the time of my site visit. As this was not the string line I had requested to be erected, I did not seek any submissions from counsel on it. I note, however, that unsurprisingly, the trees were trimmed to a level somewhat above the stringline, which is anticipated by the undertaking. The trees were not excessively above the stringline in my view, noting my conclusion at [54] that the trees at their present height do not cause an undue obstruction of the Vickery's easterly views.

[63] I would urge the parties to seek to agree costs. If they are not able to do so, the respondent may file a memorandum within **10 working days** of the date of this judgment. The appellants are to file and serve any response within a further **5 working days**. No memoranda are to exceed three pages in length.

[64] I will thereafter determine costs on the papers.

[65] I thank Mr Molloy and Mr Allen for their helpful submissions.

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Fitzgerald J