IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2006-004-2768

BETWEEN	GLEN ANTHONY OUTTRIM AND JEAN KATHRYN OUTTRIM Plaintiffs
AND	JUDSON JIANJUN LI AND SIHONG YANG Defendants

Hearing: 2, 3, 4 November 2009

Appearances: MIS Phillips and A Singh for Plaintiffs
CS Henry for Defendants

Judgment: 22 December 2009 at 12:00 midday

JUDGMENT OF ASHER J

This judgment was delivered by me on 22 December 2009 at 12 p.m.
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

……
Date

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Introduction

[1] Glen Outtrim and Judson Li are neighbours. With their spouses they own recently constructed houses that have been built at the back of two properties fronting Pukenui Road, Epsom. They have come to the High Court over a dispute about what should be done about a brick and wooden fence that runs along the boundary of the front part of the two original sections, and a counterclaim for damages. During the course of the hearing they have resolved issues relating to the fence itself, but the defendants' counterclaim has proceeded.

[2] In the counterclaim Mr Li and his wife, Sihong Yang, claim that Mr Outtrim committed tortious acts when he erected signs stating that there was a boundary dispute and was involved in an incident with them on 26 October 2007. They claim that Mr Outtrim's actions have cost them in excess of $450,000, which they now claim as damages.

History

[3] Pukenui Road is a pleasant leafy street, in Epsom, Auckland, which leads up towards One Tree Hill. Numbers 3 and 5 Pukenui Road adjoin each other. Houses were erected on the two properties in about 1930. In 1986 the owner of number 5, with the consent of the owner of number 3, erected the present fence between the two properties. It is a substantial structure, of brick columns and wooden slats. In December 1994 permission was granted for 5 Pukenui Road to be cross-leased, but this was not pursued. At some point prior to 1997, number 3 Pukenui Road was cross-leased, creating 3 and 3A Pukenui Road, 3 being the front lot.

[4] In April 1997 the plaintiffs, Glen and Kathryn Outtrim, purchased the cross-leased back lot at 3A Pukenui Road. On 8 November 2002 the defendants, Judson Li and Sihong Yang, became the registered proprietors of number 5 Pukenui Road. Mr Li and Ms Yang obtained a surveyor's report for the purposes of subdividing number 5 Pukenui Road into two freehold titles. On 24 June 2003 the Council granted consent to that subdivision. The subdivision was completed and in 2006

Mr Li and Ms Yang proceeded to build on the back lot, on what was now 5A Pukenui Road. Their new house at 5A Pukenui Road was built beside that of the Outtrims. Therefore, the configuration of each property is the same, with the newer houses on the back with right-of-ways to the road; those right-of-ways going past the original houses which are at the front.

[5] Mr Outtrim says that in early 2006 his suspicions were aroused when he became aware of contractors or workmen, engaged by Mr Li, showing interest in the fence which divides the properties. He investigated the matter and found a survey pin on the footpath at the top of the drive, which indicated where the boundary was. It appeared that the fence was not on the boundary, but, rather, built on the Outtrim side of the boundary line on number 3. He engaged surveyors to investigate the matter further, and they provided a report. That report stated that the fence had been built, save for the wide front brick pillar, not on the boundary, but from the roadside some 155 millimetres from the centre line, on 3 Pukenui Road. The relevant part of 3 Pukenui Road on which the fence is built is the common area of the cross-leased title, and owned by the registered proprietors of both 3 and 3A. It runs for approximately 22.6 metres from the top of the drive. The fence stops close to the Outtrim's house and is replaced for the rest of the boundary by a solid wall over which there is no dispute.

[6] On discovering the true position of the fence Mr Outtrim wrote to Mr Li and Ms Yang on 20 February 2006. I will refer to this letter later in the judgment, but the effect of it was to give five working days' notice of Mr Outtrim's intention to move the fence to the centreline of the boundary. It was stated that it was his intention to reshape and build the fence in exactly the same way as the present fence, which would have had the effect of narrowing the driveway of number 5.

[7] Mr Li and Ms Yang's lawyers, BenLiu & Co., responded on 21 February 2006, observing that the allegation of the fence not being on the boundary was speculation rather than fact, and stating that if the fence were to shift it would be necessary for the defendants to consent to that. It was proposed that the parties' surveyors meet and that there could be a dispute resolution process.

[8] Mr Outtrim wrote back on 22 February 2006 stating that he did not agree to the request for a further survey, and stating that there would be an application to the Court. He stated that construction would now begin on 6 March 2006.

[9] Correspondence between Mr Outtrim and BenLiu & Co. continued through March. Mr Outtrim appeared to back away from unilateral action and stated that he would be issuing Court proceedings. BenLiu & Co. took the position that its clients were willing to negotiate on the issue. The correspondence stopped on 17 March 2006.

[10] In late October 2006 Mr Outtrim became aware that the defendants intended to put in a new driveway to access the rear section. It was to run down the western boundary of number 5, along the fenceline. Mr Outtrim consulted his solicitors, Penney Patel Law. On 26 October 2006 they sent a letter to BenLiu & Co. stating that they had reviewed the correspondence, and prepared proceedings for an order for removal of the encroaching fence and consequential orders, based on the provisions of the Property Law Act 1952, and the Fencing Act 1978. It was stated that the proceedings were ready to be filed, including an application for injunction restraining the defendants from completing their driveway. It was asked whether the defendants would remain open to discussing how the matter might be resolved. It was stated that from the Outtrims' perspective any negotiations were meant to relate to the removal and relocation of the wall along the legal boundary. An urgent response within approximately 24 hours, by Friday 27 October 2006, was sought. An undertaking was also sought that the defendants would not proceed with the completion of the driveway.

[11] There was no response from BenLiu & Co. to this letter and proceedings were filed on 27 October 2006. A without notice interim injunction was sought. The proceedings were issued with the consent of the owners of the front lot of 3 Pukenui Road, Epsom. The Court declined to proceed with the matter without Mr Li and Ms Yang having been given notice.

[12] No statement of defence was filed by Mr Li and Ms Yang following the filing of proceedings and the declining of the application for an injunction on

27 October 2006. In the weeks that followed Mr Li and Ms Yang had the driveway completed. Boxing was constructed to contain the concrete for the drive, and the edge of the concrete was at least two or three centimetres inside the boundary and did not go onto number 3. The rear dwelling at 5 Pukenui Road was completed.

[13] Ten months went by. No steps were taken in the proceedings by either party. On 20 August 2007 Mr Li and Ms Yang engaged Barfoot & Thompson Real Estate Agents to sell 5A Pukenui Road, the old house at the front. Mr Steven Chang was the agent involved.

[14] Barfoot & Thompson was to hold an open home on Saturday, 25 August 2007. In the days prior sale signs were erected, one on the fence and one in front of the house. They announced the open home, which would be on Saturday and Sunday between 2:00 – 3:00 pm.

[15] On or about 25 August 2007 Mr Outtrim placed a sign on the paling part of the fence. The sign was on the wooden palings of the fence in the common area of the Outtrim/Tutt property. It warned of a "boundary dispute", and referred to the distance of the encroachment, and said "buyer beware". There was a scene involving Mr Outtrim making various remarks about the land to Mr Chang. These events are referred to in more detail at [34]-[43].

[16] On the next open home day Mr Li ensured that visitors came in from the other side of the house. Mr Li says that people still read the sign. He removed it. By the following weekend another sign had been erected, this time entirely on the common area of Mr Outtrim's property at number 3. It was a sign about a-metre-and-a-half tall, which repeated the same message. It was clearly visible to anyone on the drive on the western side of Mr Li and Ms Yang's property.

[17] Open homes were held that weekend and on a further weekend. After a third open home Mr Li decided not to hold any further open homes because, he says, the sign was deterring purchasers. Although the house remained on the market, Mr Li stopped marketing it and removed the "For Sale" signs. He stopped all newspaper advertisements.

[18] These events led to a re-activation of the proceedings. A counterclaim was filed by Mr Li and Ms Yang on 5 October 2007 asserting that the degree of encroachment on the plaintiffs' land was minimal and did not affect the plaintiffs' enjoyment of their land, and stating that they were prepared to agree to alter the construction and position of the fence. A counterclaim claimed that the erection of the warning notices was unlawful, and that they were deterred from selling. Damages, being the interest on their mortgage, and an injunction prohibiting the display of the sign, were sought.

[19] The proceedings still moved at a desultory pace. Ten months later in August 2008 they were transferred to the High Court. Orders were made for service of the proceedings, now in the High Court, on all concerned persons including the present owners of 3 Pukenui Road: John Tutt, Sarah Fitzgerald and QL Corporate Trustee Co. Limited. The proceedings were also to be served on the owners of the front lot at number 5, being 5 Pukenui Road.

[20] In the meantime there were various interlocutory measures taken by the parties. Interlocutories were issued on behalf of Mr Li and Ms Yang against the Outtrims on 24 October 2008. Mr Li and Ms Yang applied for summary judgment against the Outtrims on 2 July 2009. There was an unsuccessful settlement conference.

[21] The sign stayed up for seven months until Sunday, 18 May 2008, when Mr Outtrim's daughter took it down. Within a few days Mr Li had contacted Mr Chang and active marketing of the front property started again. In August 2008 a conditional offer on the property of $960,000 was made. This was not accepted by Mr Li and Ms Yang, who sought a higher sale price. Efforts to sell the house continued, but through 2008 property values had fallen. The property ultimately was sold at auction on 26 May 2009 for $850,000.

[22] Mr Li and Ms Yang blame Mr Outtrim for the house not selling in 2007, and say that his actions caused them loss because of the drop of values in 2008. They have called evidence from a valuer, Ms Holdaway, who says that in August 2007 the property was worth $1,170,000. Mr Li and Ms Yang say that Mr Outtrim's actions

stopped them selling the property, and that his actions resulted in them selling the property for $320,000 less than what they could have received for it in August 2007. They claim that loss from Mr and Mrs Outtrim in their counterclaim. They also say that it is the Outtrims' fault that they had to continue paying interest to the bank until they sold the property and were able to repay their mortgage. In this regard they claim interest of $133,950.87.

[23] The parties now agree on the degree of the encroachment of the existing brick and wooden paling fence. A licensed surveyor, Mr Brian Cowley, was instructed by the plaintiffs and his evidence as to the position of the boundary and the fence is not in contention. His evidence is that there is an average encroachment of 19 centimetres along the boundary by the fence for a length of 31.98 metres onto the common area of 3 and 3A Pukenui Road. At its widest point at the Pukenui Road end, the centre of the fence is 0.22 metres off-set, narrowing to a 0.16 metres off-set at the 31.98 metre mark.

The claim and counterclaim

[24] The Outtrims' claims under the Fencing Act 1978 and Property Law Act 2007 were settled after the first day of hearing, and consent orders were made. It has been agreed that the Outtrims will, at their expense, remove the existing brick and wooden paling fence. They will replace it with a hedge planted on their side of the boundary, to be trimmed up to the boundary line. The effect is that Mr Li and Ms Yang and the owner of 5 Pukenui Road will have slightly more width at the start of the driveway and will not lose any presently usable space. The Outtrims and the owners of the front lot will have the benefit, in the common area of their property, of a hedge of their choosing that they can control. They will have no more room on their part of the property, possibly less. On their side of the boundary there is, at present, grass and vegetation.

[25] This leaves the counterclaim of Mr Li and Ms Yang against the Outtrims. There are two causes of action.

[26] The first cause of action is headed "Intentionally causing loss by unlawful means". The acts of the plaintiffs set out in the first cause of action are the erection of the large sign by the Outtrims concerning the boundary dispute, shouting in an intimidating manner, Mr Outtrim making indecent gestures, and the erection of the second sign. It is alleged that the Outtrims by their words and actions intended to intimidate and coerce Mr Li and Ms Yang to inhibit them from selling the section, to turn away potential buyers, and otherwise to interfere with their reasonable use and enjoyment of the property.

[27] The second cause of action is headed "Intentional interference with the defendants' use and enjoyment of their land". Mr Henry, for Mr Li and Ms Yang, made it clear that this was a claim based on nuisance. It is pleaded that the Outtrims or their agents acted deliberately and maliciously to injure Mr Li and Ms Yang's interest in and use and enjoyment of their land.

[28] I propose dealing with the nuisance cause of action first, as Mr Henry in his submissions puts forward the acts of nuisance of the Outtrims as one of the unlawful means of intentionally causing loss.

Nuisance

Approach

[29] The tort of nuisance is not set into a single comprehensive definition. In *Bank of New Zealand v Greenwood* [1984] 1 NZLR at 525 at 530 Hardie Boys J observed that it gave a remedy for "certain interferences with the occupier's use or enjoyment of his land". It is not every interference with another's land that constitutes nuisance. The interference must be unreasonable. Thus it has been stated in the House of Lords in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 per Lord Wright:

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society; or more correctly in a particular society.

Lawton LJ said in *Kennaway v Thompson* [1981] QB 88 at 94:

> Now nearly all of us … have to put up with a certain amount of annoyance from our neighbours. … The question is whether the neighbour is using his property reasonably, having regard to the fact that he has a neighbour. The neighbour who is complaining must remember, too, that the other man can use his property in a reasonable way and there must be a measure of give and take, live and let live.

[30] It must be understood that the concept of "unreasonableness" is not approached only from the perspective of the defendant. In *Bank of New Zealand v Greenwood* Hardie Boys J put it on the basis that the test is "simply whether a reasonable person, living or working in the particular area, would regard the interference as unacceptable" at 531. At the same time he observed that the hypothetical reasonable person must be accorded the attribute of acknowledging the reasonable exercise of rights by his neighbours. He observed that reasonableness is not considered solely from the perspective of the person carrying out the activity. He quoted Salmond on the Law of Torts (17th ed 1977 at 531:

> He who causes a nuisance cannot avail himself of the defence that he is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to other persons, or as a source of damage to their property.

[31] An unreasonable use of premises, which does not involve any physical interference, may give rise to nuisance. In *Thompson-Schwab v Costaki* [1956] 1 WLR 335, it was held to be at least arguable as a nuisance for the premises next door to the plaintiffs to be used for prostitution. This was a direct interference with the plaintiff's enjoyment of his home. So also the picketing of premises for the purposes of persuading employers not to do work over many months, has been seen as an attempt to prevent people visiting premises, and been held to be nuisance: *J Lyons Sons v Wilkins* [1899] 1 Ch 255 at 267. The "besetting" of members of the public may amount to a nuisance. In *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383 it was stated at p 388 by Murphy J:

> Besetting is appropriately a term applied to the occupation of a roadway or passageway through which persons wish to travel, so as to cause those persons to hesitate through fear to proceed or, if they do proceed, to do so only with fear for their own safety or the safety of their property.

[32] The general proposition is that motive in nuisance is irrelevant: *Bradford v Pickles* [1895] AC 587. But proven malice may assist the Court in its objective assessment of the reasonableness of the actions. In *Christie v Davey* [1893] 1 Ch 316, where the defendant had adopted the practice of blowing whistles, banging on trays and hammering on the party wall, it was taken into account the fact that the defendant's noise had been made "deliberately and maliciously". The Judge made it clear that if there had been an innocent explanation for the events, then a different view might well have been taken: at 327. While both neighbours had made noises that annoyed the other, it was the neighbour who acted maliciously who was liable in nuisance. The decision of *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468 was to the same effect. It is not a legitimate use of a home or property to use it for the purposes of vexing and annoying neighbours.

[33] Thus, the question here is whether Mr Outtrim's actions can be regarded as beyond the actions that a reasonable occupier, viewed objectively, would regard as reasonable.

Significance of the infringement

[34] It is necessary to consider the details of Mr Outtrim's conduct. I first record that the boundary infringement could not be regarded as trivial or inconsequential, and indeed it is not suggested by Mr Henry in his submissions that this was so. The area of land involved is estimated at 6 square metres, and the evidence of value was that it was worth more than an earlier estimate for a smaller piece of land, of $7,000 to $15,000. Mr Outtrim and the valuer called by the plaintiffs, Richard Purdy, both stated initially in their evidence that the land involved reduced the potential width of the access-way to the back lot. It was not proven that the difference would be material to any attempt to freehold 3A Pukenui Road, but I am nevertheless satisfied that the loss of approximately six metres of land on a boundary in such a position would be a matter of legitimate concern to an owner in Mr Outtrim's position. It was reasonable for him to want to have the situation rectified.

Initial exchange

[35] Mr Outtrim's initial stance in relation to the fence in his first letter of 20 February 2006 was unfortunately belligerent. Although he said that the fence would be put on the correct boundary at their expense, he stated that he would carry out the work within five days without any further reference to Mr Li and Ms Yang. The tone of the letter was personally critical of Mr Li and Ms Yang.

[36] In the letter in reply of 21 February 2006 from BenLiu & Co., the mis-location of the fence was described as "speculation rather than fact" and a dispute resolution process was suggested. Mr Outtrim continued to adopt an aggressive position while Mr Li and Ms Yang's solicitors' letters continued to propose discussions, although the tone of those letters was also, perhaps understandably, not overtly conciliatory, for example the reference in their letter of 8 March 2006 to Mr Outtrim's "trouble-making".

[37] After a 10 month gap, Mr Li and Ms Yang in late October started construction of the new driveway, which would be beside the contentious fence. They did so without notice to Mr Outtrim. He reacted immediately, instructing his solicitors to write and draft proceedings. When there was no reply from Mr Li and Ms Yang's solicitors, proceedings were filed the next afternoon.

[38] There was no response to this letter or indeed to the proceedings. While Mr Outtrim was aggressive in his initial correspondence, it is hard to understand why Mr Li and Ms Yang did nothing to try to resolve the impasse about the boundary in the ten months following the 26 October 2006 letter, and the issue of proceedings, and placing the property on the market in August 2007. The Outtrims, after sending the letter and issuing the proceedings, also appear to have not taken further steps.

Events of 25 August 2007

[39] The conduct specifically complained of arose against this background, more than a year-and-a-half after the fencing issue first arose, and some ten months after proceedings had issued and the interim injunction had been denied. Mr Outtrim

became aware that the front property was on the market and there were open homes before the open home on Saturday, 25 August 2007. He reacted immediately. The sign he put up on the wooden paling part of the fence on his property was handwritten and read as follows:

> Warning. Boundary dispute. The boundary is 150 millimetres to the east of this fence. See the edge of the concrete. 5A side. We have a notice lodged in the High Court Auckland. The vendors have had a notice served on them. Buyer beware.

[40] On the Saturday there was an exchange between the agent from Barfoot & Thompson, Mr Chang, and Mr Outtrim. Mr Chang and Mr Li say that Mr Outtrim approached Mr Chang looking very angry. Mr Chang says he was told by Mr Outtrim very loudly "You can't sell this, this is my land." He said he pointed to him with his finger. He said that Mr Outtrim's face was very red and his hair appeared out of order, and that he was scared of him. They say that Mr Outtrim made a rude gesture with his arm, by putting his hand on the inside of his elbow and lifting and extending his lower arm with a closed fist. Mr Li said Mr Outtrim told his story to everyone who was passing, and to the neighbours, and kept shouting.

[41] Mr Outtrim admits talking to Mr Chang in a loud voice, and that he was "peeved". He denied that he was angry. He says that he did not make a deliberately rude gesture at Mr Chang or Mr Li. He has a tendon problem, which causes him to lift his hand on occasions in the way complained of. He admits asking how Mr Li could sell the property with the boundary dispute unresolved.

[42] I accept that Mr Li and Mr Chang felt insulted and frightened by Mr Outtrim's actions. However, I do not consider that Mr Outtrim deliberately made a threatening gesture, and I accept the explanation that he made about his tendon problem. It is not, in ordinary terms in New Zealand, regarded as a threatening gesture to raise an arm while holding the elbow down with the fist clenched, and I can see no reason why Mr Outtrim would have made such a gesture with the intention of threatening an assault. I consider that he was upset at the time, but not of any mind to approach or physically threaten. It was an action he made because of his sore tendon. I consider, however, that Mr Outtrim did use words to the effect

that Mr Li could not sell part of his land, and that he should not sell with the fencing dispute unresolved.

[43] It is necessary to deal briefly with some other aspects of the evidence. Mr Li has made assertions about Mr Outtrim's conduct, which were denied by Mr Outtrim. Unfortunately some of these matters were not put to Mr Outtrim in cross-examination, although I note that Mr Li was also only challenged in a very general way on Mr Outtrim's contradictory statements. Considering the evidence as a whole as best I can I make the following observations on contested points of evidence:

a) Mr Li says that there were people coming to the open home when the incident occurred when Mr Outtrim spoke to Mr Chang and that some of them shook their heads and left. Mr Outtrim denies that there were people present, although he said he talked to some of his neighbours. I consider Mr Outtrim, Mr Li and Mr Chang to all be honest witnesses. However, when there was a conflict in matters of detail I preferred Mr Outtrim's evidence. He showed a willingness to accept adverse propositions when they were put to him, and despite the intemperate position he initially took, and his undoubtedly strong expressions on the Saturday, his concern was in resolving the boundary issue and he had no wider agenda. I prefer Mr Outtrim's recollection that there were no passers-by present at the time of the incident.

b) Mr Li gave evidence that some prospective customers when they read the sign left without inspecting the house. Despite the fact that this was not put to Mr Outtrim, I accept that this would have happened, and that the presence of the sign would have put off some purchasers.

c) Mr Li stated that prior to the 25 August 2007 incident Mr Outtrim had shouted at him that he would make trouble for him when building the house, and would make them lose $100,000 if they tried to sell the front property. Mr Outtrim denies saying this. I am not satisfied that Mr Outtrim did make such a remark.

d) I accept that in late 2005 there were some arguments over the trimming of a tree, and Mr Outtrim considered that Mr Li had acted inconsiderately in allowing debris from the cutting to go on his property.

The warning sign

[44] The incident where there was an actual exchange of words between Mr Outtrim and Mr Li or Mr Chang was on Saturday 25 August 2007. There were at least two further open home weekends when there were no further exchanges. However, after the removal of the notice on the fence, Mr Outtrim put the same notice with the same wording in handwriting inside the fence in the common area of number 3 on 31 August 2007, and that remained until May 2008. There is no doubt that it would have been seen by many prospective purchasers who walked down the driveway on that side of the house.

[45] The statement in the sign was more or less accurate. At one stage in submissions Mr Henry queried whether the dispute could accurately be described as a boundary dispute, given the fact that there was never any particular argument about the boundary. There was, however, an ongoing issue as to what should happen about the fence on the boundary. Mr Li's own solicitors in their letter of 3 March 2006 referred to the "boundary issue" and the "boundary problem".

[46] The statement on the sign about the boundary dimensions was not entirely accurate, but in fact it understated the degree of deviance, stating it to be 150 millimetres whereas in fact it was, at least at the beginning of the boundary, 220 millimetres.

[47] It was not accurate for the sign to say there was a notice lodged in the High Court at Auckland, as in fact the true position was that there were proceedings filed in the District Court at Auckland. They were filed later in the High Court. However, that difference would hardly have been material to any reader trying to assess the nature of the issue. It was true that the vendors had had a notice served on

them. The statement "buyers beware" can be seen as a reflection of the fact that any buyer needed to be aware of the fact that there was this ongoing dispute.

[48] Thus, I conclude that the words on the sign were not misleading or inaccurate. The question still remains, however, whether it was reasonable to leave such a sign in place, visible to prospective purchasers. Mr Li clearly feels that it was a most unreasonable act. He has called evidence from a valuer, Ms Holdaway, which is not in contention, to the effect that the sign or the statement on it would have deterred purchasers. Mr Chang said that persons who were interested expressed the view that they were worried about the neighbour problem. I have no doubt that purchasers would rather not purchase a house where it was involved in an ongoing boundary dispute. In that sense, in assessing the reasonableness of Mr Outtrim's act in putting up the notice, it is necessary to take into account the fact that it should have been apparent that this would make it harder to sell the property.

[49] However, it was also accepted by Ms Holdaway, who gave clear and balanced evidence, that a vendor should disclose the existence of a boundary dispute to any prospective purchaser. In this regard Mr Phillipps, for the Outtrims, referred to *Smyth v Wadland* [2008] NZCA 578 at [28]. There it was stated in relation to the making of a boundary issue known at an auction:

> A vendor in those circumstances was arguably under a duty to disclose the boundary encroachment. [The vendor's] silence may well have constituted an actionable misrepresentation: see *Sharplin v Henderson* [1990] 2 NZLR 134 (CA); *Thompson v Vincent* [2001] 3 NZLR 355 (CA); *Harvey Corporation v Barker* [2002] 2 NZLR 213 (CA) at [2] …

[50] Mr Outtrim was not the vendor. But as a part owner of the land on which the fence was placed, he had a legitimate interest in ensuring that any purchaser was aware of the boundary dispute. It is not unreasonable for a party who has a dispute over a boundary fence to bring the existence of that dispute to the attention of prospective purchasers. A purchaser who has notice is much more likely to seek a resolution than a purchaser who buys unaware of the dispute, and then is faced with its existence at a later date. Moreover, Mr Outtrim's wish for Mr Li and Ms Yang to address the fence problem and sort it out before sale rather than leave it to a later purchaser was not unreasonable. It was an issue that needed to be addressed. He

was not motivated by malice in the sense of having a wish to hurt or cause loss to Mr Li and Ms Yang. He was motivated by a wish to have the fence relocated in its correct position.

Overview on nuisance

[51] Mr Henry submitted that Mr Outtrim's conduct in relation to the boundary dispute had been belligerent and unreasonable, and that the notice must be seen in that context. However, while Mr Outtrim had initially been belligerent, Mr Li had not responded to the request to negotiate made by Mr Outtrim's lawyers 10 months earlier in October 2006. While the initial notice period of 24 hours in which to respond was not particularly reasonable, Mr Li and Ms Yang did not respond at all, and made no effort to come up with a solution, (although they did indicate initially a wiliness to negotiate). Mr Li and Ms Yang put the property on the market, without endeavouring to communicate their intention to do so.

[52] Ms Holdaway, the valuer, observed that prospective purchasers would be put off in dealing with a person who chose to resolve a dispute in the manner adopted by Mr Outtrim. The sign was a clear indication to any prospective purchaser that there was not only a dispute, but that Mr Outtrim was taking the dispute very seriously and had very strong feelings about it. However, Mr Outtrim had not set out to exaggerate the dispute, and insofar as the sign showed him as very concerned, it was accurate. The law of nuisance does not require neighbours to behave towards each other in a conciliatory manner, or to take all possible steps to resolve cases out of Court.

[53] Taking all this background into account, and the words actually used on the notice, I do not consider that the notice can be regarded as an unreasonable interference with Mr Li and Ms Yang's right to the use of and enjoyment of their land. While it may be possible for the erection of signs containing material adverse to a neighbour to constitute a nuisance, in this case a notice that accurately drew to the attention of prospective purchasers the existence of a boundary dispute was not, on an objective test, unreasonable. Purchasers not so informed might well have

complained at a later date that they had been misled by the silence of their future neighbour on the topic.

[54] Mr Henry emphasised that it was important to consider the aggregation of incidents in assessing whether there was a nuisance. He emphasised Mr Outtrim's behaviour on 25 August 2007, and his hand gesture and his words. I will consider these actions further in considering the first cause of action and the submissions that they were an assault, but for the time being I note that there was no physical assault or threat of physical assault, or the use of swear words or any general threats. The incident occurred on one day out of at least six open home days. I find that Mr Outtrim did not embark upon a course of conduct aimed at intimidating or disrupting any sales, other than putting the sign in place. While persistent efforts to disrupt a legitimate sale process might in certain circumstances be a nuisance, Mr Outtrim's single exchange on the Saturday cannot possibly be regarded as an unreasonable pattern of behaviour. At worst, it was an initial flare-up.

[55] Mr Outtrim in his evidence expressed regret that he had used the language he did in his initial letter, and he apologised for his choice of words. Mr Li and Ms Yang are not guilty of any such aggression, and impressed as persons who are polite and controlled. But I have no doubt that they regret that they did not make greater efforts to resolve the issue or bring it to a head in the year-and-a-half that went by after the initial exchange in February/March 2006 before they placed the front property on the market. Both sides must take some responsibility for the impasse that was in place in August 2007. The fact is that there was an ongoing dispute at that time, and that Mr Outtrim did not commit a nuisance in drawing the attention of prospective purchasers to that dispute. The placement of the sign and other actions did not constitute an unreasonable interference with Mr Li and Ms Yang's use of the land.

[56] Mr Henry argues that Mr Outtrim has acted with malice. I do not accept that submission. Mr Outtrim's initial correspondence was intemperate. He clearly has had, at times, very strong feelings about the placement of the fence. The expression of his feelings may have been, on occasions, excessive. However, I have discerned no deliberate wish on his part to cause Mr Li or Ms Yang injury or financial loss. He

was not motivated by malice. His concern has been to have the fence relocated in its proper position. Ultimately the position he has taken during the course of this hearing in relation to the placement of the fence and the cost of relocating it has been entirely reasonable. I am cautious, of course, of attributing that reasonableness to his conduct throughout, and indeed I do not do so. However, I have concluded that at no stage have his actions been occasioned by personal animis. Rather, they have been a reaction, on occasions an overreaction, to a perceived wrong done to him, and a problem that required resolution.

The bad start

[57] It is necessary to consider whether the initial belligerent letters of Mr Outtrim in February 2006 can be regarded as relevant to a cause of action in nuisance or intentionally causing loss by unlawful means. The letter did threaten a trespass onto number 5 to remove parts of the brick supports that were on that side of the boundary. The letters, as Mr Outtrim rightly accepted, were aggressive. They indicated an unwillingness to compromise. They left the polite and rational Mr Li and Ms Yang offended and baffled. However, it was clear by March 2006, a year-and-a-half before the attempt at sale, that Mr Outtrim was not going to take unilateral action. He had already acted by issuing proceedings seeking Court orders. Any threat of unlawful action was long spent before the signs were put up. Mr Outtrim's initial belligerence may have some relevance to costs, but cannot be seen as part of a nuisance or intentional causing of loss.

Particular authorities

[58] Mr Henry relied on two North American cases. One, *Saelman v Hill* Unreported Ontario Superior Court of Justice 13526/00 20 May 2004, related to a long sequence of disruptive activities by a neighbour over a period of some years, which included repeated deliberate actions aimed at causing interference with the plaintiff's enjoyment of their property. One such action was deliberately creating a trench onto the plaintiff's land and hosing in water. The actions were held to constitute a nuisance. One of those actions was placing a sign in a window saying "No Trespassing". However, this was just one of a large number of factors and, it

has to be said, one of the most trivial. I have not derived any assistance from that case.

[59] In *Chiang v Yiang* (1999) BCPC 29, a judgment of the Provincial Court of British Columbia, there was what was described as "continual and oppressive interference with the defendant's use and enjoyment of her property [which was] both substantial and unreasonable by any objective standard" (at [44]). The actions had included repeated and unreasonable complaints to the authorities about piano playing, banging on walls, shouting obscenities, threatening with bodily harm and general abuse. Then when the claimant put the property on the market the defendant would shout to prospective purchasers abuse and make insulting remarks about the complainant. The actions were held to constitute a nuisance, and damages were awarded both for interference with the use and enjoyment of the property, and for the loss of the value to the unit caused by the actions. It was specifically taken into account that no person was prepared to make an offer on the property when faced with the prospect of living next door to the claimant. The reduction of value was assessed at five percent and damages were awarded.

[60] These cases involved deliberate actions over a long period of time, clearly driven by malice. The position is entirely different in relation to Mr Outtrim's actions. There is a cumulative aspect to nuisance, when dealing with altercations between neighbours. There was only one incident where he actually got involved in anything approaching an altercation, and I have already set out my conclusion that there was no threat of assault on that occasion. As I have stated, I do not regard the placing of the sign as unreasonable by any objective standard.

[61] I do not consider that there is any element of besetting here. Despite Mr Chang's understandable fear, in my view he somewhat misinterpreted the nature of Mr Outtrim's gesture and words in that they, on an objective level, did not constitute an actual threat. Moreover, they were momentary. They were not repeated.

[62] I consider that a case with greater similarity is that of *Broderick Motors Pty Ltd v Rothe* [1986] Aust Torts Reports AT-059. There the defendant, without using

physical force, attempted to persuade people not to enter the plaintiff's premises. He believed he had been sold a seriously defective car by the plaintiff. He parked his car outside the plaintiff's dealership which was called "Go Motors", with a sign on the roof reading "For Sale. Distance travelled unknown. Purchased from Go Motors 14.6.1985. Be the tenth owner of this bomb?" The word "bomb" was in distinctive red letters. Hunt J, of the Supreme Court of New South Wales, held that this did not constitute a nuisance. There was no malice, no besetting, and no effort to interfere with the plaintiff and others accessing the site. The facts of that case are more similar to the present, than those of *Chiang v Yang.*

Nuisance - conclusion

[63] I conclude, therefore, that although there was an interference with Mr Li and Ms Yang's use and enjoyment of their land, in that their ability to attract prospective purchasers was affected by the signs, that the erection of the signs was nevertheless a reasonable action on Mr Outtrim's part, given the incorrect position of the fence. I conclude that Mr Outtrim's other actions, considered as a whole with the erection of the signs, did not constitute an unreasonable interference with Mr Li and Ms Yang's enjoyment of their land. I, therefore, find that the claim in nuisance has not been made out.

Intentionally causing loss by unlawful means

[64] It has been held in New Zealand that there is a tort of intentionally causing loss by an unlawful means: *Van Camp Chocolates Ltd v Aulsebrooks Limited* [1984] 1 NZLR 354 at 357-359. The essence of the tort appears to be the deliberate interference with the plaintiff's interests by unlawful means. It was stated by Cooke J at 360:

> In principle, as we see it, an intent to harm a plaintiff's economic interests should not transmute the defendant's conduct into a tort actionable by the plaintiff unless that intent is a cause of his conduct. If the defendant would have used the unlawful means in question without that intent and if that intent alone would not have led him to act as he did, the mere existence of the purely collateral and extraneous malicious motive should not make all the difference. The essence of the tort is deliberate interference with the plaintiff's interests by unlawful means. If the reasons which actuate the defendant to use unlawful means are wholly independent of a wish to

> interfere with the plaintiff's business, such interference being no more than an incidental consequence foreseen by and gratifying to the defendant, we think that to impose liability would be to stretch the tort too far. Moreover it would entail minute and refined exploration of the defendant's precise state of mind - an inquiry of a kind with the law should not call for when a more practicable rule can be adopted.

[65] In *OBG Limited v Allan* [2008] 1 AC 1 at [38], [189], [264], the existence of the tort was recognised in the United Kingdom. It has been described by the Australian High Court as an "embryonic or emerging tort … in need of further definition," *Northern Territory v Mengel* (1995) 185 CLR 307 at 343. It must be observed that the necessity for the "means" to be "unlawful" tends to lead to other more familiar and commonly used causes of action being available, and perhaps explains why there are so few examples of the tort in New Zealand.

[66] On the basis set out in *Van Camp Chocolates Ltd v Aulsebrooks Limited,* to establish the tort there must, first, be an actual intention on the part of the defendant to cause loss to the plaintiff, secondly, unlawful actions in pursuit of that intention, and, thirdly, actions which actually result in damage to the plaintiff. I interpret *Van Camp Chocolates Ltd* as requiring an intention to cause loss to be a motivating factor, although it need not be the sole or even the predominant purpose.

[67] Mr Henry in his submissions relied on a wide range of unlawful acts, submitting that Mr Outtrim assaulted Mr Chang and Mr Li, that he threatened them with the unlawful act of placing a caveat on their title, that he breached the peace, and that he interfered with the use and enjoyment of their property by erecting and maintaining the signs.

[68] He also referred to the tort of intimidation, although this was not pleaded as a separate cause of action. The Court of Appeal in *Huljich v Hall* [1973] 2 NZLR 279 following *Rookes v Barnard* [1964] AC 1129 recognised the existence of the tort of intimidation. It has been observed that the tort is possibly only an example of the wider wrong of intentionally causing loss by unlawful means: *Salmond & Heuston on the Law of Torts* (21st ed 1996) at 16.7. Lord Hoffman in *OBG Limited v Allan* recognised it as being a variant of the broader unlawful means of tort; at [7],

although this was in the context of interference with the actions of a third party in relation to the plaintiff.

[69] It is necessary to consider whether the actions referred to by Mr Henry give rise to the tort of intentionally causing loss by unlawful means.

[70] In relation to the threat to caveat the property, Mr Outtrim made this threat in his letter of 9 March 2007. Mr Henry submitted that this was an unlawful act, capable of supporting the tort. It might well have been an unlawful act to register a caveat in the sense that Mr Outtrim had no right to place a caveat against Mr Li and Ms Yang's title, as he had no interest in their land. However, it was a threat only. It was held in *Huljich v Hall* by McCarthy P at 286 that apart from threats of assault, threats of illegal action, even if they induce a person to do something which causes loss, are not actionable. Turner J expressed the same view at 288. I do not consider that mere threats to register a caveat are capable of giving rise to the tort of intentionally causing loss by unlawful means or any subsidiary tort of intimidation. For this reason alone Mr Outtrim's threat to register a caveat cannot support the tort. Moreover, for reasons that I have already referred to, the threat was not actuated by any intention to cause loss, but rather an intention to have the fence put in the correct position. Finally, the threat caused no loss. Its effects were totally dissipated by the time of the alleged loss a year-and-a-half later, when the presence of the sign induced Mr Li to take the property off the market.

[71] In relation to the alleged assault, for there to be an assault there must be an overt act which has the intention of creating in another person an apprehension of imminent infliction of a battery. The test is whether a reasonable person in the plaintiff's position would have had the necessary fear of immediate harm: *T v H* [1995] 3 NZLR 37, 51. In that case the definition in Fleming, *The Law of Torts* (7th ed, 1987) at p 24 was quoted:

> Assault consists in intentionally creating in another person an apprehension of imminent harmful or offensive contact.

The test is objective; whether a reasonable person would have had a fear of imminent physical contact: *T v H* at 51. Presumably it is a reasonable person with the

characteristics of the plaintiff that are known by the defendant: *McPherson v Booth* (1975) SASR 174 (FC) Bray CJ at 177). I do not consider that, objectively assessed, Mr Outtrim's words and his gesture were sufficient to create an apprehension of imminent harm or offensive conduct. He was agitated and loud and made unusual gestures with his arm of the type described earlier, but nothing on an objective test indicated any intention on his part to push, slap, punch or have other physical contact with Mr Chang or Mr Li.

[72] It is also necessary for the threat to be an intentional threat which induced a perception of imminent physical contact. I find that Mr Outtrim had no intention whatsoever of making Mr Chang or Mr Li fear physical contact on his part. He was not seeking to act in a physically intimidating manner. He was upset and expressing his views forcefully, but not going any further than that, and was not setting out to physically scare his neighbour.

[73] Nor do I accept Mr Henry's submission that a breach of the peace by Mr Outtrim has been shown. The essence of the concept of a breach of the peace is violence or threatened violence. On an objective test there was no violence or threatened violence in the incidents involved. Further, he had no intention to cause harm to Mr Li's economic interests by his actions.

[74] I would also observe that a single one-off altercation of a minor nature will not give rise to the tort of intentionally causing loss by unlawful means, if it is not directly associated with some loss. The one-off incident on 25 August 2007 did not, in my assessment, lead to the property being taken off the market. It was perhaps a minor factor, but the central concern which led to Mr Li's action was the ongoing existence of the sign. Even if the altercation had involved an assault, I would not have held the first cause of action to have been made out.

[75] Finally, for all the reasons already given, I do not consider that the placing of the sign of the fence and then in the common area of number 3 to be an unlawful act. It was not a nuisance. It was not a trespass, and I have already set out why I consider that the erection of the sign was not intended to cause loss, but rather to get the fence impasse resolved.

[76] Thus, the plaintiffs cannot point to any unlawful acts capable of giving rise to the tort, or any acts done with an intention even in part of harming Mr Li or Ms Yang's economic interests.

Damages

[77] The issue of damages has been the subject of submissions. I accept that damages can be claimed in nuisance for economic loss. I have some doubts whether, even if causes of action had been established by the plaintiffs, they would be entitled to claim losses arising from the drop in property values. The measure of damage would be the diminution in the value of the land as a consequence of the tortious actions at the time they were committed. Such losses were not addressed in the evidence. Rather, the evidence addressed the issue of later losses resulting from the decision to take the property off the market, and the subsequent drop in market values. Losses like this arising from decisions engendered by any nuisance, even if those decisions later result in losses being sustained, are of a different type to those usually awarded in nuisance actions. It is on those losses that the plaintiffs have focused. They may be too remote. Given my conclusions on liability, however, and the lack of detailed argument on this issue, it is not necessary to express any final view on damages.

Result

[78] The counterclaim has failed and judgment is entered on that counterclaim in favour of the plaintiffs.

[79] As noted earlier, the plaintiffs' claim has been resolved by consent orders, and no costs issues arise. There remains, however, the issue of costs on the counterclaim. If that issue cannot be resolved the plaintiffs should file submissions within 14 days, and the defendants within a further 14 days.

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Asher J