

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

**CIV-2013-404-004138
[2014] NZHC 349**

UNDER The District Courts Act 1947 and the
Harassment Act 1997

BETWEEN SHENG XU and GIA YUE JIANG
Appellants

AND ANTHONY WILLIAM MAYES and
PAMELA BETTY MAYES
Respondents

Hearing: 12 December 2013

Appearances: D Mitchell for Appellants
Respondents in person

Judgment: 3 March 2014

JUDGMENT OF TOOGOOD J

*This judgment was delivered by me on 3 March 2014 at 4:45 pm
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

Introduction

[1] The appellants, Mr Xu and Ms Jiang, and the respondents, Mr and Mrs Mayes, are neighbours. At the beginning of 2013, problems arose between the parties regarding the use of a common driveway. On 9 August 2013, Judge P.A. Cunningham heard an application by Mr and Mrs Mayes for a restraining order against the appellants under s 16 of the Harassment Act 1997 (“the Act”).¹ The Judge found on a balance of probabilities that a number of incidents occurred on the driveway which were sufficient to justify a finding of harassment, namely that Ms Jiang threatened to kill the respondents; that Mr Mayes was assaulted; and that Mr Xu often followed Mrs Mayes down the driveway to the mailbox in a manner which caused her to fear for her safety. The Judge held that a restraining order was necessary to protect Mr and Mrs Mayes from further harassment.

This appeal

[2] The appellants now appeal against the granting of the restraining order, relying on five grounds of appeal:

- (a) Judge Cunningham erred in fact and law when she found that the appellants had committed acts of harassment;
- (b) the Judge erred in law in the application of s 3(1) of the Act;
- (c) no evidential basis existed for a finding of harassment;
- (d) the Judge placed undue weight on the character references of the respondents; and
- (e) the terms of the restraining order are unnecessarily wide.²

¹ *Mayes v Xu* DC Auckland CIV-2013-004-601, 9 August 2013.

² This ground of appeal was not advanced in the notice of appeal but was an issue which was raised at the hearing and the parties were given the opportunity to file supplementary submissions on it.

- [3] These grounds of appeal give rise to a number of issues:
- (a) Are the appellants entitled to rely on the defence of lawful purpose despite its not being argued in the District Court?
 - (b) Was the Judge wrong to find in favour of the respondents on the issue of credibility?
 - (c) Was the Judge correct to find on a balance of probabilities that the alleged incidents occurred?
 - (d) Did the Judge's findings of fact justify a finding of harassment?
 - (e) Was the Judge right to make a restraining order?
 - (f) Are the terms of the restraining order too wide?

Factual background

[4] Mr and Mrs Mayes live at 19 St Lukes Road, Mt Albert. They have lived there for 27 years. The appellants live at 21A St Lukes Road and have done so since May 2012. Access to numbers 17, 19, 21 and 21A St Lukes Road is shared by a common driveway which runs from St Lukes Road to number 17 at the top of the driveway. Number 21A is closer to the road end of the driveway.

[5] The conduct which forms the basis for the making of the restraining order has its genesis in an ongoing dispute between the parties over the proper use of the shared driveway. Mr and Mrs Mayes consider that the appellants and their visitors use the driveway in a manner which is not permitted. Their principal concerns are that the appellants and their visitors park and stop their vehicles on the driveway and that people driving from the appellants' property drive further up the driveway before turning around and exiting onto the road. The respondents say that this often occurs late at night while they are sleeping.

The incidents on 24 March 2013

[6] For the past eight years there has been a hand-painted sign in the driveway saying “No stopping, no parking in R.O.W. at all times”. At about 10:30 am on 24 March 2013, Mr Mayes was repainting those words onto the sign after someone (allegedly Ms Jiang) had painted over them. Mr Mayes claimed this was the fourth time he had had to repaint over the sign because someone had defaced it.

[7] Mr Mayes was approached by Mr Xu. He told Mr Xu that if he or his wife defaced the sign again, Mr Mayes would call the Police. Mr Mayes said in evidence that Mr Xu was acting in an aggressive and belligerent manner and that Ms Jiang then appeared with a pail of white paint and proceeded to paint over the entire sign in front of Mr Mayes. Mr Mayes said he attempted to leave the scene but Ms Jiang stepped in front of him and began yelling at him. Mrs Mayes was also on the scene at this time and Ms Jiang allegedly approached Mrs Mayes in a similarly aggressive manner. Mr and Mrs Mayes said Mr Xu then hit Mr Mayes on the right side of his head and that they then fled down the driveway to their property. They said they were followed by Mr Xu and Ms Jiang and that Ms Jiang threatened to kill them. The appellants denied both the punch and the threat to kill.

The incident on 10 April 2013

[8] On 10 April 2013, a person in a silver car visited the appellants’ address at 21A. Mr Mayes said the car was driving fast and that he went to speak to the driver to ask him if he could drive more slowly. He said that as he was talking to the driver, Ms Jiang came out and allegedly began yelling abuse and insults at the respondents, telling them that they were “mad” and “lived like dogs”. He said Mr Xu tried to get Ms Jiang to go inside but she continued to abuse and laugh at the respondents before she suddenly turned in a threatening and intimidating manner and threatened to kill Mr Mayes. Again, the appellants denied this happened.

The “following” incidents

[9] Mrs Mayes said that she had often been followed down the driveway to the mailbox by Mr Xu and that he has done this on occasions when he has been eating food. The impression given by her evidence was that whenever Mr Xu sees Mrs Mayes at the end of the driveway he comes out into the driveway. Mrs Mayes said she finds this intimidating and unnerving.

The decision in the District Court

The Judge’s findings

[10] Both parties were self-represented in the District Court. After considering the legal requirements for the making of a restraining order under the Act, Judge Cunningham was satisfied on the balance of probabilities that the incidents on 24 March, 10 April and the “following” incidents were sufficient to justify a finding of harassment against the respondents.

[11] The Judge said:

[32] It is apparent from the material before the Court that there have been regular incidents on the driveway involving either or both of the applicants and either or both of the respondents. Yet the only time the police were called by the applicants was on 24 [March] and 10 April. That is because the applicants say that the nature of the interactions between the parties changed. It is clear from what I heard and saw that both Mr and Mrs Mayes were deeply affected by what transpired on 24 March and 10 April including the words spoken by Ms Jiang “I’ll fucking kill you”.

[33] Mr Mayes gave me the impression that under normal circumstances he is a calm, sensible and responsible person. There were letters from a number of people who described Mr Mayes in this manner. Given his demeanour and presentation in the hearing before me and the opinions of others it would surprise greatly if Mr Mayes would deliberately lie to the Court.

[34] Mr Mayes gave evidence that once he was struck during the incident of the 24 March that he and his wife fled to the safety of their home. This would be an appropriate response following an assault.

[35] In relation to the last incident of following Mrs Mayes to the letterbox, I am satisfied on the balance of probabilities that Mr Xu has done this on more than one occasion. The detail that Mrs Mayes gave around this issue included that sometimes Mr Xu is still eating from a bowl when she

becomes aware of his presence. She has also said that she no longer goes down to the bottom of the driveway because this has happened on a number of occasions.

[12] Judge Cunningham found that Mrs Mayes in particular was clearly affected by the relevant incidents to the extent that she sought medical treatment for her sense of worry and anxiety. Both Mr and Mrs Mayes were also unwilling to attend a meeting for all driveway users because they feared for their safety. Judge Cunningham concluded:

[41] I am satisfied that the behaviour complained of not only caused distress to Mr and Mrs Mayes but would do so to a reasonable person in their circumstances and that the behaviour justifies the making of an order.

[42] I am further satisfied that such an order is necessary to protect the applicants from further harassment. The legal and practical issues about using the right of way are not settled as between the parties. Therefore [the] potential for the situation to flare up again remains.

Submissions

Appellants' submissions

[13] For the appellants, Mr Mitchell argued that Judge Cunningham erred in fact when she found that the appellants had committed acts of harassment because the Judge was wrong to find that Ms Jiang made death threats towards the respondents; that Mr Xu punched Mr Mayes; and that Mr Xu followed Mrs Mayes to the mailbox on more than one occasion. Mr Mitchell submitted that the evidence did not justify such findings.

[14] In relation to the threats to kill, Mr Mitchell said that the appellants denied the incidents; there were others present at the time of the incident who did not give evidence; Ms Jiang was speaking in a language Mrs Mayes cannot understand; and it was never put to Ms Jiang in cross-examination that she specifically said "I will kill you".

[15] As to the finding that Mr Xu punched Mr Mayes, Mr Mitchell noted that Mr Xu denied the allegation and said that Mr Mayes bumped into Ms Jiang; there is no

evidence of an injury to Mr Mayes; there were no independent witnesses; and Mrs Mayes's evidence was that "they" hit Mr Mayes in the head.

[16] Regarding the "following" incidents, Mr Mitchell submitted that there was no evidence that Mr Xu consistently followed Mrs Mayes down the driveway.

[17] Mr Mitchell argued that because there were no independent witnesses to the incidents, Judge Cunningham had to make findings on the basis of her assessment of the credibility of the parties. He said that Judge Cunningham referred to and relied on letters to the Court and concluded that Mr Mayes is a calm and sensible person and it would surprise her if he would lie in Court. However, Mr Mitchell submitted, the evidence shows the respondents are not calm and sensible and the writers of the letters were not called to give evidence. He argued that Judge Cunningham was wrong to have placed any weight on them. Mr Mitchell said that because Judge Cunningham did not find that the appellants were lying or that their evidence was unbelievable, credibility should have been regarded as a neutral factor.

[18] Even if the specified acts are sufficient to justify a finding of harassment, Mr Mitchell submitted they would not cause a reasonable person to fear for their safety or be distressed. The parties share a common driveway and are bound to see each other. He argued that the respondents had not been shy about confronting the appellants and putting their views across. Although the respondents said they were too scared to attend a community meeting presided over by the Police, Mr Mitchell said this was not a reasonable position to take and a meeting with the Police would be a safe place.

[19] The appellants also seek to rely on the defence of lawful purpose; a defence not pleaded or advanced in the District Court. They argue that the act of Mr Xu walking down his driveway is a lawful purpose and it is inevitable that at times Mr Xu will be on the driveway at the same time as either of the respondents.

[20] As to the breadth of the restraining order, Mr Mitchell said that the appellants have concerns given the close proximity of the parties' residential premises as neighbours. He submitted the restraining order goes too far in that it prevents the

appellants from looking at the respondents while the appellants are walking up and down the driveway, especially if the respondents are also on the driveway at the same time. Without abandoning his primary arguments, Mr Mitchell submitted as an alternative that this Court on appeal should add special conditions to the harassment order to ameliorate these concerns.

Respondents' submissions

[21] Mr Mayes made the essential point that credibility is fundamental to this case and not a neutral factor as submitted by the appellants. He submitted that the District Court Judge was justified in finding for the respondents on the credibility issues; no independent witnesses were present at the incidents on 24 March and both Ms Jiang and Mr Xu were cross-examined on the threat to kill.

[22] Mr Mayes argued that the supporting letter provided for the respondents by their neighbour was relied upon by Judge Cunningham only in relation to the character of the respondents. The letter did not purport to give any evidence of witnessing the threats to kill. Although it referred to the neighbour observing that "Asians chase Tony's car up driveway", the Judge said she did not take this paragraph into account.

[23] As to the finding that Mr Xu punched Mr Mayes, the respondent submitted this finding should not be disturbed. There was evidence that Mr Mayes suffered slight injury and it was described as "not possible" that Mr Mayes bumped into Ms Jiang. Again there were no independent witnesses and so the Judge was entitled to make findings of credibility in the manner she did.

[24] As to Mr Xu following Mrs Mayes down the driveway, Mr Mayes submitted that Judge Cunningham came to the correct conclusion. He noted that, in reaching her decision, the Judge took into account the level of detailed evidence that Mrs Mayes gave about this issue and the respondents' evidence about Mrs Mayes's response to those incidents.

[25] Mr Mayes also says that the appellants' submission that the respondents are not calm and sensible is wrong and that Mr Xu even said in evidence that Mr Mayes is a reasonable person. Ms Jiang also gave evidence that she and her husband would argue.

[26] Mr Mayes also submitted that it is wrong to suggest that repeated threats to kill and punching to the head did not cause the respondents to fear for their safety and would not cause a reasonable person in the particular circumstances to fear for their safety. The same can be said for the level of distress caused to the respondents. This was an entirely reasonable and understandable response and it was reasonable for the respondents to feel too scared to attend the meeting presided over by the Police. Mr Mayes pointed out that Mrs Mayes in particular was clearly affected by the appellants' conduct to the extent that she sought medical treatment for her sense of worry and anxiety.

[27] As to the lawful purpose defence advanced by the appellants, the respondents say that as this was not advanced in either the District Court or the notice of appeal, it would be unfair for it to be considered now. Further, they argue that the onus is on the appellants to prove the defence and even if it can be now raised, there is no evidence before the Court to demonstrate that Mr Xu was engaging in any lawful purpose when he walked up the driveway to the letterbox as is now asserted.

[28] Mr Mayes also submitted that narrowing the scope of the restraining order as suggested by the appellants would have the effect of eroding and whittling down many of the specified acts set out in the restraining order to the point that the respondents would have limited protection against further acts of harassment by the appellants.

The statutory framework for restraining orders under the Harassment Act 1997

[29] Section 9 of the Act permits a person who is being harassed by another person to apply to the Court for a restraining order in respect of that other person.

“Harassment” is defined in s 3:

3 Meaning of “harassment”

- (1) For the purposes of this Act, a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.
- (2) To avoid any doubt,—
 - (a) The specified acts required for the purposes of subsection (1) may be the same type of specified act on each separate occasion, or different types of specified acts:
 - (b) The specified acts need not be done to the same person on each separate occasion, as long as the pattern of behaviour is directed against the same person.

[30] A “specified act” is defined in s 4 as follows:

4 Meaning of “specified act”

- (1) For the purposes of this Act, a specified act, in relation to a person, means any of the following acts:
 - (a) Watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose:
 - (b) Following, stopping, or accosting that person:
 - (c) Entering, or interfering with, property in that person's possession:
 - (d) Making contact with that person (whether by telephone, correspondence, or in any other way):
 - (e) Giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person:
 - (f) Acting in any other way—

- (i) That causes that person (“person A”) to fear for his or her safety; and
 - (ii) That would cause a reasonable person in person A's particular circumstances to fear for his or her safety.
- (2) To avoid any doubt, subsection (1)(f) includes the situation where—
 - (a) A person acts in a particular way; and
 - (b) The act is done in relation to a person (“person B”) in circumstances in which the act is to be regarded, in accordance with section 5(b), as done to another person (“person A”); and
 - (c) Acting in that way—
 - (i) Causes person A to fear for his or her safety; and
 - (ii) Would cause a reasonable person in person A's particular circumstances to fear for his or her safety,—

whether or not acting in that way causes or is likely to cause person B to fear for person B's safety.
- (3) Subsection (2) does not limit the generality of subsection (1)(f).

[31] Section 29 provides that every question of fact that arises is to be determined on the balance of probabilities.

[32] Section 16 gives the Court the power to make a restraining order if it is satisfied of the following:

- (a) The respondent has harassed, or is harassing, the applicant; and
- (b) The following requirements are met:
 - (i) The behaviour in respect of which the application is made causes the applicant distress, or threatens to cause the applicant distress; and

- (ii) That behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances; and
 - (iii) In all the circumstances, the degree of distress caused or threatened by that behaviour justifies the making of an order; and
- (c) The making of an order is necessary to protect the applicant from further harassment.

[33] Section 16 is subject to s 17 which provides that it is a defence to prove that specified acts are done for a lawful purpose.

[34] Against this background, I turn to consider the issues raised in this appeal.

Are the appellants entitled to rely on the defence of lawful purpose?

[35] Because the function of a court on appeal is to reconsider a matter already decided, there is a reluctance to permit new points to be raised for the first time on appeal. However, the defence of lawful purpose was at least arguable on the evidence presented to the Court below, and Mr Mitchell did not seek to adduce further evidence. Mr and Mrs Mayes had an opportunity to argue the point and did not suggest further evidence was required to rebut it. For those reasons, I am satisfied that it is just to consider whether the defence was available to rebut the “following” allegation.³

Was the Judge wrong to find in favour of the respondents on the issue of credibility?

The applicable principles

[36] The jurisdiction to appeal a decision of the District Court making a restraining order derives from s 34(1) of the Act; s 34(2) invokes the High Court

³ *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (PC); *Paulger v Butland Industries Ltd* [1989] 3 NZLR 549 (CA).

Rules and sections 74 to 78 of the District Courts Act 1947, with all necessary modifications, as if the appeal was made under section 72 of that Act.

[37] Appeals under s 34 are conducted by way of rehearing.⁴ Applying the approach described by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*⁵, the appellants must persuade this Court that the decision below is wrong. I am not required to defer to the District Court Judge's views but "customary" caution is appropriate when the facts found by the trial judge turn on issues of credibility.⁶

[38] Because the issue of credibility is central to this appeal, I bear in mind also the following principles contained in the Court of Appeal's decision in *R v Munro*⁷ (albeit in the context of an appeal from a criminal conviction in a jury trial), which were endorsed by the Supreme Court in *R v Owen*,⁸ modified for the circumstances of this appeal:

- (a) An appellate court is performing a review function, not one of substituting its own view of the evidence.
- (b) An appellate review of the evidence must give appropriate weight to the advantages the District Court Judge may have had in assessing the honesty and reliability of the witnesses.
- (c) It is essentially for the District Court Judge to determine the weight to be given to individual pieces of evidence.
- (d) Reasonable minds may disagree on matters of fact.

⁴ District Courts Act 1947, s 72 and High Court Rules, r 20.18.

⁵ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13].

⁶ *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 197 per Richardson P and Tipping J and 199 per Thomas J.

⁷ *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

⁸ *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13].

- (e) Under our judicial system, the body charged with finding the facts in this case is the District Court. Appellate courts should not lightly interfere in this area.
- (f) An appellant who invokes a right to appeal under s 34 of the Act must recognise that this Court is not conducting a retrial on the written record. An appellant must articulate clearly and precisely in what respect or respects the decision appealed from is said to be unreasonable and why, after making proper allowance for the points made above, the decision should nevertheless be set aside.

Reliance by the District Court on character references

[39] In the present case, Judge Cunningham took into account references supplied to the Court on behalf of the respondents, testifying to their good character. These were written by a neighbour; a local Member of Parliament; and an Auckland Council local board member.

[40] The writers of those letters were not called to give evidence. While the appellants complain about that, s 30 of the Act permits a court to receive any evidence that would not otherwise be admissible in a court of law, if the court is satisfied that the admission of the evidence is required in the interests of justice. The character evidence was opinion evidence and hearsay which would not ordinarily be admitted in court proceedings. But it was germane to the issues and not readily susceptible to cross-examination. I do not consider it was unjust of the Judge to receive the character references and hold she was entitled to take them into account.

Discussion of credibility point

[41] The Judge did not rely solely on the character references but also had Mr Mayes's demeanour and presentation at the hearing before her. Judge Cunningham said that on the basis of what she had seen and read she would be greatly surprised if Mr Mayes would deliberately lie in Court.

[42] Mr and Mrs Mayes, Mr Xu and Ms Jiang gave evidence in chief and were cross-examined at the hearing. I am satisfied that Judge Cunningham will have benefited from seeing and hearing from the parties when she formed her views as to credibility. Mr Mitchell's analysis of the evidence does not persuade me that Judge Cunningham was wrong to find the evidence of the respondents more credible than that of the appellants.

Was the Judge correct to find on a balance of probabilities that the alleged incidents occurred?

[43] In her discussion of the evidence and the allegations and counter-allegations made by the parties, the Judge observed that there were a number of people involved in the neighbourhood dispute over the use of the driveway. She noted that it appeared that each owner of a property for which access was provided by the driveway was permitted such access to their own house or property by driving a car up the driveway and observed that it was a reasonably wide area. Each of the properties appeared to have garaging for at least two vehicles but it was acknowledged that visitors would also use the driveway to access the four properties along it and there were occasions on which visitors would stop their vehicles momentarily on the driveway before departing.

[44] The Judge held, however, that because of the "unclear" legal situation and the nature of the allegations made by the witnesses, she was unable to determine whether any of the things done by any of the parties in relation to the use of the driveway itself could be described as harassment. The Judge said it was clear that Mr and Mrs Mayes felt harassed by the number of times they were required to "educate" visitors about what they could and could not do in relation to the driveway and got the impression that they complained about any use of the driveway that they did not feel fitted strictly with the legal use of it as they believed that to be.

[45] The Judge said that she would confine her consideration of whether there had been harassment justifying the making of a restraining order to alleged occasions on which Ms Jiang threatened to kill either or both Mr and Mrs Mayes (first on 24 March 2013 and second on 10 April 2013); to the allegation that Mr Xu punched Mr Mayes in the head on 24 March 2013; and the allegation that whenever Mrs

Mayes went down to the letterbox or the end of the driveway near the street to collect the rubbish bin, Mr Xu came out of the house, in Mrs Mayes's words "running up" behind her.

The alleged threat to kill on 24 March 2013

[46] The evidence established that on 24 March 2013 Mr Mayes was in the driveway repainting the "no parking" sign. It was not disputed that Ms Jiang then came into the driveway with a tin of paint and painted over the writing Mr Mayes had just previously repainted. In her evidence, Mrs Mayes said that Ms Jiang became abusive and was yelling in her face "and every word was 'f'". Mrs Mayes says that she and Mr Mayes were forced away and she had to leave her shoe behind as "it was so horrible". She says that Ms Jiang threatened to kill her by saying "I'll f-en kill you", although Mrs Mayes did say that at the time Ms Jiang was speaking in her own language. This evidence was supported by Mr Mayes. He said that he was not sure whether Ms Jiang had sworn when she threatened to kill the respondents, but he said she certainly said "I'll kill you".

[47] The threats to kill were denied by both Mr Xu and Ms Jiang, although Mr Xu did not deny that the alleged incidents occurred at all, just that they did not occur as alleged by the respondents. Mr Xu did say, however, that he did not really hear what Ms Jiang had said.

[48] There were no independent witnesses to the incidents in March and April 2013. In the District Court, however, the respondents filed a number of photographs taken on 24 March 2013. They show both Mr Xu and Ms Jiang in the driveway; Ms Jiang is holding the hand of her young daughter. The photographs show Ms Jiang painting over the sign and they also appear to show her in an agitated and confrontational state. One of the photographs shows both Mr Xu and Ms Jiang very close to Mr Mayes and they both appear to be confronting him. The Judge noted that the respondents called the Police following the confrontation on 24 March.

[49] In light of the consistent evidence of both Mr and Mrs Mayes; the photographs taken on 24 March 2013; and the credibility findings made by Judge Cunningham, I am satisfied the Judge was entitled to find on a balance of probabilities that a threat to kill was made.

The alleged punch by Mr Xu on 24 March 2013

[50] In relation to the alleged punch, Judge Cunningham had to make an assessment based on the differing accounts she heard. The evidence of Mrs Mayes was that she saw Mr Xu hit Mr Mayes around the head with a closed fist. Mr Mayes said that Mr Xu became agitated and punched him on the side of the head. Mr Xu denied hitting Mr Mayes, saying “I suppose I never do this to some older man”.

[51] It was suggested that Mr Mayes himself hit Ms Jiang on the chin with his shoulder. However, Mr Mayes denied this, saying that it was “totally untrue”.

[52] On these issues also the Judge’s finding turned principally on her view as to the credibility of the witnesses. I am not persuaded by the appellants that the Judge was wrong to conclude, on balance, that Mr Xu punched Mr Mayes, and that Mr Mayes did not retaliate against Ms Jiang as alleged.

The threat to kill on 10 April 2013

[53] The Judge did not closely analyse the evidence related to the allegation of a further threat to kill on 10 April 2013, simply expressing the conclusion, based on her assessment of the relative credibility of the witnesses, that Ms Jiang made another threat to kill at the time of the later incident. There was evidence supporting this conclusion and I am not persuaded I should overturn it.

The “following” incidents

[54] The allegation of harassment by Mr Xu in following Mrs Mayes up the driveway on several occasions asserted that he did so deliberately and not merely coincidentally. The Judge found it significant that on some occasions when Mr Xu has acted in that way he has still been eating his food. The impression drawn by the

Judge was that whenever Mr Xu saw Mrs Mayes at the end of the driveway which is near his house at number 21A St Lukes Road, he would come out onto the driveway and that Mrs Mayes found that intimidating and unnerving.

[55] Mr Mitchell accepted that harassment may exist in the way lawful acts are performed or undertaken, citing *Irvine v Edwards*.⁹ He submitted, however, that if the act of Mr Xu walking on his driveway as alleged was proved, despite his denials, Mr Xu was following a lawful purpose in walking on his own driveway. In such circumstances and because of the consequences of a restraining order, Mr Mitchell submitted that the evidence should be thoroughly tested before it could found an order based on such allegations.¹⁰

[56] There was no close analysis of the evidence by Judge Cunningham but the Judge did refer to both Mrs Mayes's description of what she said occurred and Mr Xu's denial of it and decided the issue on the basis of her credibility findings. She could have done little more given that there was no corroborating evidence, one way or the other, and bearing in mind also that the Judge was not required to find the allegations proved beyond reasonable doubt. I am satisfied that the Judge was entitled to find the manner in which Mr Xu followed Mrs Mayes up the driveway, notwithstanding that Mr Xu was lawfully entitled to be there, was capable of amounting to harassment in the circumstances.

Did the Judge's findings of fact justify a finding of harassment?

[57] Having determined that Mr Mayes was assaulted on 24 March 2013; that Ms Jiang made threats to kill on 24 March and 10 April 2013; and that Mr Xu had taken to following Mrs Mayes to the letterbox whenever he saw her out on the driveway, the Judge had no difficulty concluding that the conduct was such as to cause a reasonable person to become distressed and fear for their safety. She noted that in this case Mrs Mayes said she no longer goes down to the bottom of the driveway because of the "following" and that Mr and Mrs Mayes no longer go to their neighbours' property to discuss the issues relating to the use of the driveway.

⁹ *Irvine v Edwards* [1999] DCR 171.

¹⁰ *Todd v Tuhi* [2009] NZFLR 89.

The Judge noted that the following of Mrs Mayes to the letterbox was a specified act in terms of s 4(1)(b) of the Act and that the incidents of the threats to kill and the assault were specified acts in terms of s 4(1)(f).

[58] Given the nature of the Judge's findings as to what had occurred, the conclusion that a reasonable person would have feared for their safety was inevitable and I am not persuaded I should set it aside.

Was the Judge right to make a restraining order?

[59] The Judge was satisfied that the criteria for the making of a restraining order set out in s 16 of the Act were met in that she had held:

- (a) that the appellants had harassed Mr and Mrs Mayes;
- (b) that the behaviour caused Mr and Mrs Mayes to fear for their safety and that it would do so to a reasonable person; and
- (c) that the making of a restraining order was necessary to protect Mr and Mrs Mayes from further harassment.

[60] Because the disputed issues about the use of the driveway had not been resolved between the parties, the Judge considered that there was a risk of further incidents unless restraining orders were made. In the absence of the appellants' acceptance that they had acted in the manner found by the Judge, and without any assurances there would be no repetition, that conclusion was open to the Judge and I am not persuaded to disturb it.

The terms of the restraining order

[61] The Judge granted the restraining order with standard conditions. The standard conditions are as follows:

The respondents,¹¹ and any associated respondent, must not –

- (a) Do, or threaten to do, any specified act (set out below) to the protected persons; or
- (b) Encourage any person to do any specified act to the protected persons, where the act, if done by the respondents or any associated respondent, would be prohibited by this order.

A “specified act” is any one of the following acts:

- Watching, loitering near, or preventing or hindering access to or from, the protected persons’ place of residence, business, employment, or any other place that the protected persons frequent for any purpose; or
- Following, stopping, or accosting the protected persons; or
- Entering, or interfering with, property in the possession of the protected persons; or
- Making contact with those persons (whether by telephone, correspondence, or in any other way); or
- Giving offensive material to the protected persons, or leaving it where it will be found by, given to, or brought to the attention of, those person; or
- Acting in any other way –
 - That causes the protected persons to fear for their safety; and
 - That would cause a reasonable person in that person’s particular circumstances to fear for their safety.

A specified act is regarded as being done to the protected persons if –

- (a) It is done to a person with whom the protected person is in a family relationship; and
- (b) The doing of the act is due wholly or partly to the protected person’s family relationship with that person.

Are the terms of the restraining order too wide?

[62] It can be seen that the standard conditions set out above do not easily accommodate a situation in which a person against whom a restraining order is made lives in close proximity to the person for whose benefit the order is made. As is evident from the Judge’s findings on the “following” allegations, it is the manner in

¹¹ Reflecting the wording of the Act, the reference to “the respondents” in the order and the conditions is to the persons against whom the order is made; namely, Mr Xu and Ms Jiang.

which Mr Xu behaved in what otherwise might be the pursuit of a lawful purpose which has caused Mr and Mrs Mayes to fear for their safety. But Mr Xu and Ms Jiang must be free to act as they normally would in carrying out normal daily activities in and around their home.

[63] Further, strict adherence to the orders made would prevent the parties from meeting to reconcile their differences, if that should be possible. The Judge certainly felt that that was a course which should be encouraged.

[64] Mr Mitchell conceded, correctly in my view, that the powers of the Court under ss 20 and 22 of the Act to impose or vary special conditions does not extend to authorising the Court to remove the standard conditions. I agree with him, however, that special conditions may be imposed so as to modify or supersede the standard conditions when read together.

[65] In *Beadle v Allen*,¹² the High Court imposed a special condition providing that the restraining order would not prevent the appellant who was the subject of the order from communicating with certain organisations for a specific purpose when such communications would otherwise have been in breach of the order.

[66] I am satisfied that the standard conditions, if left unmodified, are too wide and that the special conditions proposed by Mr Mitchell, with minor amendments, are reasonable. Contrary to Mr and Mrs Mayes's submissions, I do not consider the modifications will render the standard conditions worthless.

Result and orders

[67] Accordingly, I allow the appeal in part, but only to the extent that the standard conditions imposed by the District Court Judge need modification. I add the following special conditions to the restraining order, namely:

- (a) The following conduct by the respondents shall not be in breach of this restraining order, despite the standard conditions imposed:

¹² *Beadle v Allen* [2000] NZFLR 639 (HC) at [75].

- (i) Using the driveway providing access to the respondents' property at 21A St Lukes Road, Mt Albert, for the purpose of gaining access to their home, checking their mail, retrieving their rubbish, maintaining their property, and welcoming all visitors, whether or not Mr and Mrs Mayes are on the driveway;
 - (ii) Being near the residence at 19 St Lukes Road, Mt Albert, or watching Mr and Mrs Mayes, provided the respondents do not enter the property at 19 St Lukes Road.
 - (iii) Communicating with Mr and Mrs Mayes by mail or email, if the communication is for the purpose of attempting to resolve the differences between the respondents and Mr and Mrs Mayes concerning the use of the driveway that services the properties at 19 and 21A St Lukes Road, Mt Albert.
 - (iv) After obtaining Mr and Mrs Mayes's consent in writing, having further contact, including meeting in person, for the purpose of attempting to resolve the said differences.
- (b) If either respondent and Mr or Mrs Mayes are on the driveway at the same time, the respondents are not to attempt to engage in conversation with Mr and Mrs Mayes on the driveway and are to keep a reasonable distance between themselves and Mr and Mrs Mayes to ensure there is no physical contact between them.

Costs

[68] Costs are reserved, but I indicate that it is my tentative view that, since both the appellants and the respondents have succeeded in part, costs should lie where they fall.

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Toogood J