IN THE HIGH COURT OF
NIUE (Civil Division)

Application No: CV18/11

IN THE MATTER GRAHAM MARSH

AND PAESE MCMOORE

Decision

Introduction

[1] This is an application filed by Graham Marsh under s 71 Niue Act 1966, seeking an order to have the Public Works Department cut down a kapok tree situated on land owned by his neighbour, Paese Moore.

[2] The application is brought on the basis that it is a danger and that a flowering kapok tree amounts to a private nuisance causing damage to his house by blocking his guttering , window screens and water tanks, and generally interfering with the peaceful enjoyment of his property.

[3] The kapok tree is approximately 10years old, 20 metres high, 1 metre round and it flowers once a year. The fluff from these trees is used for making pillows, stuffing mattresses, constructing dugout canoes for fishing and is a food source for birds and fruit bats.

[4] There is some history between these two neighbours. In 1999 a Court order granted the applicant permission to construct a road across the respondent's property, providing access his own property. The respondent was not to interfere with the road, and the applicant was not to break, touch or damage any trees or plants on the respondent's property. This was referring to some coconut trees situated near the proposed road, though they were not specified in the order.

[5] The present application has renewed the tension between the parties.

The Applicant's case

[6] Counsel for the applicant submits that their claim under the tort of private nuisance raises an issue that is separate to the 1999 Court order because the flowering kapok is causing damage to the applicant's house and property, interfering with his quiet and peaceful enjoyment of his property.

[7] It is also considered a danger because if it topples in a cyclone then it could fall on their house.

[8] It is further submitted that if the Court order of 1999 applied it would only prevent a member of the Marsh family from entering the respondent's property to cut down the tree, and not the Public Works Department.

[9] The respondents relied on the precedent of *Bone v Seale* and *Ognus v Richardson*, as well as the *Text on Torts* by Michael Jones to support their claim of private nuisance.

[10] The applicant has stated that he is prepared to cover the costs incurred by the Public Works Department should he obtain an order to cut down the tree.

[11] The applicant's acknowledge that the kapok tree is a traditional tree, but it is an imported species, and they allege that it is no longer used for the same purposes that it once was.

[12] The applicant's wrote to the respondent on 20 September 2011, requesting removal of the tree. The respondent has not replied which is considered unreasonable by the applicant.

The Respondent's case

[13] The Respondent submits that the kapok tree is an important, natural resource and there are few remaining on Niue. It aids in reducing the importation of synthetically manufactured goods to Niue.

[14] The kapok tree is located near unmarked graves and its removal risks disturbing them.

[15] The respondent referred to *A Text Book on Torts* by Michael Jones, when defining what constitutes an interference with a claimant's comfort or convenience. The applicants rely on the case of *Bone v Seal,* which states that interference can occur because of smell. The respondents submit that this renders the applicants application inappropriate. However the respondents also acknowledge that there are other cases that establish that it can be caused by dust, vibration, noise or even using premises as a brothel or a sex shop.

[16] The respondent also submits that the applicant's property lies to the north of the kapok tree, and as the predominant wind is a North-East wind, their property is not substantially affected. No other adjoining houses have made any complaints about the fluff.

[17] The respondent refers to the history between the two parties, and an already tense relationship. They have already been to Court in 1999, and then in 2000 when a complaint was made by Mrs McMoore to the Police after the applicant destroyed trees on her land, exacerbating the situation.

[18] The respondent claims that in this case the principle of res judicata applies as the matter of damaging trees on her property was dealt with in 1999 and cannot be raised again.

[19] The respondent refers to the applicant's right of abatement, and states that if the branches were overhanging, then she has no issue with the applicant removing them, so long as they do not enter her property to do so.

Discussion

[20] In this case there are two issues to determine:

i. Does the principle of res judicata apply?

ii. Is there a case for private nuisance?

Does Res Judicata Apply?

[21] At the Court hearing on 14th November 2011 I asked the parties to consider the principle of res judicata and having regard to the 1999 case.

[22] The 1999 order stated:

i. Mrs P McMoore not to interfere with the road to Nooroa's resident.

ii. Mrs Nooroa and family not to break, touch etc, any plants or trees at Mrs Paese McMoore's land.

iii. Any damage caused by anyone of the two applicants should be taken to the Police Department, but not to the Land Court.

[23] This case pertained to trees being cut down for the construction of a roadway and was directly linked to that issue.

[24] The general rule for the application of res judicata is that the matter has been previously adjudicated upon between the same parties suing in the same right.[1]

[25] This prevents the re-agitation of issues which have been determined and is essentially an objection to the resurrection of issues, rather than to the admissibility of evidence.[2]

[26] In this case, while the parties are arguing over trees, the issues are quite different. In 1999 the issue was the removal of trees to construct a roadway. The present issue involves a kapok tree interfering with the quiet enjoyment of the applicant's property.

[27] As a result, I find that the principle of res judicata does not apply in this instance.

Is there a case for Private Nuisance?

[28] A private nuisance is an unlawful and unreasonable interference with an occupier's use and enjoyment of land or of some right over, or in connection with it.[3]

[29] The function of private nuisance is to strike a balance between the occupier's right to use their land as they see fit, and the neighbour's right to quiet enjoyment of their property. For there to be an actionable nuisance, there must be a "finding of fact from the trial judge,

---

[1] Spiller, P. "Butterworth's New Zealand Legal Dictionary", 6ed, 2005, LexisNexis.
[2] *In re Medical Practitioner* [1959] NZLR 784, 791.
[3] Spiller, above n 1.

following from the balancing of conflicting interests".[4] The level of annoyance and interference must be substantial and unreasonable and exceed the bounds of normal 'give and take' expected of neighbours.[5]

[30] Reasonableness can be ascertained by asking whether a reasonable person living or working in the particular area would regard the interference as unreasonable.[6] Time, duration and intensity of the interference are also considerations when assessing whether the level of annoyance is substantial or not.[7]

[31] The nuisance must be caused by an emission from outside the plaintiffs land, and must be caused by "an emanation, such as noise, dirt, fumes, a noxious smell, vibrations and suchlike".[8] There must be proof of actual or imminent harm.[9]

[32] Therefore there is an onus of proof on the applicant, to prove the elements, as set out above, exist.

[33] In considering these factors a balance must be struck between the respondent's right to have trees on her property, and also to protect the unmarked graves of her family, and the applicant's right to peaceful and quiet enjoyment of his property, without fear of danger from the tree falling or the annoyance of kapok fluff blocking their guttering.

[34] The question that arises is whether the flowering of the kapok is of a level that is so substantial and unreasonable that it exceeds the bounds of normal give and take that is expected of neighbours.

[35] The kapok tree only flowers once a year and prima facie, a tree that flowers once a year does not seem to be something that creates an unreasonable interference. There is no evidence of the length of time that the kapok flowers for, or how 'intense' the flowering actually is. There is also no evidence of the extent to which their guttering and window screens become blocked and how often it must be cleaned out or replaced, or the costs of carrying this out. Also, the respondent points out that the prevailing wind would generally blow the flowers away from the applicant's house.

---

[4] *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525.
[5] *Kennaway v Thompson* [1980] 3 All ER 329, 333 (CA) Lawton LJ.
[6] *Bank of New Zealand*, above n 4 at 531.
[7] Todd, S (ed) *The Law of Torts in New Zealand*, (Brookers Ltd, Wellington 2009) at 474.
[8] *Hunter v Canary Wharf* [1997] AC 655 (HL) at 685.
[9] Law of Torts, above n 7, at 462.

[36] While the tree is tall and could reach the house should it fall, there is no corroborative evidence that there is danger of this occurring. It is unreasonable to say this damage may exist in a cyclone because many trees and other objects could be affected or fall in a cyclone. The parties houses may even be blown down.

[37] Based on this lack of evidence it is difficult to draw the conclusion that there is a substantial or even unreasonable interference with the applicant's peaceful and quiet enjoyment. Substantial interference is a high threshold to meet and the applicant has in my view failed to meet this threshold.

Decision

[38] As a result of the above findings, the application for the removal of the kapok tree is dismissed.

Dated at Wellington this 10th day of February 2012.

JUSTICE WILSON W ISAAC