IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2020-441-021
[2021] NZHC 641

BETWEEN	PETER JAMES MALCOURONNE Appellant
AND	MARY JELENA O'NEILL Respondent

Hearing: 6 October 2020

Appearances: S K Keall for Appellant
P Ross for Respondent

Judgment: 26 March 2021

JUDGMENT OF CLARK J

Table of Contents

Introduction

[1] Since June 2018 Peter Malcouronne has lived with his partner and their children on Shakespeare Road, Napier. Ms O'Neill and her husband live next door. Although immediate neighbours the relationship between Mr Malcouronne and Ms O'Neill has been far from neighbourly. In 2019 both parties applied under the Harassment Act 1977 (the Act) for a restraining order against the other.

[2] In an oral judgment delivered on 19 February 2020, Judge Harvey made an order against Ms O'Neill in favour of Mr Malcouronne and his partner, Ms Spicer.[1] The order was to last for two years. The Judge also made a restraining order against Mr Malcouronne to last for one year. The reason for the disparity in the duration of the orders was attributed to Ms O'Neill's "relentless and obsessive pattern of behaviour" which required a longer period of restraint than the order relating to Mr Malcouronne.[2]

[3] Mr Malcouronne appeals the District Court decision. The key issue raised by the appeal concerns the Judge's determination that Mr Malcouronne engaged in a pattern of behaviour that amounted to harassment under the Act. Mr Malcouronne also appeals the Judge's later decision in which he determined that costs should lie where they fall.[3]

The statutory scheme

[4] Before turning to the history between the neighbours, I set out the operative statutory provisions and the requirements that must be met before a court may make a restraining order.

[5] The object of the Act is set out in s 6:

> **6 Object**
>
> (1) The object of this Act is to provide greater protection to victims of harassment by—

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1 *O'Neill v Malcouronne* [2020] NZDC 2991 [*District Court decision*].
2 At [26].
3 *Malcouronne v O'Neill* [2020] NZDC 2814 [*Costs decision*].

(a) recognising that behaviour that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context; and

(b) ensuring that there is adequate legal protection for all victims of harassment.

(2) This Act aims to achieve its object by—

(a) making the most serious types of harassment criminal offences:

(b) empowering the court to make orders to protect victims of harassment who are not covered by family violence legislation:

(c) providing effective sanctions for breaches of the criminal and civil law relating to harassment.

(3) Any court which, or any person who, exercises any power conferred by or under this Act must be guided in the exercise of that power by the object specified in subsection (1).

[6] "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.

(3) For the purposes of this Act, a person also harasses another person if—

(a) he or she engages in a pattern of behaviour that is directed against that other person; and

(b) that pattern of behaviour includes doing any specified act to the other person that is one continuing act carried out over any period.

(4) For the purposes of subsection (3), **continuing act** includes a specified act done on any one occasion that continues to have effect over a protracted period (for example, where offensive material about

a person is placed in any electronic media and remains there for a protracted period

[7] As can be seen, the pattern of behaviour required by s 3(1) involves a person doing a "specified act" to the other on at least two separate occasions within 12 months.

[8] A "specified act" is defined in s 4:

> **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, electronic communication, 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:
>
> (ea) giving offensive material to a person by placing the material in any electronic media where it is likely that it will be seen by, 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).

[9] The power to make a restraining order is given by s 16 of the Act:

16 Power to make restraining order

(1) Subject to section 17, the court may make a restraining order if it is satisfied that—

(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.

(2) For the purposes of subsection (1)(a), a respondent who encourages another person to do a specified act to the applicant is regarded as having done that specified act personally.

(3) To avoid any doubt, an order may be made under subsection (1) where the need for protection arises from the risk of the respondent doing, or encouraging another person to do, a specified act of a different type from the specified act found to have occurred for the purposes of paragraph (a) of that subsection.

[10] In *Wallis v Rebolledo* Heath J distilled from the statutory provisions the following propositions:[4]

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4 *Wallis v Rebolledo* [2017] NZHC 2565, (2017) NZFLR 832 (footnotes omitted).

[9] …

(a) The object of the Act is to provide greater protection to victims of harassment who are not able to obtain protection orders under the domestic violence legislation. This object is achieved by:

(i) Enlarging the type of behaviour beyond "domestic violence" (as defined in the Domestic Violence Act 1995) to ensure protection is available to someone who is not in a defined domestic relationship; and

(ii) Extending the scope of unacceptable behaviour (including what might otherwise be regarded as innocuous or trivial in nature), which is of a kind that requires a protective order to cover those who are not in a domestic relationship.

(b) The circumstances in which restraining orders may be made contain three distinct dimensions:

(i) The first involves words or conduct on the part of the person alleged to be harassing the other. These are the "specified acts" to which s 4(1) of the Act refers. These give rise to the pattern of behaviour required to establish harassment.

(ii) The second involves the effect of the alleged behaviour on the applicant for the restraining order. In short, the behaviour must be such as to cause distress to a reasonable person in the position of the applicant, or to threaten him or her.

(iii) The third is the statutory acknowledgement that while the first and second elements might be established, the Court must stand back and determine whether, in the circumstances of the particular case, a restraining order "is necessary to protect the applicant from further harassment".

[10] The Act is designed "to provide greater protection to victims of harassment" by ensuring adequate legal protection is available for such victims. In proceedings that have no criminal element, that objective is to be achieved by "providing effective sanctions for breaches of the … civil law relating to harassment". The question whether it is necessary to make a restraining order is informed by those objects.

Specified acts

[11] A specified act under s 4 means any of the acts set out in subs 1(a)–(ea). In addition to those acts, a specified act includes acting in any other way that causes a person to fear for his or her safety and would cause a reasonable person in those circumstances to fear for his or her safety.

[12] In *Beadle v Allen* one of the issues before the Court was whether subs (i) and (ii) which appear following (f), apply to all the specified acts in s 4(1). In other words, do all the specified acts in s 4(1)(a)–(ea) require a person to fear for their safety?[5] Her Honour declined to read in such a requirement noting that (f) introduced a final "wash-up category — 'acting in any other way'" which was qualified by the further requirement that the victim is caused to fear for their safety.[6]

[13] In *Mooney v Wilkinson* the Court reached the opposite conclusion.[7] It does not appear, however, that the Court in *Mooney v Wilkinson* was directed to *Beadle v Allen*. There is no reference to *Beadle* in the judgment.

[14] Mr Ross, for Ms O'Neill submitted that the conflict between the two High Court authorities is more apparent than real. Because of the definition of "safety", their approaches do not make much difference in this case. While Mr Ross preferred Potter J's approach, he submitted that it did not make a lot of difference to the appeal.

[15] As was Potter J, I am strongly inclined to the view that s 4(1)(a)–(ea) stands apart from s 4(1)(f). A specified act means any of the acts at (a)–(ea). Additionally, a specified act can be "acting in any other way … that causes that person to fear for his or her safety …".[8] I do not regard all of the specified acts at (a)–(ea) as requiring the further ingredient of fearing for safety.

Patterns of behaviour

[16] Findings of "specified acts", regardless of their frequency, are not themselves determinative of a finding of a "pattern of behaviour" constituting harassment under

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5 *Beadle v Allen* [2000] NZFLR 639 (HC) at [36]. I note that subs (ea) was inserted from 3 July 2015 by s 33(2) Harmful Digital Communications Act 2015 (2015 No 63). Therefore, placing material in any electronic media where it is likely to be seen was not, at the time of her Honour's judgment a "specified act" as defined by s 4(1). Her Honour's reasoning and determination of the point concerning the requirement to "fear for … safety", is unlikely to have been influenced by the enactment of subs (ea).

6 At [38].

7 *Mooney v Wilkinson* [2015] NZHC 2488.

8 Harassment Act 1977, s 4(1)(f).

the Act. In *Munro v Collection House (NZ) Ltd* the Court approached the interpretative exercise in the following way:[9]

> [34] The interpretation and application of that definition is coloured, first, by the expression "pattern of behaviour", which implies "a regular and intelligible form or sequence discernible in certain actions or situations; especially one on which the prediction of successive or future events may be based." It is coloured also by the object of the Act, which is to provide "greater protection to victims of harassment", and by the ordinary meaning of "harassment": "to trouble or vex by repeated attacks". So, for example, merely stopping, or making contact with, a person twice within a period of 12 months would not usually be sufficient to constitute harassment which satisfies the first criterion of s 16(1) for the making of a restraining order.

[17] Similarly, the Court in *Mooney v Wilkinson* noted:[10]

> [27] The second and related point is that the definitions of "harassment" and of "specified act" contemplate the existence of a bright line between the actor (Person A, the harasser) and the person who is the unwilling object of Person A's attentions (Person B, the harassed). Harassment is not intended to encompass what is essentially some form of dialogue and mutual contact between Persons A and B, however fractious that contact might be.

Background facts

[18] The documents and papers filed in the District Court exceeded 500 pages. During the course of the proceeding there were judicial conferences and a number of efforts were made to try and settle or resolve the differences between the parties. Prior to the beginning of the hearing the Judge offered a first impression of the case having read and analysed the documents in some detail. He suggested a way through. The success of his suggestion depended though on a "mutuality of approach".[11]

[19] After a 15 minute adjournment Mr Malcouronne indicated he was prepared to accept the approach but it was not acceptable to Ms O'Neill. Accordingly, the matter proceeded. Shortly before 11 am on the second day of the hearing, all evidence had been called, legal arguments were concluded and the matter was adjourned until after the lunch break when the Judge indicated he would give his decision.

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9 *Munro v Collection House (NZ) Ltd* HC Auckland CIV-2010-404-8473, 10 June 2011 (footnotes omitted).

10 *Mooney v Wilkinson*, above n 7.

11 *District Court decision*, above n 1, at [8].

District Court's recitation of the incidents

[20] It is convenient to rehearse the background by reference to the District Court's extensive recitation of the facts. After referring to the relevant provisions and principles the Judge proceeded to identify "each and every incident" referred to in the affidavits and state whether or not it amounted to a pattern of behaviour or a specified act.[12] The Judge expressly did not refer to the evidence of four witnesses who filed affidavits on behalf of Mr Malcouronne. I return to this point at [108] below.

[21] The "sad relationship" started in June 2018 when Ms Spicer and Mr Malcouronne moved into their address in Shakespeare Avenue.[13] On that day there was a confrontation between Ms O'Neill, Ms Spicer and Mr Malcouronne.

[22] In August 2018 Ms Spicer had a discussion with Ms O'Neill and allegations were made about the former occupant of Ms Spicer's and Mr Malcouronne's home.

[23] Between 20 September and 24 September 2018 Mr Malcouronne was dropped off in front of Ms O'Neill's property. She remonstrated with him. Ms O'Neill attempted to record Mr Malcouronne's behaviour on 21 September 2018. There was yelling and Mr Malcouronne tried to stop Ms O'Neill from videoing him. The Judge considered the behaviour on the part of Ms O'Neill in recording and filming Mr Malcouronne's activities using her mobile phone was a specified act.

[24] On 24 September Ms O'Neill complained to Mr Malcouronne's employer, the Napier City Council, about Mr Malcouronne being dropped off in front of her address.

[25] Ms Spicer deposed to Ms O'Neill playing her radio loudly in the backyard. On 23 October 2018 at 6.15 am some garden implement, possibly a leaf blower, was being used outside the couple's bedroom window. Mr Malcouronne also deposed to an incident involving radio noise on 7 November 2018 while he was in the garden with his son.

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12 At [24].
13 At [25].

[26] On 1 December 2018 Ms Spicer replaced the flag left by the previous owner with the West Papuan "Morning Star" flag. During the night of 5 December 2018 someone entered Mr Malcouronne's property and cut down the flag. Ms Spicer asked Ms O'Neill via Facebook to return the flag or she would go to the Police. Mr Malcouronne admitted he removed the rubbish bag Ms O'Neill put out for collection but said it was for the purpose of examining whether or not the flag was in Ms O'Neill's rubbish. The Judge determined that the act of entering or interfering with Ms O'Neill's property amounted to a specified act.

[27] Following these incidents there was a report of Ms O'Neill banging items loudly outside their bedroom window at 6 am.

[28] The Judge referred to Mr Malcouronne's report of a neighbour advising him that Ms O'Neill had hacked several of the trees on his property while they were on holiday. The trees were badly damaged. The Judge characterised the evidence as hearsay.

[29] On 16 January 2019, Mr Malcouronne videoed Ms O'Neill from 8–10 metres away while she was using her hose when water restrictions were in force. This use of a recording device amounted, in the Judge's view to "watching" within s 2(1)(a) of the Act and therefore amounted to a specified act.[14]

[30] In January 2019 Ms O'Neill posted Facebook posts about Mr Malcouronne. On 31 January 2019 Ms O'Neill made a complaint about Mr Malcouronne to Oranga Tamariki. The Judge found her behaviour in making the complaint vexatious "and possibly even malicious to create difficulties for Mr Malcouronne and his wife".

[31] On 6 February 2019 Ms O'Neill came within a metre of Mr Malcouronne, filmed him and posted the video on Facebook. This was said to be offensive, and a specified act.

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[14] At [33].

[32] On 7 and 13 February 2019 there were complaints of repeated loud banging and dragging noises from Ms O'Neill's property outside Mr Malcouronne's and Ms Spicer's bedroom window before 7 am and at 12.30 am.

[33] On 3 March or in March 2019 Ms O'Neill said access to her property was blocked by a car and trailer.[15] The District Court decision records the incident may have involved the sale of a barbeque but in any event given the hostility between the parties it was interpreted as hindering access which was a specified act against Ms O'Neill by Mr Malcouronne.

[34] On 20 March and 23 March 2019 Ms O'Neill filmed Mr Malcouronne. Each incident amounted to a specified act of watching.

[35] On 25 April 2019 Mr Malcouronne and Ms O'Neill engaged in "tit for tat" filming and retaliatory filming involving what the Judge said he "could consider to be a specified act".[16]

[36] Ms O'Neill alleged Mr Malcouronne exposed himself to her. She took photographs showing Mr Malcouronne's top half and posted them on her Facebook page. The Judge said there was no indication Mr Malcouronne was naked. The photograph could have been doctored and he placed no reliance upon it but the act of posting the photographs amounted to a specified act.

[37] The Judge found further specified acts in Ms O'Neill's filming of Mr Malcouronne on 4 and 5 May 2019. She also filmed Mr Baxendale, a witness who gave evidence that when he delivered a hut to Mr Malcouronne's property and was assisted by the couple to unload it, Ms O'Neill started filming them. That was a further specified act.

[38] There were incidents on 7 and 12 June involving Ms O'Neill's car horn, a loud radio and the banging of an object on a metal frame.

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15 At [37].
16 At [39].

[39] Ms Spicer deposed to further excessive noise on 3 July 2019 involving the banging of an object on a wire frame.

[40] The Judge recorded that on 4 July when the parties came to court a statement was made to court staff that involved allegations reputationally harmful to Mr Malcouronne. These were indicative of the pattern of behaviour and hostility that characterised the proceeding.[17]

[41] On 7 July Mr Baxendale was again filmed. Mr Baxendale is a close family friend and had visited Mr Malcouronne and Ms Spicer on 7 July when they were preparing to take a trailer load of rubbish to the tip. His evidence was that Ms O'Neill filmed Mr Malcouronne from about four metres away.

[42] On 21 July when Mr Baxendale was helping Mr Malcouronne with spouting he noted Mr Malcouronne was being filmed. He said that at one point when Mr Malcouronne was talking to him, Ms O'Neill loudly told Mr Malcouronne to "shut up". I pause to mention that, consistent with his approach to the volume of evidence before him, the Judge referred to the paragraph references in Mr Baxendale's affidavit although did not describe the incidents in detail.

[43] On 4 August 2019 Ms O'Neill alleged on Facebook that Mr Malcouronne had stripped "completely naked in front of me exposing his private body parts". The Judge found the "grossly offensive" post amounted to a specified act and also a pattern of behaviour.[18]

[44] In August 2019 Ms O'Neill made complaints to the Napier City Council, Mr Malcouronne's employer, consistent with the "vexatious and malicious utilisation of public bodies that seemed to be a characteristic" of her behaviour.[19]

[45] On 27 August 2019 an AA officer, Mr McGrath, parked outside Ms O'Neill's address to assist Ms Spicer who was having difficulty with her vehicle. Ms O'Neill demanded the removal of Mr McGrath's vehicle. Mr McGrath indicated he would not

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17 At [44].
18 At [47].
19 At [48].

be long and that he would move on as soon as he had attended to his duties. Mr McGrath's evidence was that Ms O'Neill threw a 10 cm rock in his direction. It landed heavily in front of Ms Spicer's vehicle and broke into several pieces. One of the pieces bounced off the road and scratched the paintwork on Ms Spicer's vehicle. Mr McGrath told Ms O'Neill he was going to call the Police and report the incident. He took photographs to record the damage to Ms Spicer's vehicle, the rock and its location, and where his and Ms Spicer's vehicles were parked. The Judge was satisfied Ms O'Neill threw the stone although he emphasised that nobody actually saw Ms O'Neill throw it. He inferred from established facts "that the stone arrived, that it did not just fall out of the sky, that in fact it was thrown, it was directed towards the motor vehicles in question, that Ms O'Neill was nearby and that she was vexed by the treatment she was receiving from Mr McGrath and behaved accordingly".[20]

[46] Although not recorded by the Judge Mr McGrath gave evidence that he laid a complaint with the Police and provided them with the photographs he had taken including of Ms O'Neill reversing her car and leaving it parked immediately in front of his vehicle in what Mr McGrath believed was an attempt to block him in.

[47] Further incidents of banging noises and Ms O'Neill acting aggressively towards Ms Spicer in August and on 4 September 2019 were part of the pattern of behaviour to which the Judge had already referred.

[48] There was a further filming incident on 25 September 2019 involving Mr Malcouronne's children and a further Facebook post on 27 September 2019.

[49] On 23 November 2019 Ms Spicer witnessed Ms O'Neill stalking and filming Mr Malcouronne. On this occasion Mr Malcouronne called Ms O'Neill "a loser".

[50] On 2 December 2019 Ms O'Neill's radio was played so loudly that a neighbour across the road texted Ms Spicer about the "blaring radio". The children had difficulty getting to sleep. On 6 December 2019 when Ms Spicer returned home with her children Ms O'Neill brought her radio outside and played it loudly for several hours.

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[20] At [50]. These were the bases for the inference the Judge drew.

On 12 December 2019 Ms O'Neill drove very close to Ms Spicer, blasted her horn and later filmed her.

[51] Dr Peters, a friend of Mr Malcouronne and Ms Spicer visited them on 15 December 2019. She gave evidence of Ms O'Neill filming Mr Malcouronne pruning his trees.

[52] Having summarised the evidence of the incidents, the Judge turned to the issue of whether there had been a pattern of behaviour directed against each of the applicants. There was no doubt there had been—[21]

> … a pattern of behaviour on the part of Ms O'Neill involving noise, excessive use of radios, excessive intrusive use of filming and observation of the parties, offensive use of motor vehicles and generally offensive behaviour involving the utilisation of social media.

[53] The Judge was also satisfied there had been a pattern of behaviour on the part of Mr Malcouronne. He had contributed to the incidents in question—[22]

> … regularly … walked up and down, kept an eye on things, has behaved as he has said in an infantile and retaliatory manner. I consider that although the pattern of his behaviour has not been as intensive as that of Ms O'Neill, nevertheless it is a pattern of behaviour.

[54] The Judge then found in relation to Ms O'Neill that the pattern of behaviour included a specified act. He had detailed and specified those when he narrated the chronology.

[55] The Judge also considered that:[23]

> … there have been more than two specified acts on the part of Mr Malcouronne in filming and the involvement of his activity in taking the rubbish bag at least two and those specified acts took place within a period of 12 months.

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21 At [58].
22 At [59].
23 At [60].

District Court's conclusions

[56] The Judge was satisfied that:[24]

(a) all parties had been caused distress "particularly Ms Spicer, who suffers from anxiety" and had been caught up in the unfortunate matter as had Mr O'Neill;

(b) Mr Malcouronne's tit-for-tat behaviours had arisen as a result of "being pushed to the brink" by Ms O'Neill;

(c) Ms O'Neill too had suffered and her references in her evidence to hypertension had not been challenged; and

(d) the high degree of distress justified the making of an order.

[57] The Judged commented that:[25]

> … the behaviour of the parties has gone way beyond [infantile vendettas and mindless tit-for-tat] and in some cases the responses of both parties to incidents has been aggressive and provocative and the initial dislike that they have for each other has escalated from June 2018.

[58] The Judge continued in his next paragraph to discuss the parties' behaviours in terms that suggest a mutuality and equality in their hostility and responses to each other. The Judge reached the view that the degree of distress justified the making of an order.[26]

> … Without the making of an order the hostility between these parties will continue and is likely to escalate. In some respects, it appears that they have become conflict habitués and in my view this is particularly the case with Ms O'Neill. It is quite clear from the history of this matter that once things start to irritate Ms O'Neill her behaviour deteriorates and the steps that she takes escalate and it seems to me that when things go wrong with her interactions, they go very wrong indeed.

[59] The Judge added:[27]

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24 At [61].
25 At [62].
26 At [64].
27 At [65].

> … by the same token it is quite clear from the evidence that I have heard and read that Mr Malcouronne on occasions has behaved selfishly, spitefully and to a certain degree arrogantly, especially when it related to the use of parking facilities outside the property. It is my view that he was well aware of the hazardous nature of the street and he was quite uncompromising in his attitude in parking, even although for a short period of time. In my view that amounted to what could be a pattern of behaviour.

[60] Ultimately the Judge was satisfied that there had been a level of distress and the making of the order against Ms O'Neill was necessary to protect Mr Malcouronne and Ms Spicer from further harassment. The restraining order the Judge made was to subsist for two years and special conditions were imposed. Ms O'Neill:[28]

(a) was not to film, video, take photos or record any activities of Mr Malcouronne, Ms Spicer or their children;

(b) was to refrain from excessive or disturbing noise by any means whatsoever so to ensure the quiet enjoyment of their property by Ms Spicer and Mr Malcouronne;

(c) was not to make direct or indirect contact with Ms Spicer or Mr Malcouronne by any means whatsoever;

(d) was not to make indirect or direct contact with either Ms Spicer's or Mr Malcouronne's clients, business associates, or employer;

(e) was to immediately remove all images, comments, messages, videos or posts from any social media platform including, but not limited to Facebook or YouTube; and

(f) was to refrain from posting any images, comments, messages, videos or posts for the duration of the order.

[61] "By the same token" an order was made against Mr Malcouronne who was prohibited from doing or threatening to do any specified act against Ms O'Neill. The

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[28] At [70]–[72].

order was said to be "made for her protection".[29] The further restraints on Mr Malcouronne were virtually identical to the special conditions made in relation to Ms O'Neill. The duration of the order in Ms O'Neill's favour against Mr Malcouronne was to last for one year. As I stated at the outset, the reasons for the disparity were attributed to the "relentless and obsessive pattern of behaviour" on the part of Ms O'Neill. At least two years was given to Mr Malcouronne and Ms Spicer to have relief "both for themselves and for their children" and would allow Ms O'Neill to take steps to modify her behaviour towards her neighbours given that they lived in such close proximity.[30]

[62] For Mr Malcouronne's part, the Judge considered he needed "to cool off" and to focus his attention elsewhere. The period of one year would allow him to "modify his needling, infantile and retaliatory types of behaviour".[31] The Judge concluded:[32]

> … Rather than obsessively monitoring each other in the hope that there will be some minor infraction, the parties are advised to get on with their own lives and mind their own business. This case has dealt with neighbour hostility and conflict over a period of 20 months and it must end. As Judge Kozinski concluded in the case of *Mattel Inc v MCA Records Inc* the parties are advised to chill.

District Court costs decision

[63] In his costs decision the Judge described the situation as unusual: "[b]oth parties, it could be said have succeeded, but by the same token they have also lost".[33]

[64] At the beginning of the District Court hearing on 18 February 2020 the Judge suggested to the parties that they might like to consider having orders made by consent in each set of proceedings. Mr Malcouronne indicated he would be prepared to settle on that basis. In hindsight, that seems to me characteristic of the conciliatory and responsible position Mr Malcouronne has tended to adopt throughout. Ms O'Neill on the other hand would not. The Judge considered Mr Malcouronne's willingness to consent to the orders as having the potential to "spik[e] her guns" as far as the

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29 At [73].
30 At [75].
31 At [76].
32 At [76] (footnotes omitted).
33 *Costs decision*, above n 3, at [9].

proceeding against Ms O'Neill was concerned. As events had transpired Mr Malcouronne's application was successful but so was Ms O'Neill's. Therefore, costs lay where they fell.

The appeal

Grounds of appeal

[65] Mr Malcouronne appeals on the following grounds.

[66] First it is said that the Judge erred in finding that "on 3 or in March 2019" Mr Malcouronne blocked access to Ms O'Neill's property by a car and trailer and that this constituted a "specified act" under s 4 of the Act. Mr Malcouronne contends the Judge's account of the context and events was erroneous and contrary to the evidence.

[67] Next Mr Malcouronne says the Judge erred by finding that the acts on 16 January and 25 April 2019[34] constituted "specified acts" under s 4 because the findings:

(a) failed to take into account the context of the interaction between Mr Malcouronne and Ms O'Neill during the events in question;

(b) failed to consider whether the acts, taken in context, would cause reasonable fear to Ms O'Neill as required by the Act; and

(c) failed to take into account the object of the Act.

[68] It is also said the Judge erred in finding Mr Malcouronne displayed a "pattern of behaviour" and that his actions thus amounted to "harassment" under s 3. Mr Malcouronne says the Judge:

(a) failed to give due regard to the overall context and relationship between Mr Malcouronne and Ms O'Neill as reflected in the evidence of the witnesses; and

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[34] See [29] and [35] above.

(b) failed to consider whether Mr Malcouronne's actions were sufficiently repetitive to amount to a pattern of behaviour constituting harassment within the meaning of that term in light of the object and provisions of the Act.

[69] A further ground is that the Judge erred by failing to separately consider, and thus not give reasons, as to whether a restraining order was justified and necessary under s 16 of the Act.

[70] The final ground of appeal is that costs should have been awarded in favour of Mr Malcouronne and that the Judge erred by "drawing an equivalence" between the parties to determine that both were successful and unsuccessful and that costs should lie where they fall.

[71] Mr Malcouronne seeks to have the restraining order against him set aside.

Principles applicable to the appeal

[72] The appeal is a general appeal and proceeds by way of rehearing.[35] In these circumstances, the appellate Court must reach its own view on the merits "even where that opinion is an assessment of fact and degree and entails a value judgment".[36]

[73] Following the decision of the Supreme Court in *Austin, Nichols*, Heath J in *Wallis v Rebolledo* approached an appeal from a restraining order "on the basis of the need for a fresh evaluative assessment of the findings made in the District Court".[37] His Honour stated:

> [13] In *Surrey v Surrey*, notwithstanding the approach articulated by the Supreme Court in *Austin Nichols*, the Court of Appeal took the view that a challenge to a finding of "necessity" gave rise to an appeal against a discretionary decision, as opposed to one requiring re-evaluation. That is no longer the correct appellate approach. As Harrison J, for the Court of Appeal, said in *SN v MN*, the Surrey approach has not survived the later decision of the Supreme Court in *Kacem v Bashir*.

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35 Harassment Act, s 34 and High Court Rules 2016, r 20.18.
36 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, (2008) 2 NZLR 141 at [16].
37 *Wallis v Rebolledo* [2017] NZHC 2565, (2017) NZFLR 832.

[74] As did his Honour, I propose to undertake a fresh, evaluative assessment of the evidence in the District Court.

Grounds of appeal — "specified acts"?

First specified act: "watching"

[75] The Judge was satisfied that Mr Malcouronne had filmed Ms O'Neill, that this activity consisted of "watching" and was therefore a specified act. He stated:

> [33] On 16 January 2019 Mr Malcouronne videoed Ms O'Neill removing dog excrement. He denies that she was doing that but I am satisfied that he was videoing her and he also admits filming her whilst she was using her hose ostensibly to police her use of water during water restrictions. These incidents occur at page 3 of Ms O'Neill's affidavit, page 70 of the bundle of documents Mr Malcouronne's second affidavit, para 27. As I have said the use of a camera or a recording device in my view amounts to a watching within s 2(1)(a) Harassment Act and therefore amounts to a specific act.

[76] Mr Keall submitted that this incident occurred in the context of several acts of provocation by Ms O'Neill. Mr Malcouronne had returned home from holiday to see that their trees had been hacked and earlier their flag had been stolen.

[77] Under cross-examination Mr Malcouronne expressed his regret for recording Ms O'Neill:

> There are two incidents in all of my in the last 18 months that I have some regret for and one is filming you like that because I got you on a technicality. And it sounds petty and pathetic to do that and I'd never normally do that to anybody but I come home, the trees have been hacked, there was the extraordinary letters that you'd been sending to my employer, my friends had come from Wellington, they'd come to stay and they hadn't even parked their car up in front of our house and you jumped out and started filming them and so I was really —

[78] Mr Keall submitted Mr Malcouronne's candour was indicative of his moral values and amicability but instead of recognising this the Judge erred by regarding Mr Malcouronne's evidence as a concession. Mr Keall further submitted that in light of Ms O'Neill's provocations and despite Ms O'Neill's exasperation at the time, his filming of Ms O'Neill from a distance of eight to ten metres demonstrated restraint under the circumstances. After some 15 seconds Ms O'Neill had advanced aggressively towards him narrowing the gap between the two and thrusting her camera

in his face. Mr Keall submitted that against that background and in context, Mr Malcouronne's filming could not be regarded as constituting conduct that caused Ms O'Neill to fear reasonably for her safety, as required by *Mooney v Wilkinson*.

[79] The appellant has not established this ground of appeal. The Judge did not err in determining that the filming was "watching" and therefore was a specified act under s 4(1)(a). On the basis of my approach to s 4(1)(f) (discussed at [15] above) the specified acts at s 4(1)(a)–(ae) do not require the person to whom the act is directed to fear for their safety. It was not necessary, therefore, that Ms O'Neill should fear for her safety. Nor is it necessary when assessing whether an act is a "specified act" that the act be viewed in context. Section 4 is clear and prescriptive. A specified act means any of the acts that are described in subs (1).

Second specified act: blocking access

[80] The concern under this head is that the Judge appears to have regarded one event as involving two incidents. The Judge stated:

> [37] On 3 or in March 2019 there was an incident disposed [sic] by Ms O'Neill page 3, para 4.4, where a car and trailer blocked access to her property. She says Mr Malcouronne said, "Don't move it" and that he yelled at her. It seems to me that this may have been an incident involving the sale of a barbeque. It is difficult to determine but certainly the blocking of access by a car and trailer given that there was obviously a developing hostility between the parties can in my view be interpreted as possible hindering of access which is a specified act against Ms O'Neill by Mr Malcouronne.

[81] Having determined that the car and trailer hindered Ms O'Neill's access and that this was specified by Mr Malcouronne, the Judge's next paragraph describes an incident on 20 March 2019 involving the sale of a barbeque and Ms O'Neill being engaged in an act of filming (which amounted to a specified act of "watching").[38]

[82] The evidence shows there was only one incident involving the sale of a barbeque.

[83] On 20 March 2019, an unrelated third party came to Mr Malcouronne's address to pick up a barbeque listed on Trade Me. He was not given parking instructions by

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[38] *District Court decision*, above n 1, at [38].

Mr Malcouronne but parked his vehicle in front of Ms O'Neill's property as there was nowhere else to park.

[84] Mr Keall handed up a roadmap of the area showing the addresses at 80–87 Shakespeare Road. Mr Malcouronne's property is two houses from the T-intersection where Shakespeare Road meets France Road. As one rounds the corner towards Mr Malcouronne's address there are yellow lines preventing any parking until 82 Shakespeare Road, which is Mr Malcouronne's address. Parking in the narrow street is at a premium. It will be remembered that the AA officer himself was unable to park outside Ms Spicer's home when she needed assistance for her car. Ms O'Neill's own evidence was that the entrance to her house was blocked by another person's car and trailer. Mr Malcouronne's evidence was that upon arrival, the purchaser of the barbeque stated he had double parked outside Ms O'Neill's address and put his hazard lights on as there was nowhere else to park. As the two men loaded the barbeque onto the trailer Ms O'Neill began to film them at which point Mr Malcouronne said to her "you call yourself an environmental consultant? This guy is doing a good thing for the planet — he is saving this from going to landfill".

[85] On close examination of the evidence, I do not consider the parking amounts to a specified act on the part of Mr Malcouronne. While a specified act can include "loitering" near a person's place of residence, the car was parked outside for a matter of minutes and Mr Malcouronne explained it was not blocking the entrance to the property. That evidence was not challenged. In any event, the parking was for a legitimate purpose. Section 17 provides:

> **17 Defence to prove that specified acts done for lawful purpose**
>
> A specified act cannot be relied on to establish harassment for the purposes of section 16(1)(a) if the respondent proves that the specified act was done for a lawful purpose.

[86] Cooke J explained the function of the section in *C v L*:[39]

> …in my view whether a person is pursuing a "lawful purpose" is not limited to acts that are expressly authorised as a matter of law (by a statute or otherwise). It may also encompass steps that can be regarded as legitimate to

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[39] *C v L* [2019] NZHC 485 at [52], cited with approval in *Turner v Ikeda* [2020] NZHC 149; and *Jones v Wallace* [2020] NZHC 1721.

> take. It is the purpose of the relevant act, and whether that purpose is lawful that is the focus. The reference to that purpose being "lawful" seems to me to encompass purposes that are legitimate.

[87] The unchallenged evidence in relation to the parking incident shows:

(a) There was one incident involving the sale of a barbeque.

(b) On 20 March 2019 the purchaser of Mr Malcouronne's barbeque, sold on Trade Me, arrived to pick it up.

(c) He parked (double parked in fact) outside Ms O'Neill's property but he did not block her garage.

(d) When the purchaser told Ms O'Neill he would not be long, and as Mr Malcouronne assisted him in tying the barbeque onto the trailer Ms O'Neill began to film them.

[88] The action of the third party in parking outside the O'Neill's property for the purpose I have described, does not amount to a specified act on the part of Mr Malcouronne.

Third specified act: "retaliatory filming"

[89] On the basis of Ms Spicer's own evidence, the Judge described Mr Malcouronne and Ms O'Neill engaging "in a tit for tat behaviour", each filming the other on 25 April 2019.[40]

[90] Mr Keall submitted Mr Malcouronne's filming took place against a backdrop of sustained provocation by Ms O'Neill. I will address that point in the next part of my judgment. The salient point it seems to me is that the Judge stopped short of making a finding that the filming on 25 April 2019 was a specified act by either Ms O'Neill or Mr Malcouronne. In contrast with his rather more specific findings that a specified act had occurred, in relation to this incident the Judge simply referred to Ms Spicer's affidavit evidence and added both parties were "involved in what I could

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[40] *District Court decision*, above n 1, at [39].

consider to be a specified act".[41] Whether this was observational or conclusive is not at all clear. Nevertheless, I proceed to the next stage of the analysis on the basis that the Judge made a firm finding that Mr Malcouronne's and Ms O'Neill's simultaneous filming of each other on 25 April 2019 was a specified act by each party.

Ground of appeal — pattern of behaviour amounting to harassment?

[91] The question is whether the specified acts in which Mr Malcouronne engaged amount to harassment.

[92] The specified acts that are relevant to this analysis are the following:

(a) removing Ms O'Neill's rubbish bag on 6 December 2018;[42]

(b) recording Ms O'Neill hosing on 16 January 2019;[43]

(c) blocking access to Ms O'Neill's property in March 2019;[44] and

(d) tit for tat filming on 25 April 2019.[45]

[93] I have reached conclusions on all but the rubbish bag incident because the argument on appeal in relation to that matter focussed less on whether it was a specified act and more on whether it showed a pattern of behaviour. The rubbish bag incident is discussed below at [100]–[107].

[94] I have viewed 50 plus videos included in the evidence. It was a dispiriting experience but helpful in two respects. A large number of the clips were extracted from the O'Neills' CCTV footage. The videos give a good sense of the proximity of the parties' homes to their common boundary. The O'Neills' property is accessed through a gate at street level and then steps — some 20 to 30 — up to their door. The CCTV camera is positioned in such a way that it takes in their steps, and the road. I

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41 At [39].
42 See above at [26].
43 See above at [29].
44 See above at [33].
45 See above at [35].

should not refer to a single security camera. In oral testimony Mr and Ms O'Neill refer on multiple occasions to their very many high-resolution cameras with sound recording capability, including cameras facing and recording the area in front of their property. Ms O'Neill said there were 18 cameras. An example of the use to which the cameras are put emerged during Ms O'Neill's cross-examination of Ms Spicer when Ms O'Neill:

> … are you aware every time I meet you on the street, that I review video footage around you and saved in the case you going to come up with the false evidence against me? Now you are aware.

[95] The many videos Ms O'Neill has taken over the years of comings and goings at street level give a clear sense of the width of the street, its layout and the available parking.

[96] Harassment occurs when a person engages in a pattern of behaviour directed against another person "being a pattern of behaviour *that includes* doing any specified act to the other person in at least two separate occasions" within 12 months.[46] The emphasis is mine. The fact there may have been specified acts on at least two separate occasions does not, of itself, constitute "harassment" for the purposes of the Act. As Harrison J put it in *Todd v Tuhi*:[47]

> [The Judge] omitted the critical intermediate step of requiring proof of the requisite pattern of behaviour. The existence of two specified acts is no more than a precondition to jurisdiction. The subsequent pattern of behaviour must include but is not circumscribed by the two acts. The Court must consider a pattern; something that is sufficiently repetitive to establish the requisite behavioural trend to constitute harassment …

[97] To similar effect is the following statement of Toogood J in *Munro v Collection House (NZ) Ltd*:[48]

> [34] The interpretation and application of that definition is coloured, first, by the expression "pattern of behaviour", *which implies "a regular and intelligible form or sequence discernible in certain actions or situations; especially one on which the prediction of successive or future events may be based."* It is coloured also by the object of the Act, which is to provide "greater protection to victims of harassment", and by the ordinary meaning

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46 Harassment Act, s 3 set out above at [6].

47 *Todd v Tuhi* [2009] NZFLR 89 (HC) at [31].

48 *Munro v Collection House (NZ) Ltd* HC Auckland CIV-2010-404-8473, 10 June 2011 (footnotes omitted).

> of "harassment": "to trouble or vex by repeated attacks". So, for example, merely stopping, or making contact with, a person twice within a period of 12 months would not usually be sufficient to constitute harassment which satisfies the first criterion under s 16(1) for the making of a restraining order.
>
> (emphasis added)

[98] The words which I have emphasised were sourced to the Oxford English Dictionary.

[99] *Munro v Collection House* was cited in *Mooney v Wilkinson*,[49] in which the Judge added:[50]

> The second and related point is that the definitions of "harassment" and of "specified act" contemplate the existence of a bright line between the actor (Person A, the harasser) and the person who is the unwilling object of Person A's attentions (Person B, the harassed). Harassment is not intended to, and in my view does not, encompass what is essentially some form of dialogue or mutual contact between Persons A and B, however fractious that contact might be.

The rubbish bag incident

[100] In relation to the cutting down of Ms Spicer's and Mr Malcouronne's flag the Judge said:

> [31] There was some concern at this time about the activity of Mr Malcouronne in going through a rubbish bag that had been put out by Ms O'Neill. … Mr Malcouronne admits that the rubbish bag was stolen. He admits that he removed it. He explains that it was for the purpose of having it examined to ascertain whether or not the flag which had been mysteriously removed was in Ms O'Neill's rubbish. It was not. I am of the view that that involves entering or interfering with Ms O'Neill's property and would amount to a specified act.

[101] The relevant evidence is that Mr Malcouronne took the rubbish bag. When cross-examined by Ms O'Neill he clarified that he did not search the rubbish. But he acknowledged he took the rubbish bag and added that he was prepared to say he was sorry for that. Ms O'Neill did not challenge Mr Malcouronne's evidence that he did not search the rubbish bag. When he clarified with the Judge that he had taken but not searched the rubbish the Judge said, "all right, well that's enough".

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49 *Mooney v Wilkinson*, above n 7, at [16].
50 At [27].

[102] Both Ms Spicer and Mr Malcouronne believed that the person responsible for cutting down their flag was Ms O'Neill. The reason for that belief was that on 4 December 2018 Ms O'Neill sent a three-page email to Mr Malcouronne's employer, the Napier City Council, complaining about the flag and flagpole. The Council brought the letter to Mr Malcouronne's attention. I agree with Mr Keall's characterisation of the letter as "extraordinary". In her letter Ms O'Neill claimed that the previous owner erected the flagpole which she used to reach Ms O'Neill's house and disable their CCTV cameras. I choose not to repeat in this judgment Ms O'Neill's contentions about the previous owner. Suffice it to say that the flagpole, and flag itself, caused Ms O'Neill intense displeasure, as did many aspects of her neighbours'' presence which Ms O'Neill documented in her letter. Ms O'Neill's brought to Mr Malcouronne's attention.

[103] Acting on their understanding that Ms O'Neill was responsible for cutting down the flag, on 6 December Ms Spicer contacted the Police to ask if they would collect Ms O'Neill's rubbish bag before the early morning collection on 7 December.

[104] Ms Spicer and Mr Malcouronne said they were acting on the advice they received that it was not illegal to remove someone's rubbish bag once it had been put out for collection and that if they took the bag the Police would come and search it. Accordingly, Mr Malcouronne took the rubbish bag. The Police searched it but the flag was not inside. That evidence was not challenged.

[105] Mr Malcouronne did not attempt to argue in the District Court that taking the rubbish bag for the purpose for which it was taken did not constitute "entering, or interfering with, property in [Ms O'Neill's] possession".[51] Mr Malcouronne was prepared to accept that taking the rubbish bag could constitute a "specified act" but that when assessing whether the event formed part of a "pattern of behaviour" it needed to be considered in context rather than viewed in isolation. The notes of evidence show that during Ms O'Neill's cross-examination of Mr Malcouronne, he candidly acknowledged that he took the rubbish bag, not that he searched it, and he was prepared to apologise for taking it.

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[51] Harassment Act 1977, s 4(1)(c).

[106] One of the clips I viewed showed a man, presumably Mr Malcouronne uplifting a rubbish bag from the street. He certainly did not enter the O'Neill's property as the Judge suggested.[52]

[107] I agree that taking the rubbish, even on the advice — or Mr Malcouronne's understanding of the advice — of the Police, was a misjudgment. But it cannot be viewed as an intentional act of harassment nor part of a wider pattern of behaviour. Mr Malcouronne took the rubbish bag for the purpose of obtaining evidence that Ms O'Neill was responsible for cutting down their flag. In light of Ms O'Neill's emailed complaint to Mr Malcouronne's employer two days earlier that was not, a groundless assumption. More particularly, taking the rubbish bag was less an act "directed against"[53] Ms O'Neill than an act directed towards recovery of Mr Malcouronne's and Ms Spicer's flag.

Evidence not considered in the hearing

[108] In addition to affidavits filed by the parties themselves, affidavits were filed by Faye White, Acting Mayor; Maria Cooper the previous owner of Mr Malcouronne's and Ms Spicer's property; Sarah Spence, a former neighbour; Geraldene Peters, a friend of Mr Malcouronne and Ms Spicer; and Bridget Waikato, a neighbour. Early in his judgment, the Judge said two applications had been made to give evidence in an alternative way, particularly the evidence of Ms White and Ms Spence. The applications were made notwithstanding that Ms O'Neill had not required the presence of the witnesses for cross-examination. The Judge said that "with the greatest of respect to the parties the evidence of Ms White and to a certain degree the evidence of Ms Spence were peripheral to the real issues at hand …" and he was not prepared to grant the application.[54] Ms O'Neill had, however, belatedly indicated she required some of the witnesses for cross-examination and had been extended leniency by counsel for Mr Malcouronne and Ms Spicer in making those witnesses available.[55]

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52 *District Court decision*, above n 1, at [31].
53 Harassment Act, 1977 s 3(1) — meaning of "harassment".
54 At [5].
55 At [6].

[109] Following his recitation of the chronology of facts the Judge clarified that he had not referred to the affidavit evidence of Ms Cooper, Ms Spence, nor Ms Waikato as they had not been cross-examined.

[110] I have read the four affidavits that were put to one side. The evidence of those witnesses struck me as both relevant and helpful to understanding the broader picture and all of the circumstances in which the allegations of harassment are made.

[111] Ms White deposed to receiving a voicemail from Ms O'Neill on the evening of 2 July 2019. She described it as lengthy and as a "rant". Ms O'Neill alleged Mr Malcouronne had been watching and spying on her and made allegations of a sexual nature against him. Ms White did not respond because it was not a Council related matter. Ms White also added that she worked closely with Mr Malcouronne who was a "valued member" of the Communications Team at the Napier City Council.

[112] Ms Cooper's 52-page affidavit was detailed and specific. Her evidence was that soon after they moved into 82 Shakespeare Road Mr Malcouronne and Ms Spicer contacted her to discuss a number of issues that had arisen for them as a result of Ms O'Neill's behaviour towards them. Ms Cooper deposed to the "horrific experience" of enduring Ms O'Neill's "campaign of harassment and defamation" against her. Her evidence is that, unable to withstand the behaviour, her only escape was to move and she expressed sadness to hear that Ms O'Neill's "harassment has now been inflicted on Peter and Nicky".

[113] In a sense Ms Cooper's evidence is in the nature of propensity evidence because she describes behaviours on the part of Ms O'Neill that are virtually identical to the behaviours to which Ms Spicer and Mr Malcouronne have testified. For example:

(a) being filmed while she was inside her property using cameras, mobile phones and the CCTV cameras pointing at her property;

(b) filming her son and nephew without their permission;

(c) making false statements to the Police emergency number;

(d) playing loud talkback radio outside the bedroom window, banging and smashing things in the middle of the night, slamming the front door outside her bedroom window in the middle of the night and vacuuming under the house in the early hours of the morning;

(e) aggressive driving including crossing to the wrong side of the road "to almost hit" Ms Cooper when she was standing outside her property;

(f) keeping a high-powered bright security light on outside her bedroom window despite the Police and Ms Cooper asking for it to be turned off;

(g) trees planted on the property died within weeks of being planted but Ms Cooper did not take the advice of the City Council's advisor to have the soil tested;

(h) big branches being broken off trees in order to have a clearer view of her home.

[114] Ms Cooper acknowledged that due to her frustrations, and being sick of being filmed, she mimicked Ms O'Neill's behaviour by filming her from her bedroom window and shouted and mocked Ms O'Neill and was charged with disorderly behaviour. In 2017 the O'Neills applied for a restraining order against Ms Cooper and she countered with her own application although she deposed to wanting nothing to do with them but to simply be left alone. The matter did not proceed to a hearing because Ms Cooper decided to sell the property. Ms Cooper's evidence was that her sole reason for selling the home she loved after spending $6,000 having architectural plans drawn up was because of the harassment of her and that her mental and physical wellbeing were at risk by continuing to stay.

[115] Sarah Spence, an artist, lived at 86 Shakespeare Road with her daughter who was 15 years old at the time. She moved from the property because of Ms O'Neills ongoing harassment. She had intended to continue to lease the property at

86 Shakespeare Road until she was in a position to buy but found Ms O'Neill's harassment was relentless for the period she lived there and had no option but to move because of the effect it was having on her and her daughter's wellbeing.

[116] Ms Spence deposes to being filmed without her consent, being squirted with the hose when she was hanging her washing out in the back courtyard, being frightened by loud banging on the corrugated iron fence between their properties, being filmed when she sat under the tree on her front lawn weaving — and so on. Ms O'Neill apparently made "outrageous and untrue allegations" about Ms Spence to the property manager, her landlord and the Police.

[117] Bridget Waikato continues to live with her family at number 91, directly opposite Ms O'Neill they have lived there since 2015. As at December 2019 when Ms Waikato swore her affidavit they had three children aged 18, 4 and 1. Ms Waikato describes moving into their property in April 2015. She describes a friendly approach from Mr O'Neill who, after the family had been tidying their garden, commented that the property looked nice. Soon after, Mr Waikato arrived home one day and found that Ms O'Neill had parked her car partly over the entrance to their garage. It was the second time this had happened. The couple went to the O'Neills and asked Mr O'Neill if he would mind moving the car forwards slightly so they could use the garage. Ms O'Neill heard the exchange and yelled out to them to get off her property, that she could park where she liked and she was going to call the Police. Mr O'Neill apparently asked her to "calm down", apologised to the Waikatos and moved the car. After that incident Ms Waikato's evidence is of harassment on a consistent and relentless basis. The harassment includes false complaints to the Police, filming, cameras pointed at their property, playing loud talkback radio from Ms O'Neill's balcony when they are in their front yard, banging objects on the iron balcony when they arrive home or are in their front yard, driving her car towards them in an aggressive manner, squirting the children and Ms Waikato with her hose. The incidents are detailed by reference to dates and witnesses.

[118] It is unfortunate that cross-examination of these witnesses was not permitted particularly in light of the Judge's decision to consider only the evidence of those witnesses who had been cross-examined.

Assessment

[119] Taking into account all of the evidence that I have viewed and read it seems to me that the key issue is whether there was a sufficient evidential basis for the Court to be satisfied that the making of an order against Mr Malcouronne was necessary to protect Ms O'Neill from further harassment.

[120] The evidence plainly demonstrates that Ms O'Neill is the original and continuing source of harassment. That conduct is shown to have predated Ms Spicer's and Mr Malcouronne's arrival into Shakespeare Road.

[121] It is equally clear that if Ms O'Neill is restrained Mr Malcouronne will not be "pushed to the brink" as the Judge described it and there would be no occasion for him to engage in his self-described retaliatory and infantile behaviour.

[122] While it may be that the Judge had an understandable motivation to find a mutuality or equality as between the parties and perhaps hoped, thereby, the parties would "get on with their own lives and mind their own business" that is not the basis for making a restraining order under the Act. Where the Judge described the neighbour hostility and conflict over a period of 20 months, that description overlooks the evidence of the conflict and hostility in the neighbourhood over a period of many years and overlooks the overwhelming evidence pointing to Ms O'Neill as the indisputable and relentless harasser. The evidence of neighbours, the Acting Mayor, the AA officer, and visitors to the Malcouronne/Spicer residence bolsters Ms Spicer's and Mr Malcouronne's own evidence of Ms O'Neill's aggressive and relentless harassment of them.

[123] The appellant submits in essence, that the District Court's finding of approximate equivalence between the behaviour of Ms O'Neill and Mr Malcouronne is not supported by the evidence. In so submitting, Mr Keall traversed the evidence of numerous actions taken by Ms O'Neill to cause reputational and emotional harm to Mr Malcouronne. As Mr Keall submitted despite having nothing whatsoever to substantiate these claims, Ms O'Neill repeated them in Court with misleading or evasive justifications. The notes of evidence show that on several occasions the Judge needed to restrain Ms O'Neill from the accusatory and unsupported themes underlying

her cross-examination. For example, Ms O'Neill put to Mr McGrath (the AA Officer) that she had his signature on a warrant of fitness that he had completed. Mr McGrath denied ever completing a warrant of fitness particularly as he was not licensed to do so. Ms O'Neill maintained she had the document with his signature. When the Judge asked where it was she said she did not have it with her because "they" told her "she couldn't bring any additional evidence".

[124] It is unnecessary to traverse the appellant's points in detail. They are, in my view, carefully validated. There is uncontroverted evidence of Ms O'Neill making false and damaging accusations of sexual misconduct, indecency and child abuse. The assertions have been made to public authorities and have been published on Facebook.

[125] Having read and viewed all of the evidence adduced in the District Court I am left with the strong impression that the oral judgment significantly underplays Ms O'Neill's compulsion to harass while erroneously characterising Mr Malcouronne's two specified acts as harassment. For example, when Mr Malcouronne had been dropped off after work by a colleague, and dropped off at the first available space just past his home which happened to be outside the O'Neill's residence (situated high above street level), the Judge said he would have expected Mr Malcouronne to have his colleague park some distance away and Mr Malcouronne should walk because he knew it was irritating to Ms O'Neill to stop where he did.

[126] Having viewed the street and the videos I now understand that when Ms O'Neill complains about blocking her access she seems to mean that when a car is parked on the narrow road, opposite their gate which opens onto the footpath, her access is blocked. Ms O'Neill also put it to Mr Malcouronne that she should be able to pull up into the space immediately outside her home without waiting for anyone to leave. That may be highly desirable for Ms O'Neill but she is not entitled to a clear space outside her home at all times. Ms O'Neill misrepresented the position to the Court when she said the Council had issued permits in relation to the spaces. That is not what the road signage shows.

[127] The specified acts on the part of Ms O'Neill and the evidence of them discloses a pattern of conduct that unarguably constitutes harassment in terms of s 3(4) of the

Act and which renders necessary the making of a restraining order. I accept the submission advanced on behalf of Mr Malcouronne that there is no equivalence between his and Ms O'Neill's conduct.

[128] Most particularly, there is no evidence to show that Ms O'Neill was in need of protection from Mr Malcouronne. Consequently, there was no basis upon which the Court could be satisfied a restraining order against Mr Malcouronne was necessary to protect Ms O'Neill.[56]

Result

[129] For the foregoing reasons the appeal is allowed. The restraining order against Mr Malcouronne is set aside.

[130] Mr Malcouronne is entitled to his reasonable costs and disbursements in the District Court. Whether he chooses to recover them is for him to decide. But as a matter of law I acknowledge he is entitled to costs. The question of costs in the District Court is remitted to the District Court for determination.

[131] Having successfully appealed the District Court decision, Mr Malcouronne is entitled to 2B costs and reasonable disbursements in this Court.

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Karen Clark J

Solicitors:
Cathedral Lane Law, Napier, for Respondent

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[56] Harassment Act 1977, s 16.