IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2022-419-64
[2022] NZHC 2555

UNDER	Section 124 of the District Court Act 2016
IN THE MATTER	of an appeal against the decision of the District Court
BETWEEN	HAMILTON COSMOPOLITAN CLUB INCORPORATED Appellant
AND	LISA ROCHELLE LEWIS Respondent

Hearing: 25 July 2022

Counsel: L C Hann and T C Tran for Appellant
F A King and R B Ismail for Respondent

Judgment: 5 October 2022

JUDGMENT OF BREWER J

This judgment was delivered by me on 5 October 2022 at 2 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Webb Gould Law (Hamilton) for Appellant
McKenna King Dempster (Hamilton) for Respondent

Introduction

[1] This appeal concerns a quarrel between neighbours. Each accuses the other of wrongdoing. A District Court Judge found in favour of one neighbour. The other now appeals that decision.

[2] Ms Lewis, the successful party in the District Court, claimed damages for nuisance against the Hamilton Cosmopolitan Club (the Club). Judge Cameron upheld her claim.[1] He determined that the Club had caused a nuisance to Ms Lewis by seeking to prevent vehicle access to her property. He awarded Ms Lewis general damages of $10,000. He dismissed the Club's counterclaim against Ms Lewis in trespass.

[3] The Club appeals.[2] It argues that Judge Cameron made a number of material errors of fact and law. This includes making findings outside the scope of the pleadings, by determining that Ms Lewis had a legal right to pass and repass over the Club's land to access her property, and in finding that the Club's actions amounted to a nuisance. It seeks reversal of the District Court decision.

Background

[4] Ms Lewis rents a property adjacent to the Club's carpark.[3] She has lived in the property since 2013. The property has legal access through a strip of land which runs along the outer edge of the carpark. However, due to the presence of various objects — such as a lamp post, power pole and concrete bollards — vehicle access to the property using the strip of land is not currently possible.

[5] Since 2013 Ms Lewis has therefore accessed the property using the Club's carpark. She has been in the habit of driving through the entrance to the carpark and then backing her vehicle onto the property. There is no easement or formal right of way that permits her to do this.

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1 *Lewis v Hamilton Cosmopolitan Club Inc* [2022] NZDC 1569 [District Court decision] at [23].

2 District Court Act 2016, s 124(2). The appeal proceeds by way of rehearing: see the High Court Rules 2016, r 20.18–20.19; and *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

3 There are 13 properties in total adjoining the carpark.

[6] The Club initially had no issue with Ms Lewis using the carpark in this way.[4] Ms Lewis says that she reached a verbal agreement in 2013 with the Club's former manager, Mr Richard Shepard, allowing her to do so. The Club denies there was ever an agreement. In any event, the Club took no issue with Ms Lewis accessing her property through the carpark for a number of years.

[7] There was peace between the neighbours for a time.

[8] But their relationship began to sour in 2017. Mr Ian Morgan was appointed as manager of the Club. It is fair to say that Ms Lewis and Mr Morgan did not get along.[5]

[9] Ms Lewis began to complain to the Club about the behaviour of its patrons in the carpark. These were written complaints:[6]

> … about such things as patrons tooting their horns when leaving the carpark late at night, people in the carpark aiming fireworks at her front gate, a person attempting to enter her property by opening her front gate, and her house being egged by people in the carpark.

[10] Matters got worse. Ms Lewis continued to complain to the Club, verbally and in writing, about various issues including the behaviour of Club patrons in the Club carpark, the carpark being used by persons who were not Club patrons, motorhomes parking in the carpark and the brightness of the Club's floodlights.

[11] During the latter part of 2020, the relationship between Ms Lewis and the Club was particularly bad:[7]

> Ms Lewis was constantly complaining about activities in the carpark, including abuse towards her from its occupants. There had been a number of occasions when access to Ms Lewis' property by vehicle had been blocked by vehicles parked outside her gateway. Also, Ms Lewis filed a claim in the Disputes Tribunal against the Club relating to alleged breaches of conditions by motorhomes in the carpark.

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4 The property rented by Ms Lewis was originally owned by the Club but was subdivided off and sold. Subsequent owners of the property, before Ms Lewis came to rent it, appear to have started the practice of using the Club's carpark to enter the property.

5 See the District Court decision, above n 1, at [4]. Ms Lewis knew Mr Morgan from renting a room from him when he owned the Sails Motel. She had ultimately been told to leave the property by Mr Morgan. Judge Cameron was "satisfied from the evidence … that thereafter there was a mutual dislike between those two individuals".

6 At [5].

7 At [7].

[12] This culminated with the Club issuing a written trespass notice against Ms Lewis dated 28 August 2020. The notice was signed by Ms Susan McLean, the president of the Club. Ms Lewis ignored the trespass notice in the sense that she continued to access her property by driving through the Club's carpark. She also served the Club with a trespass notice in response.

[13] A number of further incidents occurred.[8]

[14] On 4 November 2020, Mr Morgan arranged for "quarantine" style fencing to be erected along Ms Lewis's fence-line and across the part of the accessway to the property that belonged to the Club. He said he sought advice from the Hamilton City Council and police before doing so. Ms Lewis arrived home to find the fence in place. It prevented her from driving her vehicle onto the property. She attempted to remove a portion of the fence. It fell on her. Mr Morgan was standing outside the clubroom at the time. He admitted to laughing at Ms Lewis because he found it funny.[9] The police were called.

[15] The police told the Club that the fence had to be removed. It brokered an agreement between the parties that Ms Lewis could access her property by vehicle using the carpark. She would enter and exit the carpark using the exit way.

[16] But acrimony between Ms Lewis and the Club persisted throughout 2021. This included a pattern developing whereby patrons of the Club would sound their horns as they drove past Ms Lewis's property, both during the day and at night. Ms Lewis was able to record five such incidents on CCTV during December 2021, including Mr Morgan using his vehicle's horn as he exited the property at night on 23 December 2021. He said he was tooting at a cat that was in his way. There was no cat shown on the CCTV footage.

[17] Between 2017 and 2021, Ms Lewis made approximately 90 written complaints (not including complaints made over the phone) of the kind identified above. These

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8 For example, one incident involved Ms Lewis sitting inside her vehicle in the middle of the carpark with a large dog and revving the engine, preventing the Club's office manager from leaving the building.

9 At [10].

complaints were made either directly to, or about, the Club. At times she would send complaints to (or copy in) the police, members of the Hamilton City Council and various news and media agencies. Over half of the complaints were made in 2020 alone.

[18] The claim Ms Lewis filed against the Club in the Disputes Tribunal on 22 May 2020 was transferred to the District Court on 7 October 2020. She advanced a single cause of action in nuisance. The Club filed a counterclaim against Ms Lewis in trespass.

The District Court judgment

[19] Judge Cameron traversed the facts of the dispute in considerable detail.

[20] He accepted that there was a verbal agreement in 2013 between Ms Lewis and the previous Club manager, Mr Shepard, that Ms Lewis could use the carpark for the purpose of accessing her property.[10] He was also satisfied that the fence erected by the Club on 4 November 2020 completely prevented Ms Lewis from accessing her property using a vehicle.[11] As to the agreement then brokered by police that Ms Lewis would use the exit to the carpark to come and go from her property, the Judge considered this an alteration to the 2013 verbal agreement.[12]

[21] The Judge determined that the trespass notice issued by the Club to Ms Lewis was invalid. He noted that the executive committee of the Club has responsibility for managing the Club's affairs. A quorum of five is necessary for the committee's determinations to bind the Club. The Judge therefore found that a meeting of the executive committee, properly minuted, was required in order to issue a valid trespass notice to Ms Lewis. That process clearly was not followed. Ms McLean, the Club's president, accepted that she would have simply spoken to Mr Morgan and the office manager, Ms Ellery, about issuing the notice. This did not give her the requisite authority to issue a trespass notice. The notice was accordingly invalid.[13]

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10 At [4].
11 At [9].
12 At [10].
13 At [15].

[22] The Judge also noted that at the time the trespass notice was issued Ms Lewis had filed her complaint with the Disputes Tribunal. He therefore considered that the act of issuing the trespass notice was one of retaliation by the Club against Ms Lewis.[14]

[23] As to the erection of the quarantine fence on 4 November 2020, the Judge noted that contrary to Mr Morgan's suggestion that he sought advice from the Hamilton City Council and police before arranging the fence, there was no record of either organisation having been contacted by Mr Morgan. The Judge found that Mr Morgan did not contact either organisation to discuss the fence. The Judge specifically rejected the evidence of Mr Morgan that he was instructed by police to put the fence up, finding instead that it was Mr Morgan's own idea to do so, supported by Ms McLean.[15]

[24] The Judge concluded that the Club had committed a nuisance against Ms Lewis in a number of respects. The essential nuisance was that the Club "actively sought to prevent Ms Lewis's legitimate accessway to her garage and residence".[16] In particular, he found that the Club issued a trespass notice without the authority to do so and the notice was accordingly invalid. This was said to be an "aggravating feature" of the Club's actions.[17] The Judge considered that the issuing of a trespass notice was itself an act of nuisance because it sought to prevent Ms Lewis from having vehicle access to her property.

[25] The issuing of the notice was additionally found to be motivated by Ms Lewis filing a complaint with the Disputes Tribunal against the Club. It was also contrary to the agreement brokered by the police at the time that the quarantine fence was removed.

[26] The Judge said that the presence of the invalid trespass notice had a pervasive effect, in that when Ms Lewis continued to drive up the accessway and onto her property she was at risk of being accused of trespassing. The Judge described one "unpleasant incident" when the president, Ms McLean, and her husband "effectively

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14 At [15].
15 At [16].
16 At [19].
17 At [19].

surrounded" Ms Lewis's vehicle while it was in the Club carpark, with Ms McLean yelling to Ms Lewis that she was trespassing.

[27] As a result, Ms Lewis experienced a very uncertain time over the issue of access to her property. The Judge accepted that this took an "enormous emotional toll" on her. Conversely he did not accept that members of the Club were traumatised by Ms Lewis's actions. While she was undoubtedly quick to complain about a number of things, the Judge did not regard this as having affected the mental health of Club members in the ways alleged.

[28] The Judge did not consider that other aspects of Ms Lewis's claim — such as the behaviour of occupants of the carpark, matters relating to motorhomes and excessive lighting in the carpark — amounted to acts of nuisance. He was satisfied that by and large the Club had followed up on complaints by Ms Lewis relating to the occupants of their carpark.

[29] As a consequence of the Club's nuisances against Ms Lewis "relating to access to her property", which constituted an unreasonable interference with her use and enjoyment of the property, the Judge awarded Ms Lewis general damages of $10,000.[18] He declined to award exemplary damages. He dismissed the Club's counterclaim in trespass.

[30] He also noted in doing so that the issue of access to Ms Lewis's property clearly needed to be formalised, but in the interim there remained an agreement that she could drive through the carpark for the purpose of accessing her property.

The appeal

[31] The Club's notice of appeal identifies seven errors of fact and four errors of law in Judge Cameron's decision. These may be grouped within four key issues:

(a) Did the Judge's findings fall outside the scope of the original pleadings?

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[18] At [23].

(b) Did Ms Lewis have a legal right to pass and repass over the Club's land?

(c) Did the Club's actions in preventing Ms Lewis from passing over the land amount to a nuisance?

(d) Was the Judge required to consider Ms Lewis's liability under the common law tort of trespass?

Did the Judge's findings fall outside the scope of the pleadings?

[32] Ms Hann, for the Club, submits that the Judge's findings, both in respect of preventing access to Ms Lewis's property and in relation to the trespass notice, were made outside the scope of the original pleadings advanced by Ms Lewis. While Ms Lewis's statement of claim and first amended statement of claim referred to the Club having served Ms Lewis with a trespass notice and having erected the temporary fence on 4 November 2020, counsel for Ms Lewis did not rely upon these facts as giving rise to their own causes of action at any stage prior to opening submissions for trial being filed.

[33] Ms Hann submits that the Club's entire defence was responding to the three original causes of action pleaded by Ms Lewis concerning the Club's floodlights, motorhomes in the carpark and the behaviour of Club patrons. Leave was never sought to amend the pleadings.

[34] Mr King, for Ms Lewis, submits that all the instances of nuisance that were pleaded in the first amended statement of claim were then categorised in opening submissions into five separate and distinct categories of nuisance. This included the blocking of access to Ms Lewis's property. He submits that the instances of nuisance pleaded by Ms Lewis, including in relation to the blocking of access to her land, were sufficiently detailed in the first amended statement of claim. The mere "repackaging" or categorising of these instances of actionable nuisance in opening submissions did not deviate from the pleadings. That is particularly so when the cause of action section in the original pleadings explicitly noted that Ms Lewis "repeats paragraphs 1 – 22 above".

[35] The facts of the case were couched in terms of the instances of nuisance and no additional instances were presented at trial. As such, Mr King submits that leave was not required to file a further amended statement of claim to introduce the five categories of nuisance because it was formed on the basis of instances or events that had already been pleaded. No objection was raised by counsel for the Club at trial and post-trial regret is not an error of law.

Did Ms Lewis have a legal right to pass and repass over the Club's land?

[36] It is the Club's position that no legal accessway to Ms Lewis's property through the Club's carpark existed either on the property plans or as a result of any verbal agreement between the parties. In particular, Ms Hann submits there was no evidential basis for the Judge to find that there was a verbal agreement in 2013 between Ms Lewis and the previous Club manager, Mr Shepard. Any consent that had been given to her using the carpark for the purpose of accessing her property was clearly revoked when she was served with the trespass notice on 2 September 2020.

[37] Mr King submits that the Judge was correct to find that there was a verbal agreement between Ms Lewis and Mr Shepard in 2013. The existence of such an agreement was confirmed by Ms McLean in cross-examination. At the very least, Mr King submits there was implied consent for Ms Lewis to use the carpark as an accessway. He submits that the Club and Ms Lewis then came to an agreement brokered by police that she could use the carpark for the purpose of accessing her property following the incident with the fence. Any revocation of that consent had to take the form of a properly minuted decision of the Club's executive committee.

Did the Club's actions in preventing Ms Lewis from passing over the land amount to a nuisance?

[38] A number of the errors of fact identified by the Club fall within this issue.

[39] The first concerns the Judge's finding that the trespass notice issued by the Club was an act of retaliation to Ms Lewis filing a complaint with the Disputes Tribunal. Ms Hann submits this was not a finding available to the Judge on the evidence. Ms Lewis filed proceedings against the Club in the Disputes Tribunal on

22 May 2020. The Club did not issue Ms Lewis with the trespass notice, dated 28 August 2020, until 2 September 2020. The Judge could not therefore reasonably conclude that the Club issued the notice in retaliation to Ms Lewis initiating proceedings. It was in fact issued in response to Ms Lewis's behaviour towards Club members and staff.

[40] The second alleged error of fact concerns the Judge's finding that the Club actively sought to prevent Ms Lewis's legitimate accessway to her property through its issuing of the trespass notice. Ms Hann submits, for reasons already ventilated, that no legitimate accessway through the Club's carpark existed. She submits the Judge also took into account irrelevant considerations when making this finding, namely that if Ms Lewis could not use the Club's carpark to access the property she would be required to park her vehicle on the road and walk some 70 metres to her gate, which presents a safety risk given that Ms Lewis often returns from work very late at night. That is plainly not a relevant consideration when determining the legal issue of whether a legitimate accessway exists.

[41] Mr King, again for reasons already canvassed above, submits that the Judge was correct to find that Ms Lewis has a legitimate accessway to her property through the Club's carpark (either by reason of a verbal agreement or the Club's implied consent). As to the concern for Ms Lewis's safety, Mr King submits this was merely an indirect reference to the necessity defence relied on by Ms Lewis in relation to the Club's counterclaim in trespass.

[42] The third alleged error of fact concerns the Judge's finding that the Club issued the trespass notice against Ms Lewis "contrary to the somewhat unsatisfactory deal brokered by the police at the time the quarantine fence was erected and then removed".[19] Ms Hann observes that the trespass notice was served on Ms Lewis on 2 September 2020, long before the erection and removal of the quarantine fence on 4 November 2020 and the resulting "unsatisfactory deal" brokered by the police. Mr King describes this as a misrepresentation of the Judge's finding, which was that

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19 District Court decision, above n 1, at [19].

the Club's acceptance of the agreement brokered by police was contrary to the trespass notice. He says there is no error of fact.

[43] The fourth error of fact is said to be the Judge's finding that Ms McLean and her husband surrounded Ms Lewis's vehicle while it was in the Club's carpark on 12 October 2020.[20] Ms Hann submits that this finding was premised on the fact that Ms Lewis was the victim, but all the evidence is to the contrary. Ms Hann says that the vehicle was not "surrounded" beyond a brief period when Ms McLean was photographing the front of Ms Lewis's vehicle. Mr King submits that the Judge was entirely correct in his assessment of the evidence.

[44] The fifth alleged error of fact relates to the Judge's assessment of the emotional harm and distress caused by Ms Lewis's actions.[21] In particular, the Judge rejected evidence from the Club's Chaplain that members of the Club had been traumatised by Ms Lewis's actions. Ms Hann submits that this finding was incorrect as the Judge focussed on the impact of Ms Lewis's behaviour on "Club members", when in fact the Club's counterclaim related to the impact of Ms Lewis's actions on the Club's *staff* members. The Judge was wrong to disregard the impact that Ms Lewis's behaviour had on the Club's staff. Mr King, in response, submits that the Club overstated the effect of Ms Lewis's behaviour and the Judge was correct to reject the evidence of staff members on this point.

[45] The sixth alleged error of fact concerns the Judge's finding that Mr Morgan did not contact the Hamilton City Council or police to discuss erecting the fence outside Ms Lewis's property on 4 November 2020.[22] Ms Hann submits that the Judge misstated Mr Morgan's evidence on this point which was clear and consistent. Moreover, she notes that no witnesses from either the Hamilton City Council or the police were called to give evidence on this issue. There was accordingly no basis for the Judge to prefer other evidence over Mr Morgan's evidence. Mr King submits that whatever words the Judge used he was right to consider that Mr Morgan's actions were

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20 At [20].
21 At [21].
22 At [16].

unilateral and amounted to a nuisance. He says calling a witness from the Hamilton City Council would have caused undue expense or delay.

[46] The seventh error of fact alleged by the Club is that Ms Lewis's evidence was consistently preferred over that of the Club's witnesses, despite her proving to be an unreliable and untruthful witness under cross-examination. Ms Hann submits that the evidence of Ms Lewis was rife with frequent and severe over-exaggerations and inaccuracies. Mr King disagrees and submits that the Club's two main witnesses, Ms McLean and Mr Morgan, were unreliable at best.

[47] Further, Ms Hann submits that the Judge erred in law when he found that the Club's issuing of the trespass notice was itself an act of nuisance. She submits that as the owner of the property the Club was well within its legal rights to issue a trespass notice to Ms Lewis. Having regard to the definition of a nuisance, the issuing of the trespass notice also could not be considered a "continuing wrong". Mr King submits that this finding must be understood in context. The issuing of the trespass notice formed part of the Club's pattern of preventing Ms Lewis from accessing her property using the carpark accessway. He also submits that while the Club was within its rights to revoke the verbal agreement concerning use of the carpark, such revocation was not effected properly.

Was the Judge required to consider Ms Lewis's liability under the common law tort of trespass?

[48] The last error identified by the Club relates to its counterclaim in trespass against Ms Lewis. It submits that the Judge erred in determining the counterclaim by failing to determine Ms Lewis's liability under the common law tort of trespass. He instead only considered her liability under the Trespass Act 1980.

[49] Ms Hann submits that while Ms Lewis's defence to the counterclaim in trespass related to invalidity of the trespass notice, that would not preclude her liability for trespass in tort. Ms Lewis's continued entry onto the Club's property amounted to an unjustified and direct interference with the Club's land, and therefore met the elements of the tort in trespass.

[50] Mr King submits that one lawful justification against a claim in trespass is proof of licence by way of consent. Ms Lewis had consent as evidenced by the verbal agreement in 2013. Mr King submits there was no valid withdrawal of consent for Ms Lewis to use the carpark as the purported trespass notice was not validly issued by the Club's executive committee. Mr King submits further that should the Court find the trespass notice to be valid, Ms Lewis relies on the defence of necessity as being a lawful justification for her entering the Club's land. He submits there was a clear necessity for Ms Lewis to enter the Club's carpark to prevent her having to walk down the driveway and risk suffering serious harm as a result. The Club's counterclaim must fail.

Discussion

[51] The appeal against Judge Cameron's decision is by way of rehearing. I must consider the evidence before the Judge and make my own assessment on the issues raised in the appeal. If I reach a different view to the Judge then I must find him to be in error.

[52] The first amended statement of claim (dated 27 August 2021) sets out the allegations which the Club had to meet. Under the heading "Instances of Nuisance", commencing at paragraph 13, there are allegations of fact relating to the behaviour of "patrons of the Defendant" in their use of the carpark. Paragraph 19 pleads:

> These earlier instances of nuisance in the Defendant's carpark have escalated in more recent times, where the Defendant's [sic] has allowed activities in its carpark that causes a nuisance to the Plaintiff.

[53] There follows 16 paragraphs giving particulars of the instances of escalated nuisance. Only one relates to action by the Club as opposed to users of the carpark:

> 19.11 On or about 4 November 2020 the Plaintiff's property is blocked by a large metal fence named "Central Rent a Fence". The Plaintiff make enquires [sic] to Central Rent a Fence and is told that the fence was hired by the Defendant to prevent the Plaintiff access to her property. The Plaintiff phoned police and an agreement was reached between the Plaintiff and Defendant (after Police intervention) that the Plaintiff would now access the property at 30 Claudelands Road via the Defendant's carpark exit. On or about 5 November 2020 the large metal fence is removed after Police involvement and instruction to the Defendant to remove the fence.

[54] Paragraph 20 pleads:

> On or about 6 November 2020 a motorhome parked against the boundary fence of the Plaintiff whilst in the Defendant's carpark.

[55] There follows five paragraphs giving particulars of the issues, but those are by way of background and chronology, not allegations of nuisance. The first particular reads:

> 20.1 After filing her claim in the Disputes Tribunal, the Plaintiff was served on or about 2 September 2020 by the Defendant, via courier post, a trespass notice preventing the Plaintiff from accessing the Defendant's property.

[56] Paragraph 21, and its eight subparagraphs, continue the recitation of background events.

[57] Paragraph 22 pleads:

> Since the filing of the first statement of claim in this court on 23 December 2020, the instances of nuisance by the Defendant and its patrons have continued unabated and incessantly.

[58] There follows 32 paragraphs giving particulars of the further instances of nuisance, almost all related to the use of the carpark. None are related to preventing access or to the issuing of the trespass notice.

[59] Under the heading "CAUSE OF ACTION: NUISANCE" the following is pleaded:

> 23. The Plaintiff repeats paragraphs 1 – 22 above.
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> 24. The Defendant is causing a nuisance to the Plaintiff by allowing the Defendant's floodlights to remain on and point directly at the Plaintiff's property at a level not permitted by resource consent.
>
> 25. The floodlights cause lack of sleep to the Plaintiff and her son who reside at their rented property. This causes emotional harm and contributes to the Plaintiff's medical condition of anxiety.
>
> 26. The Defendant is causing a nuisance to the Plaintiff by allowing motorhomes to park on the Defendant's carpark before obtaining the appropriate resource consent.
>
> 27. The Defendant has, or has allowed, breach of the conditions on the resource consent granted to the Defendant, causing nuisance. In

particular, but not limited to, motorhome parking, light and noise conditions.

28. The Defendant is allowing a nuisance to be caused to the Plaintiff by permitting patrons of the Defendant to behave in a manner that would be deemed a nuisance whilst on Defendant property.

29. The floodlights, the campervan persons and the patrons and members of the Defendant have caused loss and nuisance to the Plaintiff.

30. In an attempt to curb the nuisance from the Defendant and its patrons, on or about 14 June 2020 the Plaintiff erected signs on her boundary with the Defendant discouraging consumption of liquor in the carpark and trespassing on her property.

[60] The Judge's key findings on this cause of action are at [19] of his decision:

> [19] In the result, I consider that the Club has committed a nuisance against Ms Lewis in a number of respects. The essential nuisance is that the Club has actively sought to prevent Ms Lewis' legitimate accessway to her garage and residence. In particular, the Club issued a trespass notice dated 28 August 2020 against Ms Lewis. It had no authority to do so and that the trespass notice was invalid and that is an aggravating feature of the Club's actions. I also consider the issuing of a trespass notice by itself was an act of nuisance because on its face it sought to prevent Ms Lewis from having vehicular access to her property. The Club witnesses agreed that compliance with such notice would require Ms Lewis to park her vehicle on the road and in the vicinity of the cul-de-sac, and then walk on foot for a distance of some 70 metres to her gate. As the Club was aware that Ms Lewis often worked at night returning very late, this option for Ms Lewis was obviously a potential danger to her safety. I find that the action by the Club was motivated by Ms Lewis filing a complaint with the Disputes Tribunal against the Club. It was also contrary to the somewhat unsatisfactory deal brokered by the police at the time the quarantine fence was erected and then removed.

[61] The hearing before Judge Cameron took place on 24, 25 and 26 January 2022. On 20 January 2022, one clear working day before the commencement of the hearing, Mr King for Ms Lewis filed his synopsis of opening submissions. At paragraph 23 Mr King submits:

> The emanation of the effect of offensive activities being conducted on the Defendant's carpark into the Plaintiff's land forms the basis of the unreasonable interference. These instances of nuisance can be grouped into five separate categories of nuisance, any of which if proven will result in a successful claim by the Plaintiff:
>
> 23.1. The offensive blocking of access to the Plaintiff's land;
>
> 23.2. The offensive behaviour of the Defendant's employees;

23.3. The offensive behaviour of the Defendant's members and patrons, and other third parties;

23.4. The offensive use of the Defendant's carpark by motorhomes; and

23.5. The offensive and excessive use of the LED floodlight located on the front veranda of the Defendant's front entrance.

[62] However, no mention is made of the issue of the trespass notice. Instead:

> 24. In relation to 22.1, the Plaintiff claims that instances when access to her property was blocked by motorhomes, patrons and members, and employees of the Defendant surfaced since 2020. Access to the Plaintiff's property is particularly difficult given that the road access set down in the council plans was the long grass driveway parallel to the Defendant's carpark exit way. Numerous obstacles impede the Plaintiff's driveway including a tree and the Defendant's power pole, sewage, and water toby. As such, the Plaintiff is forced to use the Defendant's carpark exit away as a means of accessing her property. The ongoing and consistent blockage of this accessway has resulted in the Plaintiff being landlocked from her property. The most obvious instance of nuisance occurred on or about 4 November 2020, where the Defendant erected a temporary quarantine-style fence to prevent the Plaintiff's access to her property, which required Police intervention against the Defendant to restore the status quo – namely that the Plaintiff be able to use the Defendant's carpark to gain access to her property.

[63] The only references to the trespass notice by Ms Lewis were in her response to the Club's counterclaim in trespass in Mr King's closing submissions. Those references go to the validity of the trespass notice. There is no submission that the issue of the trespass notice was itself a nuisance.

[64] The purpose of pleadings in a civil case is to establish the issues between the parties to the case; particularly issues of fact.[23] In other words, pleadings must "identify the contest fairly".[24] A plaintiff must define its case with sufficient particularity that it can be understood and responded to by the defendant.[25] The judge's task is to determine the substantive issues between the parties. That will be done principally by relating the evidence to the pleadings.

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23 See *Reay v Attorney-General* [2016] NZCA 519, [2016] NZAR 1672 at [16]; *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at 17–18; and *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67 at [62]–[63].

24 *Brett*, above n 23, at [62].

25 High Court Rules 2016, r 5.26(b). See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [84].

[65] It is well-established that a court cannot decide a case upon evidence or arguments falling outside of the pleadings.[26] There is, of course, some leeway. The way a case is argued can change its complexion. It is not always necessary to require re-pleadings. And technicalities will not be permitted to interfere with the interests of justice.

[66] Here, though, it is clear that the Judge decided the case outside the pleadings. The Judge did not find Ms Lewis's pleaded grounds made out and decided the case in her favour by reference to grounds of nuisance which were not pleaded.

[67] It is true that the Club's counsel did not object to Mr King's recasting of the grounds of nuisance when he made his opening submissions. But counsel had scant notice of them. And, more particularly, even as recast they made no mention of the trespass notice.

[68] The prejudice to the Club is that it prepared for a case on the basis of the pleadings and the written evidence, only to face a different case by the end of the plaintiff's submissions.

[69] I find the Judge erred in deciding the case on grounds not pleaded.

[70] I find also that the Judge erred in his finding that the Club's actions regarding Ms Lewis's access to her garage amounted at law to a nuisance.

[71] The tort of nuisance protects against unreasonable interference with a plaintiff's right to the use or enjoyment of land and a plaintiff's rights over or in connection with land.[27]

[72] The Judge appears to have assumed that Ms Lewis's 2013 agreement with the then Club manager gave her some actionable right to cross the Club's land. Clearly,

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[26] *Otaki Tyre and Service Centre Ltd (in liq) v BVR Ltd* HC Wellington CIV-2001-485-978, 11 December 2007 at [24]; and *Club Marina Apartments Ltd v McHugh* (2008) 9 NZCPR 662 at [13].

[27] *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215 at [120].

it did not. The most the manager gave her was a bare permission.[28] A licence given without consideration and revocable at will.

[73] Accordingly, the Club could not, actionably, "[seek] to prevent Ms Lewis' legitimate accessway to her garage and residence". Ms Lewis had no actionable right to access as against the Club. There was no unreasonable interference with Ms Lewis's rights amounting to a nuisance at law.

[74] I agree with counsel for the Club that the Judge also erred in taking into account that, absent vehicle access across the Club's land, Ms Lewis would have to walk some 70 metres to her gate, which, late at night, could be potentially dangerous. That could only be relevant if Ms Lewis had an actionable right of access as against the Club, which she did not.

[75] Against this background, whether the trespass notice was valid in terms of the Club's rules or not is irrelevant. The bare licence apparently granted informally by the Club's manager in 2013 was revoked by the Club's president and its manager in 2020. Ms Lewis knew that and ignored it.

[76] Whether or not issuing the trespass notice was motivated by Ms Lewis's filing a claim in the Disputes Tribunal is irrelevant. The Club had an unfettered right to rescind the bare licence.

[77] The installing of the quarantine fence to give effect to the rescinding of the bare licence, and the subsequent agreement brokered by the police are also irrelevant to the issue of nuisance.

[78] I further consider that the Judge erred in dismissing the Club's counterclaim against Ms Lewis in trespass. Trespass is an unjustified direct interference with land in the possession of another.[29]

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[28] Ironically, given the Judge's finding that the trespass notice was invalid because it had not been authorised by the executive committee, there is no evidence the manager's agreement with Ms Lewis was so authorised.

[29] *Wu v Body Corporate 366611*, above n 27, at [115].

[79] Ms Lewis's licence to enter the carpark for the purpose of accessing her property was clearly revoked by the Club. She continued to enter the carpark for that and other purposes.[30] I do not consider it was legally necessary for her to do so.[31] Notwithstanding that Ms Lewis thought she was entitled to use the Club's carpark, these actions amount to trespass in law.

[80] The Club's closing submissions in the District Court on the counterclaim state:

> 67. In that regard, if the Court determines that the plaintiff has trespassed onto the Club's property, counsel respectfully seeks that an order be made against the plaintiff to prevent her from entering the Club's carpark unless and only for the purposes of accessing her property.

[81] The Club's statement of counterclaim states that it seeks general damages, costs, such other orders as the Court deems fit.

[82] I do not know whether any such order is still necessary. Nor, in the circumstances of this case, do I think an award of damages is likely to be justified. I will call for submissions.

[83] It is not necessary for me to address the Club's other submissions on factual error.

Result

[84] The appeal is allowed. The Judge's decision is quashed.

[85] Ms Lewis's claim in nuisance against the Club is dismissed.

[86] The Club's counterclaim against Ms Lewis in trespass is allowed.

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30 See the incident referred to in footnote 8 above.

31 See *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224 at [72]. Trespass was not imminently necessary to preserve human life or prevent serious physical harm arising to the person of another or to render assistance to another after that other person suffered serious physical harm.

[87] The Club is to file its memorandum addressing consequent orders, damages and/or costs by 11 November 2022. Ms Lewis is to respond by 16 December 2022.

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Brewer J