

# YOU AND YOUR PROPERTY



IN EACH ISSUE RESIDENTIAL PROPERTY LAWYER MICHAEL HOFMANN-BODY COMMENTS ON A RESIDENTIAL PROPERTY CASE WHICH HAS COME BEFORE THE COURTS. IN THIS ISSUE HE LOOKS AT THE CASE OF AITKEN V MITCHELL, A DECISION OF THE DISTRICT COURT CONCERNING MR & MRS AITKEN'S RIGHTS IN RESPECT OF THE SUPPORTS FOR THEIR DRIVEWAY WHICH ENCROACHED UNDER MR & MRS MITCHELL'S LAND AND ONE OF THE FIRST CASES UNDER THE NEW PROPERTY LAW ACT 2007.

The Mitchells wished to form a driveway on their property. It was to be built above the existing ground level. It was initially intended to be unsupported then a retaining wall was built consisting of wooden poles with timber boards. The wall was unsatisfactory and a more substantial structure was designed. Access from the Aitken's property was required to construct the new wall which included the use of lengths of railway iron set in concrete. While the Mitchells were away and without their consent the Aitkens came onto the Mitchell's property and set about installing the railway irons. The railway irons were within the Aitken's property at and above ground level, but being angled, were on the Mitchell's property below ground level. The Mitchells discovered the work going on and prevented the Aitkens from having further access to their property. With completion of the driveway then prevented, the Aitkens applied to the Court for relief in respect of the encroachment.

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The District Court Judge held the encroaching railway irons were not a

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“wrongly placed structure” as they had been intentionally placed on the affected land. Further, there was no jurisdiction to grant relief as the structure did not yet exist. The Court declined relief. The Aitkens were required to remove the railway iron encroachment and complete reconstruction entirely within their own property.

There are some important lessons to be learned from this case. First, care needs to be taken with structures being placed on or near boundaries. Next, if you are purchasing a property and suspect there is an encroachment, you should clarify the circumstances of how the encroachment came about. If it was deliberately placed in a position known to be encroaching relief will not be available. The Court has a discretion and you will need legal advice to assess the strengths and weaknesses of your position. If you are selling and are aware of an encroachment, you should disclose it or risk a claim for damages from your buyer.

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