

Police trespass onto private property in Canterbury

1. On 13 January 2021, Mr Z complained to the Authority that Police unlawfully entered his Canterbury property on the morning of 18 December 2020. At the time, Mr Z was living at the property with his partner, Ms Y, and her daughter, Ms X.
2. On 24 August 2020, after Police had entered his property on an unrelated matter earlier that year, Mr Z emailed the Canterbury District Commander advising that Police were not to enter his property.
3. On 1 December 2020, a court bailiff entered Mr Z's property to serve Family Court documents on Ms Y. The bailiff was unable to serve the documents and on 11 December 2020, a Deputy Registrar from the Family Court emailed Police requesting that they serve the documents.
4. On the morning of 18 December 2020, two unidentified Police officers entered Mr Z's property. They walked through the open front gate and past a sign with the words: *"Keep Out – Private Property"*.
5. Ms X was the only person on the property when the officers entered. She spoke to the officers through a window after the officers knocked on the front door. The officers asked about Ms Y's whereabouts and then left the property.
6. Later that same day, upon finding out about the officers' having entered his property, Mr Z emailed the District Commander requesting an explanation.

The Authority's Findings

Issue: Did Police lawfully enter Mr Z's property?

The entry of Police officers onto Mr Z's property in order to serve Family Court documents on Ms Y was not lawful.

Analysis of the Issue

ISSUE: DID POLICE LAWFULLY ENTER ONTO MR Z'S PROPERTY?

When can Police enter onto private property?

7. In certain circumstances, Police may have specific statutory authority to enter private property, either with or without a warrant. For example:
 - Section 6 of the Search and Surveillance Act 2012 authorises the issuing of search warrants, which may authorise the Police to enter private property.
 - Section 119 of the Land Transport Act 1998 authorises Police officers to enter private property, by force if necessary, to carry out breath testing procedures where they are in fresh pursuit of a person.
8. In the absence of a specific statutory power, Police may enter private property if they have the express consent (or 'licence') of the occupier of the property. This consent can be revoked at any time by the occupier, in which case the officer or officers involved must leave within a reasonable time.
9. Apart from any statutory power of entry, or express consent, Police also have the same right as any other member of the public to enter property for a lawful purpose. In law, this is referred to as an 'implied licence'.
10. The implied licence to enter property permits members of the public, including Police officers, to enter private property and go to the front door to communicate with an occupier for a legitimate law enforcement or other reasonable purpose.¹ The implied licence does not extend beyond that point.
11. An occupier may terminate or limit the implied licence to enter and remain on the property. This can be done by an occupier expressly communicating the termination or limitation directly, or by clearly indicating that the licence has been terminated or limited by way of, for example, a locked gate and/or unambiguous signage to the effect that entry is prohibited or restricted.
12. If an individual (including a Police officer) enters onto a property when the implied licence has been revoked or remains on a property for an unreasonable time after the occupier has terminated the licence, then that individual becomes a trespasser.

Did Police have any statutory authority to enter onto Mr Z's property?

13. On the morning of 18 December 2020, Police officers entered Mr Z's property and knocked on the front door. The only person home at that time was Ms X. She told us that there were two officers – one male and one female – and that they were trying to locate Ms Y.

¹ *Tararo v R* [2012] 1 NZLR 145 at [14].

14. Police have not been able to identify the officers involved. However, Police accept that officers did enter the property on that date, and that the purpose of the entry was to serve an application under the Care of Children Act 2004 on Ms Y.
15. Police did not have a warrant authorising them to enter Mr Z's property, and nor were they exercising a specific statutory power to do so.
16. While the Family Court Rules 2002 require personal service of an application under the Care of Children Act 2004,² and while the Rules authorise Police officers to serve documents requiring personal service,³ this does not confer any specific authority on Police to enter private property in the absence of either an express or implied licence.

Had any implied licence to enter Mr Z's property been revoked?

17. Given that Police did not have Mr Z's express consent to enter his property and were not exercising a specific statutory power of entry, the only authority the officers could rely upon to enter Mr Z's property was an implied licence.
18. Mr Z's position is that he had revoked the implied licence by way of:
 - his email to the District Commander dated 24 August 2020 advising that Police were not to enter his property; and
 - the presence of a sign unequivocally prohibiting entry.

Did Mr Z's email to the District Commander revoke any implied licence for the officers?

19. Around August 2020, Mr Z apparently became aware of two separate incidents where Police officers had entered, or attempted to enter, his property. Mr Z's position is that he does not want Police, or any other government agents, to enter his property at any time.
20. On 24 August 2020, Mr Z emailed the Canterbury District Commander directly. He referred to these two incidents and noted that his property has locked gates and a clearly displayed 'no entry' sign. He further said that he was revoking any common law licence for Police to enter his property: *"Please ensure they refrain from unlawful behaviour. If members of the Police enter my property unlawfully, they will be dealt with accordingly."*
21. In our view, Mr Z's email is clear and unequivocal in its message that Mr Z was revoking Police's implied licence to enter his property. However, if the individual officers who entered Mr Z's property on 18 December 2020 were unaware of the revocation of the implied licence contained in this email, then the fact of the email alone does not establish that those officers committed a trespass.

² Rule 105(1)(a)(iii).

³ Rule 106(1)(b).

22. It does not appear that this email was circulated to all Police staff in Canterbury District, and we have no reason to think that the officers who entered Mr Z's property on 18 December were aware of it.
23. Accordingly, while the language in Mr Z's email was a clear and unequivocal expression of his intent to revoke the implied licence for all Police officers, we are unable to conclude that it was effective vis-à-vis the officers who entered his property on 18 December.

Did the posted sign revoke implied licence?

24. The implied licence to enter private property can be revoked or restricted by a clear indication to that effect on the part of the occupier. Padlocked gates and/or clear and unequivocal signage prohibiting entry will be sufficient to revoke the implied licence.
25. Mr Z told us that entry to his property is through a gate at the front. He said that this gate is usually closed and secured by a padlock and chain. However, he told us that when the officers entered his property on 18 December 2020, contrary to his usual practice, he had left the gate unlocked and open. Ms X confirmed that the gate was already open when the officers entered through it.
26. However, the sign was in place. It was posted on the side of the house and was clearly visible to anyone entering the property. The officers would have walked directly up to, and past, it as they went from the front gate to the door. Our inference is that the officers must have seen the sign.
27. The courts have consistently held that the presence of locked gates, unequivocal signage, or a combination of the two, will constitute a revocation of the implied licence.⁴
28. Despite the fact Mr Z had left his front gate open on this occasion, we consider that the presence of the sign posted on Mr Z's property was sufficient to revoke any implied licence. The wording of the sign, "*Keep Out – Private Property*", is a clear and unequivocal message that the usual implied licence to enter property has been revoked. Therefore, entering the property without some other legal authority or Mr Z's express consent constitutes trespass.
29. To be clear, we find that by entering the property, the officers' actions constituted a civil trespass, rather than the criminal offence of trespass.⁵

Do Police have a defence to trespass in these circumstances?

30. In certain circumstances, a person who trespasses on someone's property will have a defence if they did so in the course of the execution of a legal process.⁶ This covers any formal step in a

⁴ See *R v Ratima* [1999] 17 CRNZ 227; 5 HRNZ 495 (CA), *Hawkes v R* [2015] NZCA 49, *Police v Sargent* [2017] NZDC 19503.

⁵ See sections 3 and 4 of the Trespass Act 1980 for the elements of criminal trespass.

⁶ See *Todd on Torts* (8th ed) at para 9.2 (5), page 513.

court proceeding (civil or criminal) undertaken pursuant to an order. This defence is only available to court officers.⁷

31. In our assessment, the officers in this case cannot rely on this defence. First, it seems doubtful that the service of originating proceedings (even when accompanied by a minute made by a judge directing a conference) is the execution of a court process pursuant to a court order. Second, the Police officers cannot, in our view, be regarded as court officers for this purpose.
32. The High Court of Australia case of *Plenty v Dillon*⁸ (*Plenty*) is instructive. There, the Court considered whether Police officers were authorised to enter a property to serve a Juvenile Court summons in circumstances where the implied licence had been revoked.
33. The Court found the execution of process defence was not available. The Court noted that the defence not only allows entry onto property, but also forced entry into premises. The Court concluded that whilst the defence may be appropriate for inherently coercive processes, it did not apply where the process involved was the service of a summons in relation to an upcoming court hearing. That reasoning applies a fortiori here, where what is involved is the originating documentation in a proceeding and a minute notifying of a scheduled hearing.
34. Applying *Plenty* to the facts of Mr Z's complaint, we consider that the execution of process defence is not available to Police, as notification of the commencement of Family Court proceedings is not a process that is inherently coercive.

What do we conclude?

35. We consider the entry by two members of Police onto Mr Z's property on 18 December 2020 to serve Family Court summons was not lawful as:
 - Mr Z had clearly revoked any implied licence to enter; and
 - Police were not entering the property for any other statutory purpose; and
 - Police are not able to rely on an execution of process defence.
36. An application for substituted service ought to have been made as opposed to serving summons if the documents urgently needed to be served. Regardless, the matter is civil and likely did not need Police involvement.

FINDING

Two Police officers unlawfully entered onto Mr Z's property on 18 December 2020.

⁷ Police officers acting under search warrants are acting pursuant to "judicial process": *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*] at 674, 689, 696 and 716. Their immunity will normally turn on the relevant statutory provisions: see in particular Policing Act 2008, s 44; Crimes Act 1961, ss 36-27; Search and Surveillance Act 2012, pt 2 and following; and Crown Proceedings Act 1950, s 6(5).

⁸ (1991) HCA 5; (1991) 171 CLR 635.



Judge Kenneth Johnston KC

Chair
Independent Police Conduct Authority

30 November 2023

IPCA: 21-6170

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

We are not part of the Police – the law requires us to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Kenneth Johnston KC.

Being independent means that the Authority makes its own findings based on the facts and the law. We do not answer to the Police, the Government or anyone else over those findings. In this way, our independence is similar to that of a Court.

The Authority employs highly experienced staff who have worked in a range of law enforcement and related roles in New Zealand and overseas.

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority receives and may choose to investigate:

- complaints alleging misconduct or neglect of duty by Police;
- complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- notifications of incidents in which Police actions have caused or appear to have caused death or serious bodily harm; and
- referrals by Police under a Memorandum of Understanding between the Authority and Police, which covers instances of potential reputational risk to Police (including serious offending by a Police officer or Police actions that may have an element of corruption).

The Authority's investigation may include visiting the scene of the incident, interviewing the officers involved and any witnesses, and reviewing evidence from the Police's investigation.

On completion of an investigation, the Authority must form an opinion about the Police conduct, policy, practice or procedure which was the subject of the complaint. The Authority may make recommendations to the Commissioner.

THIS REPORT

This report is the result of the work of a multi-disciplinary team. At significant points in the investigation itself and in the preparation of the report, the Authority conducted audits of both process and content.



Mana Whanonga Pirihimana Motuhake

PO Box 25221, Wellington 6140
Freephone 0800 503 728
www.ipca.govt.nz
