

## Property with sea and pedestrian access not necessarily landlocked

In a recent case (*Greenslade v Honeymoon Bay Holdings Ltd* [2014] NZCA 315 (14 July 2014)) the Court of Appeal found that "reasonable access" to a residential property does not necessarily mean vehicular access.

\*Stuart Dalzell, Partner and Anna Vincent, Solicitor discuss the decision.

### Background

The appellants' property, a beachfront section at Honeymoon Bay, a small secluded bay near Kaiteriteri, was accessed only by sea or by a 285-metre driveway from the road to other properties in the bay. The appellants had owned the section for over 30 years and from time to time had attempted to obtain vehicular access over the driveway, which was owned by a company called Honeymoon Bay Holdings Limited (HBH). HBH declined, taking the view in 1993 that the section had reasonable access; that the appellants had known the facts when they bought the property and that any extension of the right of way would inconvenience other users. HBH left the door ajar in 2004, noting that if the appellants wished to gain vehicular access then they would need to provide details of their proposed development of the section.

The appellants did not take up this invitation. Instead, in 2009, the appellants applied for and obtained building consent for a holiday home (telling the Council that they would rely on sea and foot access for construction and use). The appellants then wrote to HBH requesting vehicular access on pain of legal proceedings. Compensation was offered but with the amount said to non-negotiable. When HBH declined to grant access the appellants applied to the High Court for a right-of-way easement under section 328 of the Property Law Act 2007 on the basis the land was "landlocked".

The High Court declined the application, finding that the property was not landlocked for the purposes of the section because of its combination of sea and foot access which was not unreasonable. The Judge (Simon France J) noted that he would have

declined to grant access in any event on the basis that the appellants had bought the section in full knowledge of the facts and nothing had changed. The appellants appealed to the Court of Appeal.

### The Act

Under section 328 of the Property Law Act 2007 a piece of land is landlocked if there is no "reasonable access" to it. "Reasonable access" is defined as "physical access for persons or services of a nature and quality that is reasonably necessary to enable the owner or occupier of the land to use and enjoy the land". The appellant argued that whatever the situation when the bay was first subdivided in the 1950s, or when the appellants bought the section in 1982, vehicular access was now considered necessary.

### The Decision

The Court of Appeal was required to consider two issues:

1. whether the section was landlocked (that is, without "reasonable" access); and
2. the parties' conduct, "including any attempts they have made to negotiate reasonable access".

On the first question, the Court of Appeal found that reasonable access may include vehicular access, but it all depends on the circumstances. What is reasonable is a question of fact, and the Court agreed with the Judge that the section was not landlocked, given its existing combination of pedestrian and sea access which was reasonable in the circumstances. That conclusion was also supported by the stance the appellants had taken with the Council which, while "not dispositive", did provide strong evidence that the appellants considered sea and foot access reasonable for both construction and use.

Ease of pedestrian access and parking were also factors, but the Court was not persuaded that the Judge, having walked the driveway himself, was wrong to conclude that pedestrian access was not difficult. Nor was it persuaded the Judge erred in finding there were opportunities for

expanded parking and alternatives which the appellants had not pursued.

In relation to the second issue, the parties' conduct and the Court's discretion to grant relief, the Court was inclined to take a less charitable view of the appellants' conduct than the Judge: "*An applicant is normally wise to take the respondent into its confidence at the outset*", it said. It continued: "*The [appellants] eschewed that approach...Resistance was predictable.*"

Taking into account the following factors the Court found that relief should be denied:

- The plaintiffs bought the section knowing it had been developed without vehicular access;
- The plaintiffs had made three attempts to get access since 1983 and were denied it on the basis that: the plaintiffs had reasonable access; they knew they did not have vehicular access when they bought the section; and the extension of the right of way would inconvenience others;
- The appellants failed to provide HBH with details of the proposed development on the section would be required if access were sought in the future;
- The plaintiffs exhibited inflexibility noting in a letter (after the building consent had been granted) that if the requested vehicular access was not granted proceedings would follow;
- The plaintiffs had offered compensation for access but the amount was non-negotiable (and not disclosed to the Court as it was offered on a without prejudice basis);
- The plaintiffs failed to show that other reasonable alternatives were impracticable.

### Comment

Section 383 of the Property Law Act 2007 has its origins in the old common law (non-statutory) action for an "easement of necessity". That action was restrictive: requiring a right of way be not only necessary but also something the parties had intended to

provide for, but the grant was never completed for some reason.

In its judgment, the Court of Appeal confirms that the Property Law Act reforms (in 2007, but also before that) were intended as remedial and to work real change to the Court's approach toward granting owners of landlocked land access on reasonable terms. Thus, the Court said, "*there is no room for a presumption against interference with another's property rights.*"

Nonetheless, the Court's judgment also reminds landowners and their advisers that nor can they assume a right of access will be granted. As the Court said, the Act does not convert a respondent's property rights, which are generally alienable only by consent, into "liability rights", ie rights which are liable to be invaded "*at a price calculated by a court after the fact.*"

The judgment is in that sense pro property rights, and might be seen as a reminder of the need for owners of landlocked land to come to court with "clean hands"; to conduct themselves in good faith and with due respect for their neighbours' fundamental property rights.

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**Address:**

Level 14, Vodafone on the Quay  
157 Lambton Quay  
PO Box 23270, Wellington, 6140  
New Zealand

T: 04 499 0390  
F: 04 499 0391  
W: [www.parkerandassociates.co.nz](http://www.parkerandassociates.co.nz)  
E: [info@parkerandassociates.co.nz](mailto:info@parkerandassociates.co.nz)