IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2014-404-167
[2014] NZHC 3408

UNDER	the Property Law Act 2007
BETWEEN	SUSAN CARREL MACKEN, PETER FRANCIS TOBIN WARREN and CHRISTOPHER NORMAN LORD Applicants
AND	RONALD PETER JERVIS and KATHLEEN JERVIS Respondents

Hearing: 2, 3, 4 and 5 December 2014

Counsel: F Whyte for Applicants
S A Connolly for Respondents

Judgment: 23 December 2014

JUDGMENT OF HEATH J

This judgment was delivered by me on 23 December 2014 at 1.15pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
LeeSalmonLong, Auckland
Barratt-Boys Law Practice, Auckland
Counsel:
S A Connolly, Newmarket

Introduction

[1] This proceeding concerns two properties situated in Remuera, Auckland. One, at 24 Wiles Avenue (the Macken property), is owned by the trustees of the Macken Family Trust (the Trust). Dr Susan Macken lives at the Macken property. The other (the Jervis property) is 24A Wiles Avenue. It is to the rear of the Macken property, and is occupied by Mr and Mrs Jervis.

[2] The Jervis property came into existence on completion of a subdivision of the land on which the Macken property stood. When the subdivision was undertaken, Dr Macken intended that two strips of land be created along a common driveway. Strip A was to be owned by the trustees of the Trust and Strip B by the owners of what is now the Jervis property. Although Strip A was to be part of the Macken property and Strip B part of the Jervis property, mutual rights of way were intended, so that both Dr Macken and the occupiers of what is now the Jervis property could reach and park at their homes. An error was made when the subdivision was completed, before Mr and Mrs Jervis bought their property. While Mr and Mrs Jervis can use Strip A, Dr Macken cannot use Strip B.

[3] Although it is clear that the right of way to be enjoyed over the Jervis property had been inadvertently omitted from the subdivision plan, it has proved impossible for the intelligent people who live in each to resolve their differences in a pragmatic manner. Part of the problem appears to be that Mr and Mrs Jervis have retained a gate, to preserve privacy, at their end of the driveway, even though Dr Macken's rights to pass or re-pass go up to the boundary of the Jervis property. The gate was in place when Mr and Mrs Jervis bought the property. It should not be there (or should always remain open, so that it situated only on Strip B) as it is not for the purpose for which the right of way over Strip A was granted; namely, to enable the occupiers of the Jervis property to pass and re-pass.

[4] The result of the parties' intransigence has been a hearing over four days in the High Court, in circumstances where each of the parties has significant risks as to outcome. My task is to resolve their disputes by applying the controlling legal rules in a principled way.

The issues

[5] The issues in this proceeding are:

(a) Has the Macken property become landlocked, as that term is defined in s 326 of the Property Law Act 2007 (the Act)?

(b) If so, ought the Court to make an order granting reasonable access to the Macken property, whether conditional or unconditional?

Background

[6] In December 2003, Dr Macken acquired 24 Wiles Avenue. Subsequently, title to the land was transferred into the names of the trustees of the Trust. In 2007, Dr Macken instructed architects, a planning consultant, surveyors and engineers to advise on a proposed subdivision. Her intention was to create a separate section at the rear of the property. The subdivision was completed in July 2010, when separate certificates of title were issued for what are now the Macken and Jervis properties respectively.

[7] Initially (what is now) the Jervis property was sold to Mr Anson Tan, on 31 July 2011. He owned the land for about nine months, before selling to Ms Linda Lin in March 2012. Ms Lin decided to sell. After a number of open homes had been held, Mr and Mrs Jervis bought the property at auction on 23 May 2013. They took possession in early June 2013, and have lived there since that time.

[8] The Macken property abuts the road. Dr Macken intended that each owner would be granted an easement, by way of right of way over the other, meaning that both pedestrian and vehicular access would be available from the road frontage to the boundary of the Jervis property.

[9] I am satisfied that an error was made by the surveyors and those responsible for registering the easements. While the owners of the Jervis property were granted an easement to pass and re-pass over Strip A, the ability for the owners of the Macken property to access Strip B, was inadvertently omitted.

[10] Dr Macken and Mr Jervis have negotiated on the access issue. Their discussions began in June/July 2013. An impasse was reached when Mr and Mrs Jervis declined to allow Dr Macken to use her vehicle over any part of Strip B; seemingly as a result of Dr Macken's refusal to agree to the gate remaining in place; notwithstanding that its stationary presence over Strip A was not permitted by the rights of way in favour of Mr and Mrs Jervis.[1]

[11] At the time Mr and Mrs Jervis bought the Jervis property, there were three observable features that any reasonable purchaser would have noticed:

(a) The driveway from Wiles Avenue was used to enable vehicular access to Dr Macken's garage and to the boundary of the Jervis property.

(b) There was a gate located at its present position at what one of the valuer's described as "the throat of the drive where it starts to splay out", as opposed to the northern boundary line of the Jervis property.

(c) That the whole width of the driveway needed to be used by Dr Macken to drive a car into her garage, given the tight angle to be negotiated.

[12] A plan depicting the access strip, in the context of the boundaries of each property is set out below.

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1 See para [3] above.

The proceeding

[13] In an attempt to resolve the access issue, the Trust has applied under s 327 of the Property Law Act 2007 (the Act) for an order granting "reasonable access" to the Macken property. Such an application can only be made in respect of "landlocked land". So, the presence of "landlocked land" is a jurisdictional pre-requisite to the making of an order.

[14] The Trust contends that the Macken property has become "landlocked" because there is no longer any "reasonable access" to it.[2] The term "reasonable access" is defined as meaning "physical access for persons or services of a nature and a quality that is reasonably necessary to enable the owner or occupier of the land to use and enjoy the land for any purpose for which it may" legitimately be used.[3] The purpose of the application is to enable Dr Macken to drive directly into her garage by car and to allow vehicles to travel down to the boundary of the Jervis property, so that they can be used to load or remove items from the rear of the Macken property.

[15] The application is opposed by Mr and Mrs Jervis. First, they assert that the Macken property is not "landlocked land" as defined. Alternatively, they contend that discretionary relief should be refused.

The physical configuration of the properties

[16] The Macken and Jervis properties are situated in a cul-de-sac in Remuera. I visited the property and conducted a "view". As one enters the driveway, the double garage on the Macken property is just to the left. It is only because of the tight angle of entry that it is necessary for Dr Macken to drive her vehicle over Strip B.

[17] Dr Macken could, if she wished, walk (or cycle) along Strip A, past the location of the gate that remains present and up to the boundary of the Jervis property, close to the dwelling on that section. On the other hand, Mr and Mrs Jervis

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2 Property Law Act 2007, s 326, definition of "landlocked land".
3 Ibid, definition of "reasonable access".

can enter their property by motor vehicle as they have an entitlement to pass and re-pass over Strip A.

Is the property "landlocked"?

[18] The first question is one of jurisdiction. No order can be made granting reasonable access unless the property falls within the definition of "landlocked land" in s 326 of the Act. The terms "landlocked land" and "reasonable access" are both defined by that provision, and are linked in their effect:

> **326 Interpretation**
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> In this subpart,—
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> **landlocked land** means a piece of land to which there is no reasonable access
>
> **reasonable access**, in relation to land, means 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 for any purpose for which it may be used in accordance with any right, permission, authority, consent, approval, or dispensation enjoyed or granted under the Resource Management Act 1991.

[19] Mr Connolly, for Mr and Mrs Jervis, submitted that, on the facts of this case, it could not be said that there was no reasonable access to the Macken property. Primarily, he relied on a recent decision of the Court of Appeal, in *Breslin v Lyons,*[4] to support that proposition. Mr Whyte, for the Trust, responded by contending that *Breslin* was distinguishable on its facts; specifically by reference to the topography of the property in issue in that proceeding. There is no relevant authority in which the facts are close to the present case.

[20] The term "landlocked land" is defined by reference to the absence of the type of "reasonable access" that the Court is authorised to impose in order to enable a person to go onto particular land for a lawful purpose. The concept of "reasonable access" does not invariably include a need for vehicular access. But, it does anticipate the need "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" for a legitimate purpose. The Courts have recognised that "nowadays the situations in

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4 *Breslin v Lyons* (2013) 14 NZCPR 144 (CA) at para [42].

which non-vehicular access will be regarded as reasonable are likely to be few because of the great dependence people now have on motor vehicles".[5]

[21] In *Breslin*, the Court of Appeal drew a sharp distinction between access to a property and the ability to park on it. Delivering the judgment of the Court, Harrison J said:[6]

> [41] We can deal with this ground of Mr Breslin's appeal shortly. Priestley J found that:
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> > [77] It is important to note that vehicular access to a property is not necessarily the same as drive-on access. It is clear that number 31 is accessible by vehicles, particularly down the right-of-way. What is impossible (and has always been impossible without acquiring land from adjoining property owners) is the ability to drive on to the property. Any assessment of the merits of Mr Breslin's claim must bear in mind the distinction between vehicular access and drive-on access. As was clear from the valuation evidence I heard (and doubtless reflected in the asking price of number 31, before negotiation, when Mr Breslin was interested in it) the inability to drive on to number 31 inevitably diminishes its value.
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> [42] In our judgment the distinction drawn by the judge is correct and goes to the heart of the case. *When stripped to its essence, Mr Breslin's claim is that his land is landlocked, not because he is unable to drive a vehicle to the boundary, but because he is unable to drive a vehicle from there on to the property. In terms of the statutory definition, Mr Breslin, like his predecessors in title, enjoys physical access of a nature and quality that is reasonably necessary to enable him to use and enjoy the land for any purpose for which it may lawfully be used. He has an absolute and unimpeded right to drive vehicles to his land. That right is different from a right to park a vehicle on his land.* The latter is not relevant to whether Mr Breslin has reasonable access in terms of s 326 of the PLA.
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> (Emphasis added; footnotes omitted)

[22] In *Breslin*, the parties shared a common driveway between their respective properties. The access-way was described as "long" and in the shape of a "pan handle". Each of the neighbours owned a strip of the driveway, with mutual rights of way over the other half. Up to the time at which the appellants purchased one of the properties, neither neighbour could drive onto their property at the top of the driveway. Vehicle access stopped at their gates.

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5 *Squally Cove Forestry Partnership v Wagg* [2013] 3 NZLR 793 (CA) at para [23](h) approving what had been said by Mallon J at first instance: *Wagg v Squally Cove Forestry Ltd* (2013) 13 NZCPR 798 at para [60].

6 *Breslin v Lyons* (2013) 14 NZCPR 144 (CA), at paras [41] and [42].

[23] Applying the *Breslin* principle to the facts of this case, while Dr Macken is unable to drive into her garage because of the need to pass over Strip B, she does have the ability to park at the roadside in close proximity to her property. In *Breslin*, the Court of Appeal held that an inability to drive a vehicle onto the property was not sufficient to cause the land to be "landlocked"; the proper question was whether it was possible to drive a vehicle "to the boundary".[7]

[24] More recently, in *Greenslade v Honeymoon Bay Holdings Ltd*,[8] the Court of Appeal considered an application involving a driveway of some 285 metres that led from a roading network to other properties in Honeymoon Bay, near Kaiteriteri. Those properties enjoyed vehicular access over the driveway, but the section owned by the appellants could only be accessed by foot. This was known to them when they acquired the section, many years beforehand.

[25] In explaining the nature of the Court's jurisdiction, on a s 327 application, Miller J, delivering the judgment of the Court of Appeal in *Greenslade*, said:[9]

> [12] The legislation is remedial, in the sense that it does not codify the restrictive common law action for an easement of necessity but rather permits a court to grant an owner of landlocked land reasonable access on reasonable terms. Early decisions suggested that a central purpose was that of remedying anomalies arising through inadvertence or historical accident in early subdivisions, but it is now settled law that the legislation is not restricted to such situations and the broad statutory criteria speak for themselves. The legislation being remedial, there is no room for a presumption against interference in another's property rights.
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> [13] That said, neither does the legislation presume that a court will grant access to a landlocked property. Put another way, *the legislation does not simply convert a respondent's property rights, a term used to describe rights alienable only by consent, into liability rights, a term used to describe rights that others may choose to invade at a price calculated by a court after the fact*.
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> …
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> [20] Insofar as these *dicta* suggest that courts will almost always find vehicular access necessary they are incorrect, as this Court held in *Murray v BC Group*. Reasonable access may include vehicular access, but it all depends on the circumstances.

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7 Ibid, at para [42], set out at para [21] above.

8 *Greenslade v Honeymoon Bay Holdings Ltd* [2014] NZCA 315.

9 The authority to which Miller J refers in para [20] of the judgment is *Murray v BC Group (2003) Ltd* [2010] 3 NZLR 590 (CA) at para [21].

(Emphasis added; footnotes omitted)

[26] The Court of Appeal upheld Simon France J's decision, in which he found that the combination of pedestrian and sea access to the appellants' property was reasonable. Having taken a "view" of the property, the Judge found that walking access was not difficult, although someone carrying items along the 285 metres would have greater difficulty. But, heavier items could be brought in by sea.

[27] In this case, there is no dispute that Dr Macken can park in the street and walk easily onto her property, over Strip A. What is more problematic is her ability to remove heavy items from her home, or to have others delivered. It appears that the Trust was oblivious to the absence of a right of way over Strip A when the back section was sold to Mr Tan in July 2011. But it does appear that Mr Lord, the Trust's solicitor and one of the trustees of the Trust, was aware of the position (at the latest) by 17 June 2013, shortly after the auction at which Mr and Mrs Jervis had been the successful bidders.[10]

[28] On 17 June 2013, Mr Lord wrote to Dr Macken, in the context of the gate that separated the Jervis property from the balance of the driveway. He said:

> Susan, to summarise
>
> Attached is the sub divisional plan. The strip shown B belongs to the neighbour and that shown A to you
>
> You only have a right over B to convey electricity, water sewage etc but NOT a right of way
>
> Your neighbour has a ROW over A. the restriction on its use is attached, refer to 2(c), ie to keep clear of obstruction etc
>
> Accordingly your neighbours gate is entitled to extend over B as you do not have a right of way over this strip, but can not intrude/obstruct over A which a gate would obviously do
>
> Hope this is clear
>
> ….

[29] While it is unfortunate for the Trust, Mr and Mrs Jervis brought their property at auction on the basis of a pre-existing legal position, whereby Dr Macken was not

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[10] See para [7] above.

entitled to have access over the B Strip which Mr and Mrs Jervis were acquiring. There was no obligation for Mr and Mrs Jervis to yield to the legal position that Dr Macken had intended to put into place.

[30] The starting point is the existence of the legal rights that prevailed at the time Mr and Mrs Jervis purchased the property. The existence of pedestrian, bicycle and motorcycle access to the double garage on the Trust property tells against a finding that the land is landlocked. Another factor that militates against a finding that the land falls into that category is the fact that it was the fault of the Trust (through its advisors) that that state of affairs came into existence.

[31] It is difficult to see why the Court should regard land as "landlocked" when the problematic situation in which the occupier of the land seeking access has found herself has been self induced. There is, from the Trust's perspective, no "right" involved, meaning that vehicular access over Mr and Mrs Jervis' property must be purchased at a price to be agreed.[11] Put more simply: the Trust cannot compel Mr and Mrs Jervis to yield their legal (and indefeasible) property rights. The value of the right to each will inform the price at which Mr and Mrs Jervis are prepared to sell, and the Trust is prepared to buy.

[32] In my view, 24 Wiles Avenue is not landlocked, and there is no jurisdiction to grant the relief sought.

If available, what relief would have been granted?

[33] Section 329 of the Act states:

> **329 Matters court must consider in determining application for order for reasonable access**
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> In determining an application for an order under section 328, the court must have regard to—
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> (a) the nature and quality of the access (if any) to the landlocked land at the time when the applicant purchased or otherwise acquired the land:

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[11] See *Greenslade v Honeymoon bay Holdings ltd* [2014] NZCA 315 at para [13], set out at para [25] above.

(b) the circumstances under which the land became landlocked:

(c) the conduct of the parties, including any attempts they have made to negotiate reasonable access to the landlocked land:

(d) the hardship that would be caused to the applicant by the refusal of an order, in comparison with the hardship that would be caused to any other person by the making of an order:

(e) any other relevant matters.

[34] As the Court of Appeal observed in *Greenslade*, the legislation recognises that "access has a value, and by prescribing [a form of access on an application under s 327 of the Act] a Court must consider the parties' conduct, including any attempts they have made to negotiate reasonable access". That proposition:[12]

> [16] … establishes an important norm: an applicant may need to show that it has behaved reasonably before it will get relief. In particular, an applicant who can point to no historical accident or mistake may need to show that it made a reasonable attempt to purchase access. As will be seen, the Greenslades approached this case as if a liability right were at stake, with predictable results.

[35] Applying s 329, if it had been necessary for me to consider questions of relief, I would have taken a robust approach, influenced primarily by the following factors:

(a) The problem was of the Trust's own making. In that regard, the Trust's surveyors and lawyers are the agents of the registered proprietors who were implementing the proposed subdivision. To that extent, in obtaining access, the Trust is seeking an indulgence from Mr and Mrs Jervis because they acquired the Jervis property on the basis of the legal rights which pertained at the time of purchase.[13]

(b) The primary purposes for which access is required are to drive a car into the double garage on the Macken property, and to take a vehicle down the driveway for loading and unloading purposes. Reasonable access for that purpose would not require vehicles to go beyond that part of the driveway that is currently marked by the gate.

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12 *Greenslade v Honeymoon Bay Holdings Ltd* [2014] NZCA 315 at para [16].

13 Property Law Act 2007, s 329(a) and (b).

(c) Negotiations between the parties do not appear to have been cordial. The intransigence that is evident from the correspondence on both sides suggests that conduct ought to be regarded as a neutral factor.[14]

[36] My solution would have been to grant reasonable access by permitting mutual rights of way to be created, subject to the following conditions:

(a) Mr and Mrs Jervis would be entitled to keep their gate in the present position;[15] and.

(b) An exclusive easement would be granted to Mr and Mrs Jervis to use the land behind the gate (closest to their property), which would run with the land on sale.[16]

[37] On that basis, it would not be necessary for any money to change hands. The Trust would not give up anything of significance because the circumstances[17] in which any resident of the Macken property would need to go down the driveway beyond the gate would be rare. The value of the Jervis property, if anything, is likely to be enhanced. Provided access for the occupier of the Macken property were available up to the location of the gate, the ability to remove and load items from the back garden area would be available.

[38] I record that, after the hearing, Mr Whyte filed a memorandum in which he sought to be heard further on conditions, should that become necessary. I had decided not to receive further submissions, as the possibility of conditions of the type I have articulated was raised at the hearing and counsel had an opportunity to respond.

[39] The views I have expressed are not binding on the parties, as I have determined there is no jurisdiction to make an order. I have provided my own view of a suitable resolution in the hope (in all likelihood forlorn) that the parties may use

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14 Ibid, s 329(c).
15 This reflects the observable nature of what was being bought at the auction.
16 This reflects the reasonable price that the Trust would be expected to pay to acquire access rights.
17 Perhaps, some sort of emergency.

it to resolve their differences; or, at least, to assist the Court of Appeal should the jurisdictional point be appealed.

Result

[40] For the reasons given, the application is dismissed.

[41] I was asked to reserve costs. I was told that there was "without prejudice save as to costs" correspondence in existence that might be relevant. Accordingly, costs are reserved.

[42] The Registrar is directed to arrange a telephone conference before me at 9am on the first available date after 9 February 2015. No less than three working days prior to that conference, a joint memorandum shall be filed which sets out the respective positions of the parties on costs and whether any oral hearing or further submissions may be required. If costs cannot be resolved at the conference, I will make timetabling directions at that time.

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P R Heath J

Delivered at 1.15pm on 23 December 2014