IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV 2010-442-156
[2012] NZHC 3346

IN THE MATTER OF	an application under Part 6 Subpart 3 Property Law Act 2007 and under Part 5 Subpart 5 Property Law Act 2007
BETWEEN	ROSS WEBBER GREENSLADE BARBARA WILSON Plaintiffs
AND	HONEYMOON BAY HOLDINGS LIMITED First Defendant
AND	TASMAN DISTRICT COUNCIL Second Defendant
AND	SIDNEY BOYD ASHTON JOHN WILLIAM DUDLEY RYDER RIKA JOSEPHINE RYDER Third Defendants
AND	PETER JAMES NICHOLLS ROBERT MARK NICHOLLS JOANNE MARIE WATTS ROSS HANNAH MCKECHNIE Fourth Defendants
AND	TYRONE BARRINGTON MUIR BROWN BARBARA ANNE BROWN Fifth Defendants
AND	JOHN FRANK SEFTON BALDWIN ERICA LOIS BALDWIN ANTHONY ERIC BALDWIN Sixth Defendants
AND	PETER DOUGLAS LAWREY BERNADETTE MARGARET LAWREY Seventh Defendants

Hearing: 26 November 2012

Counsel: J M Fitchett and R D Fitchett for Plaintiffs
S P Rennie for First Defendants
A E Baldwin in Person for Sixth Defendants
No Appearance for other Defendants

Judgment: 11 December 2012

JUDGMENT OF SIMON FRANCE J

Introduction

[1] The plaintiffs own a vacant section on the water's edge at Honeymoon Bay, northwest of Nelson. They bring these proceedings seeking an order under s 328 of the Property Law Act 2007 ("the Act") that their vacant land is landlocked. If successful, they seek relief by obtaining a right of way to use the first defendant's already formed driveway.

Relevant law

[2] Section 328 of the Act empowers a court to make an order granting reasonable access to landlocked land. The recognised approach to these applications is:

(a) first to determine the threshold question of whether the land is landlocked;

(b) second, to access whether relief should be granted;

(c) third, to consider what conditions should be imposed including, where appropriate, payment of compensation.

[3] Landlocked land is defined:

> **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.

[4] Recently the principles were summarised by Mallon J in *Wagg v Squally Cove Forestry Ltd*:[1]

> [60] From the cases that have considered this definition, the following principles are established:
>
> (a) Whether there is reasonable access to land is a question concerned with whether there is practical[2] physical access in fact, rather than whether there is legal access.[3]
>
> (b) It is a question of present fact, concerned with whether reasonable access now exists, not whether (for example) "it is possible to provide access by upgrading existing tracks on the applicant's own land".[4]
>
> (c) Access "at the whim of an adjoining owner" or dependent on the "courtesy and goodwill" of the adjoining owner is not reasonable access.[5]
>
> (d) What is reasonably necessary to use and enjoy the land "in accordance with any right ...[or] consent under the Resource Management Act" is concerned with existing uses, not potential uses for which a land owner could apply for consent.[6]
>
> (e) Reasonable access is not necessarily the same as the best access that could be achieved. Other access may be convenient and reasonable but that does not mean that the access the land presently has is unreasonable.[7]

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1 *Wagg & Ors v Squally Cove Forestry Ltd & Ors* [2012] NZHC 2763.
2 *Murray v BC Group (2003) Ltd* [2010] NZCA 163, [2010] 3 NZLR 590 at [20].
3 *Kingfish Lodge (1993) Ltd v Archer* [2000] 3 NZLR 364 (CA) at [26]; *Murray v BC Group (2003) Ltd* at [20].
4 *Cleveland v Roberts* [1993] 2 NZLR 17 (CA) at 23–24 cited in *Asmussen v Hajnal* (2005) 6 NZCPR 208 (HC) at [61] – [62].
5 *Benham v Cameron* (1999) 4 NZconvC 193,013 (HC) at 193,021; *White v Bevan* (1985) 2 NZCPR 270 (HC) at 280; *Reikorangi Forest Ltd v Charman* HC Wellington CIV-2004-485-1255; 15 October 2007 at [47] and [48].
6 *MacLaurin v Hexton Holdings Ltd* [2008] NZCA 570, (2008) 10 NZCPR 1 at [13]–[21].
7 *Murray v BC Group (2003) Ltd* at [25].

(f) Whether there is reasonable access is a value judgment that the Court has to make on the basis of the evidence. Factors such as the characteristics of the locality (residential, commercial or mixed), the topography of the area and contemporary transportation requirements are relevant.[8]

(g) The circumstances as they existed at the time the land was acquired may be relevant evidence as indicating what the purchaser regarded as reasonable at that time.[9]

(h) Reasonable access does not invariably mean vehicular access, but nowadays the situations in 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.[10]

(i) The legislation is remedial. There is no presumption in favour of non-interference with another title.[11]

The land in issue

[5] Honeymoon Bay is a small secluded bay. It is a public beach but the only public access is by sea, or by foot around the coastline from Kaiteriteri at low tide. Otherwise access is down a wide sealed driveway which runs from what is known as the Kaiteriteri-Sandy Bay Road.

[6] The driveway runs down and through a substantial tract of land owned by the first defendant Honeymoon Bay Holdings Ltd. The driveway ends at the beach. Strictly speaking, it ends at a legal road which runs parallel to the beach, and which is well formed, and partly sealed. It runs only along the beach front, is not connected to anything, and cannot be accessed by cars other than down the first defendant's driveway.

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8 *Murray v BC Group (2003) Ltd* at [19] citing *B A Trustees Ltd v Druskovich* [2007] NZCA 131, [2007] 2 NZLR 279 at [61] and *Asmussen v Hajnal*.

9 *Murray v BC Group (2003) Ltd* at [24]; *Kingfish Lodge (1993) Ltd v Archer*.

10 *Asmussen v Hajnal* at [58] endorsed by the Court of Appeal in *B A Trustees Ltd v Druskovich* at [61] and referred to in *Murray v BC Group (2003) Ltd* at [18].

11 *Murray v BC Group (2003) Ltd* at [14].

[7] The land the driveway runs through is about 1.15 ha in size. Located at various points on the land are 13 dwellings, which are occupied by a licence which flows from ownership of the equivalent shares in the company. Two of the dwellings are close to the beach – the occupants of the rest walk down the driveway from wherever their house is situated.

[8] From where the driveway meets the beachfront, as you look at the water, there are five dwellings to the left, and two properties to the right. The five dwellings to the left (one of which is part of the Honeymoon Bay Holdings) all have a vehicular right of way over the driveway. The two to the right have the benefit of a right of way limited to "on foot".

[9] The plaintiffs' vacant lot is the first one to the right. It is a steep section, the back of which appears visually to be cliff like. Access from the first defendant's driveway would provide easy drive on. The section effectively abuts the end of the formed driveway. Presently the main foot and boat access to the beach is over a corner of the plaintiffs' property. If this were not possible, there would still be room for foot access but launching a boat would be more difficult unless some shrubbery and a tree were cleared.

[10] The second section to the right is not affected in that the owners have built at the top. They also own the section which separates their beach front section from the main road, so have been able to establish two houses at the top. Access to these houses is off the Kaiteriteri-Sandy Bay Road, at the same point as the start of the Honeymoon Bay Holdings Ltd driveway.

[11] So in summary, there are presently 17 dwellings that have vehicular use of the right of way. Thirteen of those own the land and the driveway. The other four enjoy the use of it. When the driveway stops, the occupants of those four drive along the paper road to their respective properties. However, the furtherest of these properties, a house known as the "White House", cannot be fully accessed by vehicles. There is a tall rock promontory which extends out onto the beach. At high tide the residents can only access this house by walking over a track that has been

formed at the back of the rock promontory. This house is also owned by the plaintiffs.

[12] The only property in dispute is the one vacant lot. It is in a prime position. It is zoned residential. As noted, it has a foot right of way over the driveway but is the only section without vehicular access. Hence the application.

[13] A diagram of the situation existing at Honeymoon Bay follows:

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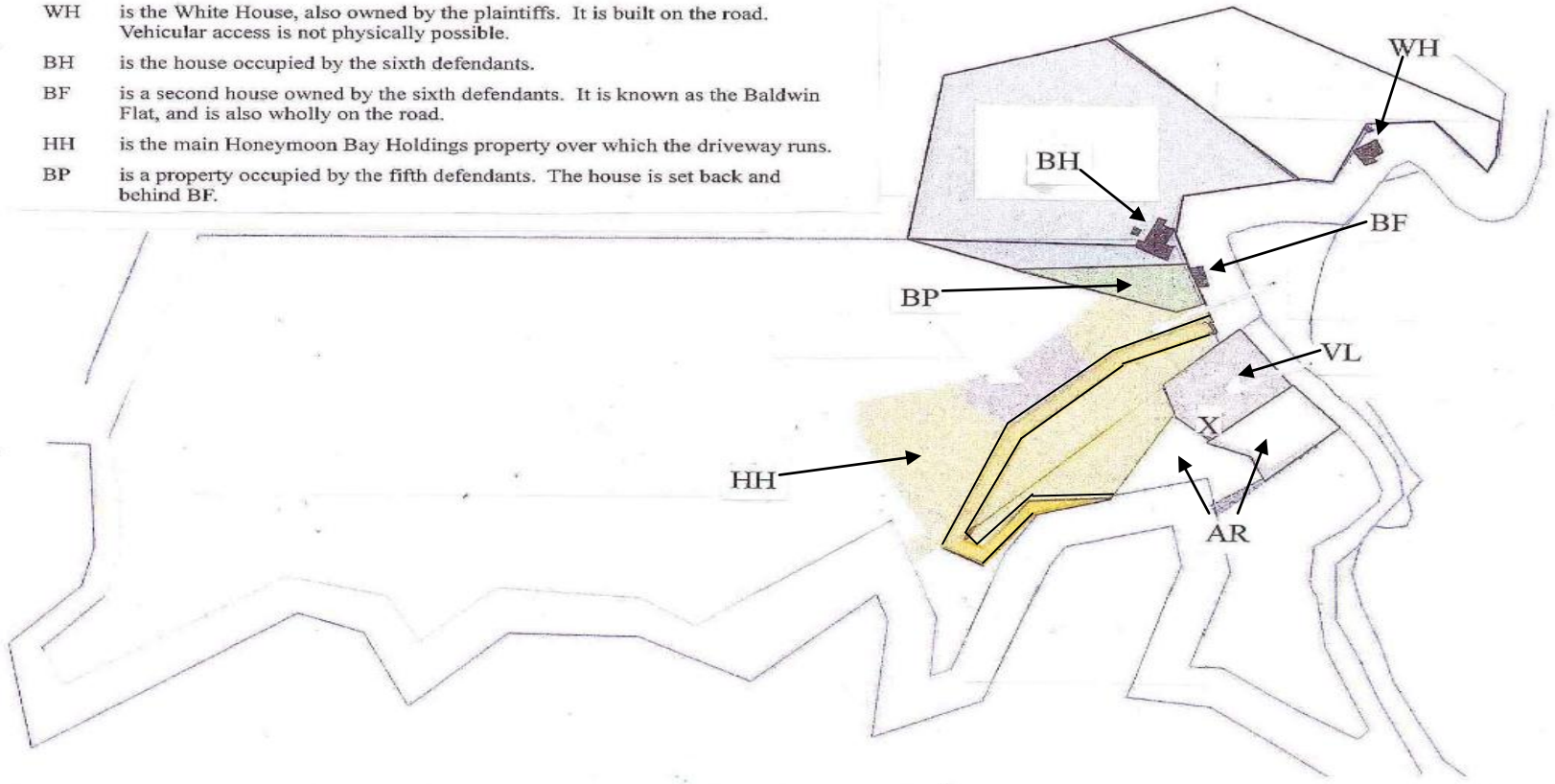
VL	is the vacant lot which is the subject of the application.
AR	are the two properties owned by the second respondent. Their access is from Kaiteriteri-Sandy Bay Road. These properties are subject to a right of way in favour of VL, the disputed property. The entrance point is marked X.
WH	is the White House, also owned by the plaintiffs. It is built on the road. Vehicular access is not physically possible.
BH	is the house occupied by the sixth defendants.
BF	is a second house owned by the sixth defendants. It is known as the Baldwin Flat, and is also wholly on the road.
HH	is the main Honeymoon Bay Holdings property over which the driveway runs.
BP	is a property occupied by the fifth defendants. The house is set back and behind BF.



Current access

[14] There are three access options requiring discussion.

(i) Sea access

[15] The disputed property runs down to the beach. There was little direct evidence about sea access. In evidence in chief it was addressed only by the sixth defendant, Mr Tony Baldwin. Mr Baldwin appeared as a witness, and acted on behalf of the sixth defendants. His evidence, and the research underlying it, was extensive. Topics covered in his 119 page (excluding exhibits), 613 para brief include a description of the area, an overview of Honeymoon Bay, a description of coastal paper roads, a complete legal history of the land in question, and a history of the various properties. The brief was a mixture of evidence, opinion and submissions on the merits of, and problems with, the plaintiffs' application.

[16] The main focus of Mr Baldwin's evidence about sea access was to testify that Mr Greenslade had previously used sea access and a temporary mooring as a way to live in his other property, the White House. This evidence is accompanied by one of the mixed passages of fact and opinion in which Mr Baldwin explains how Mr Greenslade could build on the vacant lot using sea access. In cross-examination, Mr Greenslade said he had not used that method of accessing the White House for a long time. He was not there of recent times when his son used the property, but he did not understand a boat to be used as the main means of access.

[17] The main source of information about the feasibility of sea access comes from documentation surrounding Mr Greenslade's successful application for consent to build on the disputed land. Although the property is zoned residential, the earthworks necessary to build the intended house required a resource consent. Consent was obtained on a non-notified basis, but subsequently the first defendant raised issues which prompted a review of the decision by the Tasman District

Council. The first defendant had submitted that the Council had granted consent on the mistaken belief that the plaintiffs had vehicular access. Accordingly, a Council officer reviewed the process.

[18] A rather lengthy extract from the decision of the Council on the review, written on 12 August 2009, provides helpful context for the case. It makes it plain that, at least for the purpose of that consent process, the plaintiffs were contending vehicular access was not essential to build and live on the property. The Council agreed, and seemingly waived its normal requirement that there be practicable vehicular access to the wider road network:

> The copy of the Certificate of Title supplied with the application clearly states that the rights of way in favour of Lot 2 DP 6300 over the property owned by Honeymoon Bay Holdings Ltd are "rights of way on foot only". However, the two expert reports lodged with the application appear to assume that the private road is available to the property and there is no statement or clarification of the actual situation, nor any mention of the relevant rules in Section 16.2 of the Tasman Resource Management Plan (TRMP) relating to transport (access, parking and traffic). This omission has been raised with the applicants, as per copies of correspondence attached.
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> The Consent Holders contend that their property has frontage to a formed legal road, being the legal road on the shoreline of Honeymoon Bay. However, I have been advised that the site of the proposed house must have practicable vehicle access to the wider road network in order to comply with the permitted activity rule condition 16.2.4.1(c) in the TRMP.
>
> The subject property does have a second right of way access directly from Kaiteriteri-Sandy Bay Road. However, again, the application was silent on the practicalities of using that route to access the proposed house, and it was not assessed as part of the resource consent process. Therefore, I have had to consider what would have been the likely consequences for the resource consent if the matter of vehicle access to the site had been addressed at the time.
>
> The property was created as a residential site over 50 years ago with two accesses via rights of way, one of which is "foot only". In the context of development along the Kaiteriteri coastline, there are several residential properties that do not have vehicle access from the road network – they rely on access from the sea. This is a long-standing situation which was deemed acceptable when Lot 2 DP 6300 was created. Hence, in my view, there is no compelling reason why Council should require this residential site to have vehicular access from Kaiteriteri-Sandy Bay Road.
>
> The response from the Consent Holders shows that they sought consent from the Council knowing that they had no formed vehicular access to the property from Kaiteriteri-Sandy Bay Road. At the time the Consent Holders made the application, they knew that they had pedestrian access only along the Private Road and voluntarily assumed the risk that they might not be able

> to secure legal vehicular access via that route to the subject property. The Consent Holders must therefore have clearly contemplated at the time they made the application that they may only be able to access the proposed new dwelling by foot (over land), or from the sea. The consents granted by the Council for the new dwelling (RM080721) and for associated earthworks (RM080722) do not in any way provide authority for the use of the right of way over the Honeymoon Bay Holdings Ltd land to access the site by vehicle.
>
> Therefore, while I have concerns regarding the silent approach taken to this matter in the application, and with the assumption made by Council staff, I do not see there are sufficient grounds for reviewing the consent with regard to potential effects associated with lack of vehicular access to the proposed dwelling from the wider road network.

[19] For completeness, I note that Mr Baldwin mentioned in evidence, and it does not seem to be disputed, that the water taxi that runs from Kaiteriteri will stop at Honeymoon Bay (if required). It would be a short trip – only a matter of minutes. In closing Mr Fitchett submitted that factors that count against sea access include the fact that no-one at Honeymoon Bay does that, so there is no established practice of it working. Further, there is no wharf so it would be a matter of getting on and off, and carrying supplies, from a bobbing boat. However, on the latter point I note the Court has not been given evidence as to where the taxi would stop, nor from the plaintiffs' viewpoint, why it would not work. This observation is made in a context where it is known that in other places, water access is the main or only method of access. It appears there is a wharf at Torrent Bay, but elsewhere I do not know. What I do know is the plaintiffs and the Council thought it would work at Honeymoon Bay for actually building a house; maintaining supplies for a residence seems less fraught.

(ii) Foot access over the driveway

[20] The formal driveway over which the plaintiffs have foot access, and over which everyone else has vehicular access, is 285 metres in length. There is no formal height measurement in the evidence, but it appears from maps to rise about 30 metres over that length. A view was taken during the hearing which obviously involved walking the drive. The driveway is well sealed, and wide.

[21] An issue between the parties is the availability of parking at the top. There is a Council area near power poles that appears to accommodate two cars. It would seem possible to clear it further to either accommodate more vehicles, or accommodate the two cars more easily. It is not "tagged" parking, so available to anyone. It is fair to observe, however, that given the absence of any public access to the beach, the only reason to park there is through a connection to persons associated with the dwellings, either at the top or at the beach.

[22] The evidence on the viability of this parking was unsatisfactory. I consider that the responsibility lay with the plaintiffs to establish, as they contended, that this area did not provide a viable parking option. When I inquired of counsel whether efforts had been made, for example, to obtain an encroachment licence I was pointed to a letter written on behalf of the Council which said:

(a) it would be necessary to file an application for an encroachment licence;

(b) possible difficulties that might arise include limited space, proximity to entrances to other houses and proximity to a power pole and transformer; and

(c) because of these factors, a traffic report would be required.

[23] The plaintiffs have not seemingly pursued this beyond obtaining that response. However, in the bundle there is a letter from Network Tasman which is responding to a query from Mr Baldwin. That letter identifies the requirements from the electricity company's viewpoint that would attach to parking near the double pole at the top of the drive. There is nothing in the letter to suggest the issues are insurmountable, or even particularly difficult.

[24] My conclusion is that visually there is adequate space to park. Historically (an old photo introduced by Mr Baldwin), that also appears to be the case. There is no evidence to suggest it could not be a dedicated park, and indeed a widened one. I, therefore, approach the issue of whether the foot access forms part of "reasonable

access" to the property on the basis that there is parking available at the beginning of the driveway.[12]

[25] Other than this issue, in terms of what the foot access consists of, there is no dispute. It is down a formed wide driveway of about 285 metres.

(iii) Access at the top of the disputed land

[26] As discussed in the extract from the Council report previously cited, the plaintiffs have a vehicular right of way at the top. If one looks at the sketch plan earlier set out, there are two properties labelled AR. They are owned by the third defendants, and it is these properties that the vacant lot in dispute has a right of way over. The right of way runs along the right hand edge of the property nearest the Kaiteriteri road, and then turns left along the back boundary of the front section. The access point to the plaintiffs' land is marked "X".

[27] Presently, the first part of the right of way would coincide with an existing driveway, but from where it turns left it would cut through the existing arrangements for combined use of the two properties. There is no building which would obstruct use, but a wall and garden would. A formed right of way would also run next to the recreation area for the properties. The owners of these properties filed evidence indicating they would not facilitate use of the right of way in the sense that it would plainly be obstructive to their enjoyment of their land, and they would resist to the limits allowed by law.

[28] Where the right of way leaves the subservient land and enters the plaintiffs' property, the land is very steep. One would need to erect a car deck in the air, as it were. Those who live in Wellington will recognise the concept as being often employed.

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[12] I note that I was not satisfied that having to rely on parking at Kaiteriteri would be tenable. Difficulties would arise during peak season when the area is busy. However, it can be observed the feasibility of acquiring dedicated parking at Kaiteriteri to support the combination of foot and sea access has not been explored. I comment more generally on the lack of this type of evidence in the next section of the judgment.

[29] There is again little evidence on the feasibility of this. Mr Baldwin had some engineering plans done to show it is possible. However, they were appended to his evidence and the plaintiffs' object to their admissibility. I consider the objection well founded. In the context of this case, it was necessary to have original evidence from the person giving the opinion. The feasibility of the proposal is not obvious from a visual inspection. There appear to be issues concerning whether the car deck could be constructed wholly on the plaintiffs' land, how feasible it would be for a car to get on and off (i.e. no turning area), and what access to the rest of the plaintiffs' land it would then provide. These are matters that the designer should give primary evidence on, and be available for cross-examination.

[30] The most one can say is that the section enjoys a presently unformed right of way at the top over the AR land. Where the right of way enters the plaintiffs' land is at the top of a steep slope. Any planning would also have to have regard to the fact that at the point of entry, the plaintiffs' land is then itself subject to a small right of way in favour of the section on its immediate left.

Issue one – is it landlocked?

[31] I put to one side the right of way access at the top. It is not presently offering any access, and it is plain that considerable development would be required for it to do so. Whether land is landlocked is to be assessed as it presently is. I accept that if there is a perfectly good but undeveloped access point, one would factor that in at this stage. But that is not the case here. It is at best an access of uncertain practicality.

[32] So one is left with two means of access – by sea, and by foot in the circumstances already described. Do these constitute reasonable access as that term is defined in the Act?

[33] For the plaintiffs Mr Fitchett placed some weight on two authorities. In *Asmussen v Hajnal*,[13] Wild J observed:

> (a) Reasonable access does not invariably mean vehicular access.
>
> (b) However, nowadays the situations in which non-vehicular access will be regarded by a Court as reasonable are likely to be few, as they are to be determined in the light of contemporary requirements as well as the general topography and nature of the area in question...
>
> (c) Full recognition of the very great dependence people now have upon the motor vehicle must be given. The utility to people's lives through being able to drive their vehicle upon their land cannot be underestimated.
>
> (d) There is no force in a defendant proving that there are other residential properties in the locality without vehicular access, as each case must be assessed on its individual merits.

[34] In *Murray v BC Group (2003) Limited*,[14] Joseph Williams J held foot access of 70 metres in length with a 15 metre elevation down a sealed but poorly lit path to be reasonable. His Honour added, however:

> ... if the distances or elevations were twice what they are in this case, I would not have hesitated to say that in 2009, foot access is insufficient and only vehicular access would be reasonable.

[35] *Brankin v Maclean* has some similarities.[15] The plaintiff was seeking vehicular access over a formed driveway used by others. The walk varied from 290 metres to 400 metres depending where parking was found. It had a rise of 40 metres along a path that zig-zagged to accommodate the topography. In that case the Court concluded the access was neither adequate nor practical.

[36] The situation here is not so dire. The access is not difficult for a person simply walking. Obviously as one seeks to carry things it becomes more difficult.

[37] The context is a beach section, zoned residential. It is in a specific area where vehicular access is the norm, but also in a wider area where foot or sea access to beach and holiday homes is far from uncommon.

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[13] *Asmussen v Hajnal* HC Nelson CIV 2004-442-148, 15 February 2005 at [58].
[14] *Murray v BC Group* (2003) Ltd HC Wellington CIV 2007-485-198, 12 February 2009 at [29].
[15] *Brankin v Maclean* [2003] 2 NZLR 687 (HC).

[38] In my view the combination of sea and foot access provide access of a nature and quality that is reasonably necessary to enable use of the section as a dwelling. It is not as good as vehicular access would be, but it makes the property easily accessible and quite usable. I do not consider Joseph Williams J was laying down any guideline when he observed that had the access been twice as long (which would still be shorter than here), he would have seen it as landlocked. That may be so in that case on its facts, which involved a city property. It is not, in my view, the situation here.

[39] In reaching this assessment I have put to one side the fact that other properties have vehicular access, or that it would be reasonably easy to give access to this property. It could be seen as just a case of one more user (accepting that may involve several cars, building work for a while etc). However, the fact that nearby houses enjoy better access is only marginally relevant to whether the access that this property has is reasonable in terms of the Act. It could be evidence of what other residents regard as necessary, but as will be discussed, there have been no changes for a long time. Who does and does not have vehicular access was established in the late 1950s and nothing has changed since. The situation of the other houses does not, therefore, provide any social commentary on what other users of the beach think, or see as reasonably necessary.

[40] I am conscious of the statements in some judgments that situations where non-vehicular access is regarded as reasonable will be rare, or few. However, in *Murray v BC Group (2003) Ltd*, a decision affirming the conclusion of Joseph Williams J that the land involved in that case was not landlocked, the Court of Appeal observed:[16]

> We cannot accept that it is necessarily the case that under modern day community standards vehicular access onto the site of a residential property is necessary for it to enjoy reasonable access. Whether a property is landlocked is a value judgment that the Court has to make after taking into consideration all the evidence.

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16 *Murray v BC Group (2003) Ltd* [2010] NZCA 163 at [20].

[41] This is a beachfront property in an area where homes are traditionally weekend and holiday homes. This region of New Zealand enjoys good water access, and there is an established water taxi service. The particular property is very close to the water's edge in a sheltered bay. It also enjoys a safe walk of around 300 metres. It is not a flat walk, but nor is it particularly onerous for an averagely fit person. I do not accept the property has to have vehicular access, and the options it does have provide reasonable access.

[42] I have reached that view independent of reliance on the plaintiffs' stance with the Tasman District Council. But that must reinforce it. When a query was raised, the plaintiffs said to the Council that it need not be concerned about the lack of vehicular connection to the main road. The sea access was sufficient for construction purposes, and presumably by inference the sea and foot are sufficient for living.

[43] This stance that the plaintiffs took with the Council cannot be decisive, because there is a difference between what is doable, and what is reasonable in terms of the Act. But it is relevant that this was the approach of the plaintiffs, and the Council was content to waive its usual requirements.

[44] The plaintiffs fail at the first step. However, these are value judgments, and it is appropriate for a first instance court to carry on and consider the second issue.

Issue two – if landlocked, should the Court grant access?

[45] Section 329 of the Act identifies four mandatory considerations.

[46] The first is the nature and quality of the access when the applicants purchased the property. Mr Greenslade bought the property in 1982. He testified that at the time he bought the land, he thought that his ownership of the White House would mean he could use its vehicular access for this property as well. He accepts he does not know why he thought that, and that he never had any legal advice to that effect.

[47] The agent who acted on the sale of the property gave unchallenged evidence that he told purchasers that the property did not have vehicular access, and that Honeymoon Bay Holdings Ltd had indicated it was not willing to grant such access. Mr Greenslade accepts he would have been told that.

[48] I conclude the plaintiffs had full knowledge of the correct situation. Any hope that Mr Greenslade had that an alternative existed was surprising given his general experience in property investment and development. To the extent he entertained this belief, it was not informed or reasonable, and is not a factor undermining what is otherwise a situation of full knowledge of the limitations.

[49] The second mandatory factor is the circumstances under which the land became landlocked. In the present case, since it was subdivided in 1961 into the current configuration, it has always had the same access options. There has been no change in circumstances.

[50] The plaintiffs, somewhat faintly, advanced the proposition that the absence of a vehicular right of way might be an historical error. Mr Fitchett noted that when the scheme plan was lodged in 1959, there was a reference to a right of way in favour of all the properties. It was submitted that the term "right of way" used in this unqualified way should be read as including vehicular access.

[51] I take the proposition to be that when the transfer giving effect to the right of way was formally lodged, it should have been vehicular, and not foot only.

[52] The history of the dealings, set out clearly in Mr Baldwin's evidence, does not support this. The original subdivision of the land around and including the disputed land occurred in 1959. At that time two rights of way were created. A vehicular right of way was given to many of the sections, including the plaintiffs', through what has been described as the AR land. In other words, the right of way at the top. A second right of way, over the main Honeymoon Bay Holdings' land, was also given but it was "on foot only".

[53] Honeymoon Bay Holdings' land was, at that time, under the control of a Mr George Main and his family. They acquired the main land in 1957, and the block of land on which the disputed property is situated in 1958. This block also included most of the land on which the properties at the top are located. In 1958, the family set about establishing a motel on the main land, and then in 1959 the second block was subdivided into nine lots. In 1961 three of these were later combined into two, one of which is the plaintiffs' disputed property. This is the final configuration. It was at that time the nine lots were created in 1959 that the two different rights of way were established. There is nothing to suggest it was other than a purposeful decision; car off the main road at the top, foot through the motel property.

[54] At the time those with vehicular use of the driveway were the motel units, and the Baldwin and White House properties. It must have been evident at the time that the disputed property would benefit more from a vehicular access off the main driveway than from the vehicular right of way granted at the top which was granted. Why that was not done is not known, but there is no basis to suggest it was other than deliberate.

[55] Accordingly, in relation to the second statutory factor, I conclude the section has never had vehicular access from the driveway, and was not intended to. That has been the constant approach of the owners of the subservient land, and at the time the section was created, both pieces of land were owned by the same people. The decision was taken at the time to restrict the vehicular access to the top. I do not consider the change in use of the main land shortly after, from motel to privately owned dwellings within a closely held company share arrangement, is a relevant change of circumstance. The motives behind limiting access and use of the driveway would be the same.

[56] The third mandatory consideration is the conduct of the parties, including attempts to negotiate reasonable access.

[57] My sense is that this is neutral. I consider the plaintiffs have a right to feel some frustration. The defendants have made it clear they would like to influence the size and type of house to be built, but have resisted all efforts to give specifics. I

also consider there has been an air of unreality at times in the way the defendants sought to limit the landowner's rights, and not recognise that some impacts are inevitable. On the other hand Mr Greenslade did have a house designed for which he obtained without notice consent without consulting any of the defendants. Further, having obtained a consent for a substantial house, he appears to feel committed to holding on to the consent that he has. The consequence appears to be that suggestions for compromise (admittedly belated) are assessed in terms of their impact on the consent already obtained.

[58] Other matters referred to include the plaintiffs' offer of compensation (quantum unknown to Court) and the offer of an eight metre no-build area near the most affected property of the first defendant. It is hard for the Court to comment on the first without knowing how much it was. As for the second, it is a benefit to the defendant. It is questionable whether it is a hardship to the plaintiffs given the topography. These matters are not such as to alter my assessment that this factor is neutral.

[59] Each side had some bargaining chips and sought to exploit them. The failure to reach agreement, if it a failure, is a joint one. I would not have seen the conduct of the parties, as it relates to negotiating access, to have influenced the exercise of the discretion.

[60] The fourth mandatory consideration is comparative hardship. In assessing the hardships to the defendants, it is necessary to carefully identify which hardships would flow from the making of an order granting relief. For example, it seems common ground that the plaintiffs can build their house whether or not this application is granted. It will be more difficult and expensive, but the outcome of the consent process is to say it is possible. Likewise, whether or not they build, and whether or not they obtain relief, the plaintiffs do not have to allow access to the beach over their land.

[61] The hardships to the defendants are one more user of the driveway, and increased congestion. The latter requires explanation. Presently whoever are in residence in Mr Greenslade's other house, the White House, park their cars either on

the vacant lot, or on road reserve in front of it. This is at the end of the beach furtherest from the White House. The defendants are concerned at the congestion that would be caused if this option is no longer available. Residents of the White House will want to, and need to, park their cars at their end of the beach. There is not presently room, and a possible space would involve disruption to the one piece of grassed land near the beach. It is this grassed land that houses the "beach" trampoline, and on which children play.

[62] These are legitimate concerns, but do they flow from the making of an order? There is no formal tie requiring these two pieces of land to be jointly owned. The plaintiffs could sell the vacant lot, with the result that the White House cars would have to move away. And although there are matters of convention and established practice which no doubt represent sensible use of the paper road, there are no rights in anyone to that use.

[63] Accordingly, I do not see this as a hardship flowing from the making of an order. There are, however, no proposed restrictions on where the vehicles for the disputed land would park. A suggestion was advanced by Mr Baldwin that access be limited to vehicles that will be parked on site. This is resisted by the plaintiffs. Absent such a condition there is likely to be increased congestion. Accordingly, I do identify as a hardship increased parking issues on an already stretched resource.

[64] The latter concern is emphasised by the house to be built. It is substantial. It is, one must immediately say, within the rules, but it plainly could accommodate many people. That usually means more vehicles.

[65] Other matters raised are noise and safety, and a diminishing of the first defendant's access by allowing another user. I do not consider the evidence establishes these to be a serious concern.

[66] Turning to the plaintiffs, the hardships are obvious. They would have to continue with access found by the Court (on this alternative hypothesis of landlocked) to be not reasonable. The access is not bad, but far from ideal. Construction would be much harder and generally living at the property more

difficult. All this in the context of an existing driveway being available and not needing any change.

[67] The hardship factor clearly favours the plaintiffs.

[68] There is a fifth statutory factor, being any other relevant consideration. Under this heading I deal with the top vehicular right of way access. To my eye it did not look particularly encouraging, but it must be observed the plaintiffs led no evidence to explain the difficulties. There were no expert assessments, or indication of the costs. There was no expert evidence, for example, of the feasibility or otherwise of access to the bottom of the section from an elevated car deck, or the cost of doing that, or whether something like a cable car is possible. Although I excluded the top access from my assessment of landlocked, I do not consider it can be wholly ignored now. It is a factor that could just as easily be slotted in under conduct of the parties, in terms of how hard or otherwise the plaintiffs have tried to exploit available options. My assessment is that the plaintiffs have not made any real effort or at least none that was placed before the Court. This counts against them in the exercise of the discretion. I also include in this the lack of effort in ascertaining whether the parking options at the top of the drive could be made more predictable. Overall, I do not consider they have made the type of effort and inquiry one would expect, and the consequent dearth of information should not work in their favour.

[69] It is then a question of balancing the factors. I am of the view relief should not be given. I base this on the combination of these factors:

(a) the driveway option is not new. It has always been there, and the land has never had vehicular access;

(b) the plaintiffs knew this when they purchased it;

(c) nothing has changed;

(d) if not reasonable access, it is still not bad access. A house can be built and enjoyed. It just will not be as convenient;

(e) the plaintiffs have not been assiduous in pursuing options – parking at the top, and utilising the vehicular right of way they do have. If they are in fact not feasible options, the plaintiffs have not established that by appropriate evidence.

Conditions?

[70] Given my first two decisions, I comment only briefly on disputed matters.

[71] The issue of limiting access to cars able to be parked on-site arose only in closing. The plaintiffs have, subsequent to the hearing, filed a memorandum asking the Court not to consider this. I record I would have given the parties an opportunity to file submissions, but at this point it is something I would have wished to pursue.

[72] Another possibility not raised at the hearing on which I might have sought submissions was partial relief for the purposes of construction.

[73] The parties both chose not to file compensation evidence. However, there is in the bundle a letter written on behalf of the plaintiffs to the defendants. It is the prelude to a settlement offer, and purports to identify how a court might approach the matter. At one point the letter observes a court might:

> ii) take note of the increase in value of the Vacant Allotment consequent upon it having vehicular access – which (on the basis of a valuation obtained by us) might be a sum up to or possibly in excess of $200,000;

[74] It is difficult to see this as other than an acknowledgment of the likely increase. Mr Fitchett emphasised the careful wording used, but the plaintiffs are acknowledging advice, and citing a figure. It is unlikely that the figure would be greater than that advised to them. Had I reached this point, I would have considered that compensation had to be paid. The parties chose to leave me to work it out unassisted, and I would accordingly have used this figure as a starting point.

Conclusion

[75] I have reached the view that a combination of sea and foot access is reasonable access and therefore the land is not landlocked.

[76] If wrong in that, for the reasons summarised in para [69] I would have declined relief.

[77] The defendants are entitled to costs. If agreement cannot be reached, memoranda may be filed.

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Simon France J

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