IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV 2004 442 148

BETWEEN	JONAS REINHOLD ASMUSSEN Plaintiff
AND	LASZLO HAJNAL AND MILA RELICH First Defendants
AND	GLENYS ANN SCHOFIELD Second Defendant
AND	PAUL DONALD GALLOWAY AND ZAHANE RUTH GALLOWAY Third Defendant
AND	ADRIAN HEINZ STUDER Fourth Defendant
AND	NELSON CITY COUNCIL Fifth Defendant

Hearing: 3, 4 August 2009

Counsel: J M Fitchett for the Plaintiff
First defendant (Laszlo Hajnal) in Person
K O Beckett for the Fifth Defendant

Judgment: 6 August 2009

JUDGMENT OF WILD J

Introduction

[1] The question for decision is whether the Court should now grant the plaintiff relief under s 129B Property Law Act 1952.

[2] The plaintiff lives at 142 Cleveland Terrace here in Nelson. The first defendants own the next door property, No. 136, although they live and work in Sydney. I will refer to these properties as 'No. 142' and 'No. 136'.

[3] For the last 60 years or so the plaintiff's property has enjoyed vehicular access along a driveway from Cleveland Terrace across the front of No. 136. About two-thirds of this driveway is on road reserve, but the remainder crosses the northern corner of No. 136 giving access to the parking and garaging at No. 142.

[4] The plaintiff seeks an order giving No. 142 a legal right of way along this existing driveway. The first defendants oppose any order granting an additional legal right of way to No. 142 across 146. I say 'additional', because No. 142 has always had a right of away across a small triangular shaped area (Δ ROW) at the very northern tip of No. 136. The first defendants cannot – and do not – oppose No. 142 utilising that existing Δ ROW.

[5] This judgment is a sequel to one I delivered in this proceeding on 15 February 2005. In that judgment I held that No. 142 was landlocked in terms of s 129, because it did not have reasonable vehicular access. Of the 14 options put to the Court at the hearing in December 2004 to provide that access, I identified four as providing reasonable vehicular access to 142. Reasonable, that is, in terms of their estimated cost and their practicality or ease of use. The judgment left it to the plaintiff to pursue those options, reserving leave to the parties to apply if they needed the Court's further help. The options I identified were 1, 4B, 5B and 10.

[6] The background to this dispute, and events up to the hearing on 13-14 December 2004 are detailed in my earlier judgment, so need not be repeated.

What has happened since 2005?

[7] The answer is 'a great deal'. An agreed bundle of documents comprising four volumes and running to 1,421 pages was put in evidence for this further hearing. Most but not all of its content documents events since my 2005 judgment.

[8] What follows is a summary of what I consider are the main events relevant to the decision now required.

[9] As mentioned, I delivered my judgment on 15 February 2005. The same day, the plaintiff's solicitor faxed the first defendants' solicitor. He advised the plaintiff planned to apply to the Nelson City Council (NCC). He noted that such application "would have much greater chance of success if we could signify to the Council that the neighbouring owner (the first defendant) consented to the same". As a matter of urgency, he asked that the first defendants indicate which of options 1, 4B, 5B and 10 was/were acceptable to them.

[10] On 28 February 2005, not having had a reply, the plaintiff's solicitor sent a follow up fax.

[11] On 1 March 2005 the first defendants' solicitor faxed the plaintiff's solicitor advising:

> Our clients have been considering their options carefully, following the Court Decision. They have decided to commence their own detailed design for a driveway based on option 4b, which they will submit shortly to the Nelson City Council. …
>
> Our client will invite Asmussen's input into their application. …
>
> Our clients would also welcome Mr Asmussen's own application for option 4b. They reserve the right of approval of that application, but wish to make it clear that they will not be unreasonably obstructive in that regard.

[12] The plaintiff's solicitor responded by fax on 2 March. He said that he did not accept it was appropriate for the first defendants to apply to the NCC. He advised that the application should be the plaintiff's, although the plaintiff was happy to work with the first defendants to ensure their wishes were appropriately reflected in the terms of the application. Referring to the suggestion that the plaintiff also make his own application, he said he could not see any logic in two applications going to the Council. The fax concluded:

> For the avoidance of ambiguity, we record that we have interpreted your letter as saying that Option 4B is the only Option which would be acceptable to your client. If the writer's assumption in this matter is wrong, please get in touch with us, for we do not wish to get to a position where just prior to

> the Court imposed deadline, we are told that another of the Options would have in fact been acceptable to your clients.

[13] On 3 March the plaintiff's solicitor wrote to the NCC. He explained the position. He advised that the plaintiff's engineer considered option 4B may be impracticable or impossible, and asked whether the NCC would approve it.

[14] On 9 March the NCC replied advising that options 1 and 10 would be acceptable to the Council, but that options 4B and 5B would not be because they would not permit the Council's proposed widening work on Cleveland Terrace. The letter advised that the Council preferred option 10 as it would have "the least impact on future widening works".

[15] On 15 March the plaintiff's solicitor wrote again to the first defendants' solicitor, this time enclosing his 3/9 March exchange of letters with the NCC. As the options were now reduced to 1 and 10, the letter asked which of these was/were acceptable to the first defendants. The letter also made an open offer to the first defendants in these terms:

- The existing access be legalised and brought up to NCC standards for use by two properties, at the plaintiff's expense.

- The plaintiff pay the first defendants $50,000.

- This proceeding be discontinued, costs lying as they fell.

[16] Of this offer the letter observed:

> Such a resolution would mean that your client could resell the property in the same apparent state and condition it was when he bought and have a cash sum in his pocket after paying his legal fees.

[17] On 6 April 2005, still without a response, the plaintiff's solicitor sent a follow up fax to the first defendants' solicitor.

[18] On 15 April the first defendants' solicitor responded advising that the first defendants "have lodged their application with the NCC for option 4B on 30 March

2005". That advice was correct: the first defendants had on 30 March (in fact, on 29 March) applied to the Council for consent to option 4B. The application was lodged for the first defendants by their engineer, Mr Robertson.

[19] On 4 May 2005 the first defendants applied to the NCC for the required consents to what I will term the S-bend option. This option involved a driveway substantially on road reserve in front of No. 142, although its bottom section utilised part of the Δ ROW referred to in [4], and described in more detail in [6] of my earlier judgment. The description "S-bend" reflects the fact that the driveway has two sharp bends, one of them a complete hairpin bend. The impression from the site plan of this option is of an S shape.

[20] The first defendants did not send a copy of their S-bend application to either the plaintiff or his solicitor. In a memorandum to the Court on 16 May 2005, the first defendants advised that they had submitted, to the NCC, an amendment to their application for option 4B. Although they gave some details of the amended application, they did not annex a copy of it. The plaintiff and his solicitor proceeded unaware of the first defendants' S-bend application, believing all the first defendants had done was seek an amendment to their application for consents to option 4B.

[21] The NCC granted the first defendants building and resource consents to their S-bend option on 28 February and 1 March 2006 respectively. I revert, in [46]> below, to some of the detail of this option.

[22] In their memorandum dated 9 May 2006 to the Court, the first defendants referred to those consents, and attached copies of them, although they still did not attach a copy of any of the plans they had submitted, back on 4 May 2005. The plaintiff's solicitor therefore went to the NCC's offices and looked at those plans. That was the first time either he or his client became aware of the first defendants' S-bend proposal. In a memorandum to the Court on 22 May the plaintiff's solicitor outlined what had occurred, and submitted that the plans of the first defendants' S-bend proposal:

> … are a radical departure from Option 4B as considered at the hearing of December 2004, and referred to in the Court's Decision of February 2005.

He submitted that the fact that the NCC had granted consents to a proposal departing so radically from what had earlier been before the Court required the Court to "convene to hear further argument on the matter". The plaintiff's solicitor did what the first defendants had not done – he attached to his 22 May 2006 memorandum a copy set of the drawings submitted to the NCC with the first defendants' application for consents to their S-bend proposal. This was the first time the Court saw those.

[23] As will be evident from the preceding paragraphs, the parties continued to revert to the Court in respect of this matter. In a minute on 9 June 2006, I indicated that the onus was on the plaintiff to exercise the leave reserved to him to apply for relief under s 129B. He did that, by application dated 8 August 2006.

[24] It is unnecessary to this decision to chronicle everything that ensued. It would make for a very long judgment, which the time available precludes. Just one example of the amount of material subsequently filed is the affidavit sworn on 7 December 2006 by the first defendant Mr Hajnal. It runs to 166 paragraphs. Including its 25 exhibits, it comprises 95 pages.

[25] This is an appropriate point for me to apologise to the parties for the Court's delay in again dealing with this matter. That delay ultimately led the plaintiff to complain to the Judicial Conduct Commissioner. He was justified in doing that. However, I reiterate a point I have already made to the parties:

> … this Court is particularly ill-equipped to deal with a proceeding like this which festers on, and escalates. Courts are set up to hear cases, decide them and move on. …

[26] In [25] I deliberately said 'again dealing with this matter', because the Court is still unable finally to determine it. See [73] and [76].

[27] On 16 January 2008 the plaintiff sent an e-mail directly to the first defendants:

> Dear Laszlo and Mila,
>
> Work on the widening of Cleveland Tce has begun this week. I assume you have been informed of the Council plans and what it entails for the street and for our properties. The contracting firm has removed a lot of the vegetation

> on the road reserve and marked out how far they will dig into the hillside. One of their surveyors explained to me the extent of the changes affecting our frontages and the driveway.
>
> The City Council plans include a reconstruction of the driveway entrance to allow exiting it in both directions and shoring up the bottom part with a retaining wall, but the widening of the road on the uphill side will also mean, that the practical options for alternative access to my property are further reduced.
>
> There will be no room for a separate entrance for a parallel driveway and probably not even enough room for the "bridge" construction I proposed years ago. I can see now why the Council, when asked which options they would give permits for, stated so clearly their preference for the "retained earth" solution, the one you too originally preferred over the bridge construction, because of your concerns about geotechnical stability.
>
> It occurred to me that here is perhaps a good opportunity to bring our problem to a resolution. Obviously it would be a lot easier to widen and retain the driveway now, as part of the work done to it anyway, than at a later date. The widening of the drive would not only secure my access. It would also remove it far enough from your property to enable you to realize your building plans on the bit now occupied by the existing driveway, and at the same time address your concerns about stability. And it would finally put an end to this drawn out dispute. What do you think?
>
> I would be happy to approach the Council and the Contracting Firm to see whether they would consider including this modification in their work programme, what it would cost and how we would deal with the permit process. All this would have to happen fairly urgently of course, so the sooner you can let me know how you feel about this the better.
>
> Sincerely
>
> Jonas Asmussen

[28] The first defendants responded by e-mail on 18 January. This e-mail advised the plaintiff that the first defendants had approached the NCC seeking confirmation that the widening work on Cleveland Terrace did not preclude construction of their S-bend proposal. It advised that the first defendants would be seeking an injunction against the NCC if it did so, and suggested that the plaintiff did the same. In the course of the hearing earlier this week, Mr Hajnal was asked whether he accepted that this e-mail was a 'No' to the plaintiff's 16 January offer i.e. to cooperate in having the roading contractors incorporate option 1 in the road widening work. In practical terms, that would have involved construction of a retaining wall high enough to retain the new, parallel driveway to serve No. 142. Mr Hajnal did not

accept that. He asserted that his reply merely expressed a preference for the first defendants' S-bend proposal, which had the consents it required from the NCC.

Conduct of the applicant and the other parties

[29] Section 129B(6) requires me, in considering the plaintiff's application for relief under s 129B, to have regard to:

> …
>
> (c) The conduct of the applicant and the other parties, including any attempts that they may have made to negotiate reasonable access to the landlocked land;
>
> …

[30] At [67]c) of my earlier judgment, I dealt with the parties' conduct up to that point. I was critical, in two respects, of the plaintiff's conduct. I rejected the plaintiff's criticisms of the first defendants' conduct. I need not repeat what I said.

[31] In [1] to [22] above, I chronicled how the first defendants applied to the NCC for consents to their S-bend proposal, without apprising either the plaintiff or the Court of what they were doing. Both the plaintiff and the Court, until May 2006, were under the impression that the first defendants were pursuing an amended form of option 4B. I think that was unfortunate, although I accept it was unthinking rather than deliberate. I regard it as defeating any claim the first defendants may now have to recover their costs involved in that S-bend proposal. Beyond that, I do not think it should count against them.

[32] The parties have attempted to settle this dispute. It is inappropriate that I go into the detail of those attempts, beyond noting some points that are relevant to the decision I must make:

a) In the course of what I understand was a judicial settlement conference in 2003, the plaintiff accepted the first defendants' offer to purchase his property for $300,000, but a few days later increased the purchase price to $400,000.

b) On 15 March 2005 the plaintiff made the offer I have set out at [15]: $50,000 in return for a legal right of way over the existing driveway, but upgraded to NCC requirements at his expense.

c) The first defendants have also offered to sell No. 136 to the plaintiff. This offer was made in a letter dated 21 June 2009 to the plaintiff's solicitor. The copy of the letter I have is partly redacted, but I understand it offered to sell 136 to the plaintiff for $450,000 in full and final settlement i.e. no order as to the costs of this proceeding.

[33] In a letter dated 27 June 2009 to the plaintiff's solicitor, the first defendants made an alternative offer. Effectively, they offered to cap at $110,000 the cost to the plaintiff of constructing their S-bend proposal. They would undertake responsibility to complete construction of the proposal. Some explanation of this alternative offer is needed. On 27 June 2006 the first defendants had obtained from Fulton Hogan Ltd a GST inclusive quote of $101,081.36 to build their S-bend proposal. They allowed $9,000 to adjust for three years' inflation. Thus, $101,000 + $9,000 = $110,000.

[34] In outlining their offer in their 27 June letter, the first defendants stated:

- This figure does not cover costs associated with the settlement of the legal case.

[35] In the course of the hearing earlier this week, Mr Hajnal confirmed to me that the first defendants were specifically excluding their legal costs from this settlement offer. Mr Hajnal advised me that although these costs have not been finally quantified, he estimates they are in the range $100-$130,000. He told me that the first defendants would have required payment of at least a substantial part of those costs as part of the settlement.

Legal principles

[36] I summarised these at [57]-[58] of my earlier judgment. In *B A Trustees Ltd v Druskovich* [2007] NZCA 131 at [61] the Court of Appeal described that summary

as “helpful”, which I interpret as meaning accurate. The parties referred me to two more recent decisions of the Court of Appeal. The first is *B A Trustees Ltd v Druskovich.* Applied here, I consider these points emerge from that decision:

a) Section 129B is a remedial provision: there is no presumption that I should not interfere with the first defendants’ legal title to No. 136 i.e. by granting a right of way over some part of it. ([15])

b) Inadvertence or mistake on the plaintiff’s part, at the time he purchased No. 142, as to his right to use the driveway serving it favours relief, as opposed to a situation where the plaintiff purchased No. 142 knowing he did not have legal vehicular right of way onto it. The plaintiff’s failure here to inquire properly at the time of purchase about the right of way is not a bar to relief. ([16], [59])

c) The existence of the S-bend proposal, now with the required NCC consents, is not a bar to my granting the plaintiff relief. (51])

d) The fact that the successive owners of No. 142 have used the existing right of way over No. 136 for some 40 years is a factor favouring the grant of relief. ([51]b))

[37] The second decision is *Lowe & Ors v Brankin* CA85/04 14 September 2005. The effect of this judgment as it applies here seems to me to be this:

a) The fact that the first defendants purchased No. 136 aware of the correct legal right of way position (or lack of it), and that any challenge by them to it would disturb a longstanding status quo, is a relevant factor. ([14])

b) In the event that I grant the plaintiff relief in the form of a right of way over part of No. 136, any compensation to the first defendants I order under s 129B(8)(a) should take account of both:

- Any loss in the value of No. 136;

- Any increment to the value of No. 142.

([22], [49])

Valuation evidence

[38] The following summarises the (only) valuation evidence I have, which came from the plaintiff's expert, Mr Baxendine. Mr Baxendine is a registered valuer practising in Nelson with Telfer Young. He has some 20 years experience in rural and residential valuation. There was no challenge to his credentials. These are his valuations of the two properties on the five stated assumptions:

Assumption	**No. 136**	**No. 142**
No legal formed vehicular access to No. 142 i.e. walk up access from Cleveland Terrace only	$355,000	$305,000
Current vehicular access is made legal	$325,000 (- 30,000)	$360,000 (+ 55,000)
Option 1 'as built'	$335,000 (- 20,000)	$360,000 (+ 55,000)
Option 10 'as built'	$335,000 (- 20,000)	$350,000 (+ 45,000)
S-bend 'as built'	$345,000 (- 10,000)	$350,000 (+ 45,000)

The figures I have added in parentheses indicate the reduction from or increment to the valuations for the two properties with no legal formed vehicular access to No. 142. In other words, I treat those valuations effectively as 'benchmarks'.

Decision

[39] I intend working through each of the six options before the Court in turn. These are options 1, 4B, 5B and 10 (the four options identified in my earlier judgment), the first defendants' S-bend proposal and, finally, the plaintiff's application under s 129B for relief in the form of the grant of a legal right of way over the existing driveway.

Option 1

[40] I discard option 1. It is common ground that it would now not be cost effective, if indeed it would still be practicable to build it (as to which I have no evidence).

[41] Option 1 was estimated at the time of my judgment in 2005 to cost between $23,000-35,000 (plaintiff's engineer's estimate) and $23,000 (first defendants' engineer's estimate) ([47]b) of my earlier judgment).

[42] I do not have an up-dated estimate, but in the course of his evidence earlier this week Mr Hajnal volunteered that the cost now would be "obscene". In his evidence, Mr Schruer confirmed this. He said option 1 would be "extremely expensive and a challenge at best". Mr Schruer is a qualified civil engineer, and Senior Executive Inferstructure with the NCC. The reason for that is that option 1 would now involve demolition of substantial walls built by NCC to retain the widened carriageway of Cleveland Terrace and constructing in their place a much higher retaining wall, sufficient in height to retain the new driveway which would be built over the road reserve, to serve No. 142. This is regrettable because:

a) The NCC would have approved this option had the first defendants consented to it following my earlier judgment.

b) It appears that significant cost economies may have been available had option 1 been built in conjunction with the widening of Cleveland Terrace.

Option 4B

[43] This option is also dead. The NCC indicated in its 9 March 2005 letter that it would not consent to this option, because it was incompatible with the Council's proposed works to widen Cleveland Terrace. Since then neither party has pursued it, and it is common ground it is not now practicable to build.

Option 5B

[44] The position is identical to option 4B.

Option 10

[45] The first defendants have consistently opposed this option, because it involves the grant to the plaintiff of a right of way over part of No. 136, in addition to the existing Δ ROW. The exact amount of additional land required is uncertain, but the root of the first defendants' opposition is their concern that option 10 would stymie the plans they have to redevelop No. 136. Their particular concern seems to be that option 10 would preclude them from meeting the NCC's requirements in terms of carparking and manoeuvring. At the start of the hearing on Monday this week, I asked Mr Fitchett, and then Mr Hajnal, to give me a brief overview of the respective positions of plaintiff and first defendants. In his overview, Mr Hajnal reiterated that the first defendants were "adamantly opposed to option 10". I discard this option.

S-bend proposal

Cost

[46] The offer by the first defendants which I detailed in [33]-[35] caps the cost to the plaintiff of building this option at $110,000. For the reasons I explained in [35], it seems that the total cost to the plaintiff of this option would be in the order of $200,000. That includes the $100,000 minimum contribution to their legal and other expenses that the first defendants are seeking from the plaintiff, but excludes his own legal and other expenses of this dispute.

[47] The first defendants obviously anticipate that they can still build the S-bend proposal for $110,000. Although Mr Hajnal did not say so, I think he expects that he would be able to persuade the Council to permit this option to be built with the driveway meeting Cleveland Terrace at an acute angle. That would involve a

substantial cost saving – it would dispense with a significant amount of excavation and retention work at the bottom of the driveway. It emerged from the evidence given by Mr Schruer at the hearing this week that the NCC will not agree to that. Mr Schruer was firm about that.

[48] The best evidence I have as to the likely cost of building the S-bend proposal is the quantity surveyor's estimate of $162,187 excluding GST i.e. approximately $180,000 inclusive of GST.

[49] If that proves to be correct, then I anticipate further problems if the first defendants are faced with a cost 'overrun' in the order of $70,000. I am not prepared to order something that risks further problems between the plaintiff and the first defendants, and the further worry and expense consequent upon further problems.

[50] Whether the cost be about $110,000 or about $180,000, it will increase the value of No. 142 by only $45,000. In other words, it involves over-capitalisation of No. 142 to the extent of some $55,000-$135,000. Given the remedial nature of s 129B, coupled with the fact that No. 142 has had vehicular access over the existing driveway for some 50 years now, I am not prepared to hold that the S-bend proposal represents a reasonable access solution for No. 142.

Practicality

[51] I have considerable concerns as to the practicality of the proposal. In his affidavit, Mr Baxendine said this of the S-bend proposal:

> The issue of saleability also affects the property. In perusing the plans it would appear that the use of, and therefore ultimately ownership of such a structure would be daunting for some purchasers. As a driver and valuer, I am in a position to comment on both the practical and ease of access as well as added value. The proposed access will provide some difficulties as it is suspended in nature which will create unease in some users. Users also have to negotiate two relatively tight bends while confined within a relatively tight and narrow carriageway. This is not unlike some access ramps and accessways within inner-city parking buildings.
>
> As it is so visual, and given the above complications we are certain that a proportion of potential purchasers would not contemplate acquiring the property due to the nature of the proposed drive-on access. As with some

situations such as easements, proximity to facilities etc, it would not be a question of value, simply they would not contemplate purchase. This would have an effect on saleability.

[52] In the course of evidence, I asked Mr Baxendine about the visual impact (to which I revert in [54] below), and practicability, of the S-bend proposal. This is the exchange that followed:

Q. (Bench) Next, I want to ask you about the aesthetic side of the S-bend option. I gather from your latest report that you don't think it would be really an amenity aesthetically to either of these 2 properties or any around the neighbourhood?

A. No, the structure and above the edge of the road certainly doesn't lend itself to a street appeal, which is a value component effectively what the properties look like and are they appealing from the road frontage, it's a fairly large wide bulky structure. I was taxing my brain to see if I could recall any other similar type of accesses in Nelson. I can think of one that is hidden, its about mid 300s Wakefield Quay , behind the Reserve, it gives access through that little reserve area carpark, up to 2 houses but its not seen, its tucked in behind quite a bit of undergrowth, against the cliff frontage. The Haulashore reserve – just opposite the fishing platform, the little carpark on Wakefield Quay before going round the bluff. You are talking $400-500,000 land values on those type of properties but its historically been there for quite a while. Its not visible.

Q. The last aspect is the practicality, as I interpret this there would be and would have to be sufficient space at the top of the access for cars to park and manoeuvre, turn round so they are coming front wards up the S-bend and frontwards down?

A. I don't think anybody would contemplate reversing down it, no.

Q. Your own comment as a valuer and driver is that driving up and down this largely aerial structure some people might find it a bit nerve wracking?

A. That's what I believe. Especially the tight corner and up on a suspended type structure would be similar to some parking buildings where u are going on a tight spiral wondering where your nose and tail are.

8/28-9/10

Plaintiff's view

[53] I asked the plaintiff some questions about the S-bend proposal. This is the relevant exchange:

Q. (Bench) I have some questions for you about that. First, could you, I know you have unknown expenses in relation to this case, but are you in a financial position to pay that sort of money, the $110,000, the 2nd question is, would you pay it anyway, what do you think of that proposal as a form of access to your home?

A. The answer to both is no, I cannot afford to pay $110,000 and even if I could afford it I don't think you want my comment.

Q. Yes I do, on the 2nd question, if you were able to afford that solution would you embark on it, aesthetically as something you would see as an enhancement to your property?

A. Again the short answer is no, in view of the history of the 2 properties and the practicalities and what's gone before, I think it is absurd quite frankly.

17/34-18/4

Visual impact/amenity

[54] In the passages from his evidence I have set out in [52], Mr Baxendine also comment on this aspect, somewhat unfavourably.

[55] The NCC's 1 March 2006 decision granting the first defendants resource consent for their S-bend proposal attaches the NCC planners' report on the application. Part of this report is headed "Section 104 (Resource Management Act) Evaluation. This includes the following:

…

6.7 Structures on the Road Reserve: Under the Plan the assessment criteria requires that the adverse visual effects of this proposal are considered. Structures on the road reserve are not required to comply with any particular bulk and location requirements under the Plan and large structures such bridges and overpasses are permitted activities on the road reserve.

…

6.10 Considering the location of the structure, the height relative to the residential dwellings, and that large structures can be constructed as of right on the road reserve, the adverse visual effect of this proposal are considered to be ***no more than minor***.

The words I have emphasised are those Mr Hajnal emphasised. I think that observation must be read in their context, in particular of paras 6.7 and 6.10, which

point out that large structures such as bridges and overpasses are permitted activities on road reserve. I think the comment primarily compares the visual effect of the S-bend proposal to that of such structures.

My assessment

[56] In urging the S-bend proposal on the Court, Mr Hajnal made these points:

- It is fully compliant (it has the required NCC building and resource consents).
- It will give separate access to No. 142 which is preferable as it will avoid future conflict.
- The net cost to the plaintiff will be $65,000 (i.e. $110,000 less the $45,000 value increment to No. 142).
- It uses the Δ ROW as intended when that right of way was granted some 60 years ago.

[57] I have considered all these points. For the reasons I have explained, I view the S-bend proposal as unreasonable in terms of its cost to the plaintiff. For the reasons I have explained, I have serious concerns as to its practicability. For both those reasons, the plaintiff has told the Court he will not proceed with it. Of much less importance, but still a factor I take into account, is the likely visual impact on the neighbourhood of this structure.

[58] Overall, I do not regard the S-bend proposal as a reasonable means of providing vehicular access to No. 142. For that reason, I do not regard it as a bar to the Court granting relief to the plaintiff under s 129B.

Right of way over existing driveway

[59] This is what the plaintiff seeks, pursuant to s 129B. I consider seven factors are relevant in considering whether this relief should be granted. First, I have discarded as unreasonable – in terms of their cost and/or practicality - all other options that have been put to the Court for vehicular access to No. 142.

[60] Secondly, the existing driveway has been the access to No. 142 for the last 60 years – since about 1948.

[61] Thirdly, when he purchased No. 142 in 1988, the plaintiff thought he had legal access along the existing driveway. I made a finding of fact about that in my earlier judgment, although observing that this was a careless mistake on the plaintiff's part. The point is that the plaintiff purchased mistaken, not "eyes open", as to the correct legal position.

[62] Fourthly, that is not the case with the first defendants. They purchased No. 136 having ascertained the correct legal access position. It is perhaps relevant to mention that they did not, at the time, check with the plaintiff as to his understanding of the position.

[63] Fifthly, and following from the previous point, the first defendants must have anticipated difficulty if and when they cut off access to No. 142 along the existing driveway. As Mr Fitchett pointed out at this week's hearing, the first defendants have never deposed that they were not advised about s 129B at the time they purchased No. 136. Any competent legal adviser apprised of the "lie of the land" would have mentioned that provision to the first defendants. I think Mr Fitchett was justified in making the point that the first defendants have, throughout, focused on their legal rights in respect of access to No. 142, and seem never to have accepted that s 129B also gives the plaintiff legal rights.

[64] Sixthly, No. 142 has been the plaintiff's home since 1988, that is for over 20 years now. Although he did at one stage offer to sell it to the first defendants in order to end this dispute, he made it clear in his evidence this week that he does not

want to sell the property, because he regards it as his home and as a place that (this dispute aside) he is very content living in. He lives there with his partner.

[65] Seventh, the first defendants purchased No. 136 in 2000. Although they immediately embarked on drawing plans to develop the property as a home and office for their architectural practices, they have never lived at No. 136. They have continued living and working in Sydney. None of their proposed redevelopment work has started. No. 136 has been occupied by a series of tenants. It is currently vacant.

[66] Drawing all those considerations together, I am satisfied that it is appropriate to grant the plaintiff a right of way over so much of the existing driveway leading to No. 142 as crosses No. 136. That will be in the form of an easement in favour of No. 142 over the relevant part of No. 136, pursuant to s 129B(7)(b).

[67] It remains to consider whether the grant of that right of way should be upon terms and conditions, pursuant to s 129B(8). The first matter is compensation. The valuation evidence is that the grant of this right of way will decrease the value of No. 136 by $30,000 and increase the value of No. 142 by $55,000. In the course of his evidence, I asked Mr Asmussen what compensation he considered was appropriate if I granted him the relief he sought. His answer was a thoughtful one. He said that the appropriate compensation equated to the cost of option 1, had the first defendants consented to it when approached in February 2005. He accepted that the respective parties' engineers' estimates of the cost of option 1 as at the date of the December 2004 hearing were in the range $23,000-$35,000. His reasoning was that option 1 (and he said also option 10) would have given him access to No. 142 ***and*** permitted the first defendants to go ahead with their building plans (had option 1 been selected, with a few modifications).

[68] I also asked Mr Hajnal what he considered was appropriate compensation if I granted the plaintiff a right of way over the existing driveway. He said that it was $150-200,000, plus the first defendants' legal expenses.

[69] I have reflected on those answers. I find the plaintiff's answer a compellingly logical, fair and reasonable one. The mid-point of the range of the engineers' cost estimates is $29,000. Coincidentally, that is very close to the $30,000 diminution in value to No. 136 that results from granting No. 142 legal access over the existing driveway. I accept that it is significantly less than the $55,000 value increment to No. 142. I also take into account the open offer the plaintiff made to the first defendants as long ago as 15 March 2005 – to pay the first defendants $50,000 in exchange for legal access over the existing driveway. This is the offer I set out in [15].

[70] In all the circumstances, I consider that the appropriate compensation to the first defendants is $35,000.

[71] A further term of the grant must be that the plaintiff meets the reasonable legal expenses of the first defendants consequent upon the formalisation of the right of way.

[72] Counsel for the plaintiff also asked that I make the grant conditional on the plaintiff obtaining the permission of the NCC pursuant to s 348(1) Local Government Act 1974. Given the helpful submissions by Mr Beckett for the NCC, I consider that is an appropriate further condition, and I intend imposing it. No detailed summary of the submissions I heard as to the applicability of the Resource Management Act 1991 and the Local Government Acts, should I grant relief under s 129B, is necessary. Very briefly, Mr Beckett submitted:

a) Building consent is not required.

b) Resource consent is not required.

c) It seems arguable that s 348 Local Government Act 1974 yields to the specific, remedial regime in s 129B Property Law Act, whether or not the High Court is regarded as a "person" for the purposes of s 348(1). The provision in s 129B(12) that any order made under s 129B(7)

may be registered as an instrument under the Land Transfer Act 1952 lends support to the proposition that s 129B is a complete code.

[73] The consequence of conditioning the grant of relief on permission from the NCC under s 348(1) is that the NCC may impose conditions in terms of the up-grading of the existing driveway. Because the nature, and therefore cost, of those conditions is not known, Mr Fitchett asked that I reserve leave to all parties to revert to the Court. Though not without (what I hope is understandable) reluctance, I will do that.

Result

[74] Pursuant to s 129B(7)(b), I order that the plaintiff (i.e. as the registered proprietor of No. 142) is to have right of way, both foot and vehicular, over that part of the existing driveway serving No. 142 which crosses No. 136.

[75] That right of way is granted conditional upon the plaintiff:

a) Paying the first defendants compensation in the sum of $35,000, pursuant to s 129B(8)(a).

b) Meeting the first defendants' reasonable legal expenses of the formalisation of the grant, including the registration of an appropriate easement over the certificate of title to No. 136.

c) Obtaining the permission of the NCC, pursuant to s 348(1) Local Government Act 1974.

[76] I reserve to all parties leave to apply for any further directions that may be needed to finalise and give effect to the relief I have granted.

Costs

[77] In [72] of my 2005 judgment, I reserved the costs of this proceeding to that point. Those costs remain reserved, for application in terms of [72] of that judgment, should any party consider application is appropriate. My tentative view is that those costs should lie where they fell.

[78] The plaintiff has been successful with his present application for relief. He is entitled to his costs. I order that the first defendants are to pay those costs to the plaintiff on a 2B basis. Those costs include, of course, reasonable disbursements.

[79] I am unsure whether the NCC seeks any order as to its costs. They are accordingly reserved.

Solicitors:
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