

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2020-404-000593
[2020] NZHC 2462**

IN THE MATTER of ss 316 and 317 of the Property Law Act
2007

IN THE MATTER of an application by PAIHIA PROPERTY
HOLDINGS CORPORATE TRUSTEE
LIMITED for an order modifying or
extinguishing right of way easements

BETWEEN PAIHIA PROPERTY HOLDINGS
CORPORATE TRUSTEE LIMITED
Applicant

AND BODY CORPORATE 190356
First Interested Party

CHIN YUN HOLDINGS LIMITED
Second Interested Party

Hearing: 15 September 2020 (scene visit)

Counsel: LM Van and RA Idoine for Applicant
JA Wickes for Interested Parties

Judgment: 22 September 2020

JUDGMENT OF DOWNS J

*This judgment was delivered by me on Tuesday, 22 September 2020 at 11 am
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Anthony Harper, Auckland.
Loo & Koo, Auckland.

The case

[1] This case is about proposed modification of easements granting a right of way. Easements may be modified under the Property Law Act 2007¹ if the person seeking modification satisfies the Court of certain things; here, that modification will not substantially injure any person entitled to the easements. The applicant contends this test is met. Indeed, it argues the proposed right of way constitutes an improvement for everyone. Those entitled disagree. They contend modification would compromise access, parking, an existing resource consent; and increase noise.

[2] The setting is Marsden Road, Paihia, directly opposite the beach.

The land, easements and parties

[3] Numbers 116 through 130 Marsden Road originally had one owner: Paihia Beach Resort Hotel Ltd. In 1999, that company registered easements benefitting number 130 and cutting across numbers 116 – 128.² The easements contain a right of way. So, the burdened land was essentially cut in two to facilitate access to the benefitted land; see Schedule I.

[4] On 19 May 2014, Paihia Property Holdings Corporate Trustee Ltd, or Paihia Property, bought the burdened land. Four years later, Chin Yun Holdings Ltd, or Chin Yun, bought the unit titles comprising the benefitted land. From it, Chin Yun operates Paihia Beach Resort & Spa. I refer to the company and resort collectively as the Resort.

The proposed modification

[5] Paihia Property proposes to modify the easements by moving the right of way so it is adjacent the Resort. The best explanation is again pictorial; the proposed right of way is marked F; see Schedule II.

¹ The Act. The easements also provide for electricity but this is not contentious as the transformer has already been moved by the power company.

² I call the latter the burdened land; the former the benefitted land.

[6] Paihia Property contends this modification offers more convenient, direct access to the Resort and eliminates the “meandering and wholly unnecessary traverse” of its land, both without substantial injury to the Resort.

Background

[7] As observed, in 2014, Paihia Property bought the burdened land. The benefitted land was then run as a resort too, albeit by an owner before Chin Yun.

[8] In 2016, Paihia Property concluded the easements should be reconfigured. Guests were not accessing the benefitted land within the easements, most likely because an expansion of the reception area interfered with an otherwise direct path; the easement to convey electricity was no longer necessary, as the power company had relocated the transformer to Davis Crescent; and the owner of the benefitted land appeared to be discharging stormwater onto the burdened land. Most importantly, Paihia Property was concerned at its inability to use its land.

[9] On 12 December 2016, Pahia Property proposed modification to the owner of the benefitted land. It did not respond.

[10] On 2 February 2018, Paihia Property sought consent of Far North District Council for the modification. On 4 May 2018, this was granted.

[11] On 29 May 2018, Chin Yun bought the units comprising the benefitted land.

[12] On 7, 21 and 26 September 2018, Paihia Property wrote to the Resort about the modification. The Resort did not engage.

[13] A year later, on 4 September 2019, Paihia Property again wrote to the Resort about modification. On 26 September, the Resort replied. It said it did not agree to modification but did not say why.

[14] On 20 April 2020, Paihia Property filed this application.³

³ Jagose J permitted originating application procedure; Minute of 21 April 2020.

A précis of the Resort's opposition

[15] The Resort contends the modification “would substantially injure it” and is solely for Paihia Property’s “convenience”. It argues the modification would make access to the Resort troublesome; compromise its parking and an existing resource consent; and increase noise. The Resort emphasises existing arrangements reflect its property rights and acquisition of the benefitted land by contract.

Principle

[16] The application is governed by ss 316 and 317 of the Act. These read:

316 Application for order under section 317

- (1) A person bound by an easement, a positive covenant, or a restrictive covenant (including a covenant expressed or implied in an easement) may make an application to a court for an order under section 317 modifying or extinguishing that easement or covenant.
- (2) That application may be made in a proceeding brought by that person for the purpose, or in a proceeding brought by any person in relation to, or in relation to land burdened by, that easement or covenant.
- (3) That application must be served on the territorial authority in accordance with the relevant rules of court, unless the court directs otherwise on an application for the purpose, and must be served on any other persons, and in any manner, the court directs on an application for the purpose.

317 Court may modify or extinguish easement or covenant

- (1) On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the easement or covenant) if satisfied that—
 - (a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
 - (i) the nature or extent of the use being made of the benefitted land, the burdened land, or both:
 - (ii) the character of the neighbourhood:
 - (iii) any other circumstance the court considers relevant; or
 - (b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could

reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or

- (c) every person entitled who is of full age and capacity—
 - (i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or
 - (ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or
 - (d) the proposed modification or extinguishment will not substantially injure any person entitled; or
 - (e) in the case of a covenant, the covenant is contrary to public policy or to any enactment or rule of law; or
 - (f) in the case of a covenant, for any other reason it is just and equitable to modify or extinguish the covenant, wholly or partly.
- (2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

[17] An applicant must satisfy the Court the modification should be made; those entitled to the easement need not justify the status quo. These principles reflect at least three things. First, the orthodox litigation rule that those asserting must prove. Second, the common law’s concern for property rights. Third, a closely related concern: sanctity of contract.

[18] *Paihia Property* relies on s 317(1)(d). In *New Zealand Industrial Park Ltd v Stonehill Trustee Ltd*, the Court of Appeal said:⁴

This ground has been described as a “long stop against vexatious objections to extended user”. The first issue is whether the proposed modification or extinguishment would cause injury to the dominant land owner. The second issue is the extent of any injury. The subsection requires that the dominant land owner not be substantially injured, thereby contemplating that there may be injury that is less than substantial. The word “substantially” has been held to mean “real, considerable, significant, as against insignificant, unreal or trifling”.

⁴ *New Zealand Industrial Park Ltd v Stonehill Trustee Ltd* [2019] NZCA 147, (2019) 20 NZCPR 119 at [112] (footnotes omitted).

Analysis

[19] I visited the benefitted land and burdened land with the parties' agreement.⁵ Each made brief submissions at areas of interest.⁶ The visit could not have been more helpful. What might otherwise have been an abstract, even arid, exercise based on diagrams and photographs was illuminating, indeed decisive.

More noise? Visual disturbance?

[20] The Resort caters for the upper end of the market. Its director, Ms Yuhan Yang, says the modified right of way "goes right in front of our accommodation and restaurant and is likely to detrimentally affect our guests' enjoyment by reason of vehicle noise and lights".

[21] I remind myself of the onus; Paihia Property must satisfy me the modification will not substantially injure an entitled person.

[22] I am satisfied the modification will not have the effects Ms Yang identifies. No guest rooms adjoin the proposed right of way; this because there are no guest rooms on the ground floor. The Resort's restaurant is on the first floor. It runs parallel to the proposed right of way. Those seated at the tables closest to the proposed right of way will struggle to see vehicles entering the Resort (below) because of the height of the windows and (parallel) line of travel—something I specifically noted during my visit. For the same reasons, it will be difficult to see vehicles from any other part of the restaurant if the modification is allowed.

[23] The modification will not impair the view from guest rooms either. While guests may see vehicles turning into the resort from their rooms, they already look out onto Marsden Road (beyond which is the beach and Te Ti Bay).

[24] Any increase in noise will be negligible. Under existing arrangements, vehicles *already* pass below the restaurant and underneath the Resort.

⁵ On 15 September 2020.

⁶ See my Minute of 11 September 2020. The parties agreed the hearing could otherwise be on the papers.

Fewer carparks? Greater risk?

[25] The Resort must maintain 16 carparks.⁷ Carparks 7, 8, 9 and 10 are angle parks opposite the reception; see Schedule II.

[26] Vehicles currently approach the Resort at a perpendicular angle. Only one-way traffic is allowed. All vehicles must drive past reception, then underneath the rooms above in a covered, carpark building-like tunnel. The ceiling is low; two metres or so.

[27] Peter Kelly is a senior transportation engineer. Mr Kelly believes the modification would result in loss of carpark 10 if a very large vehicle, meaning a 10-seater or larger vehicle, enters the Resort, for it would hit a vehicle in carpark 10. The space would just be too small.

[28] Mr Kelly also believes carpark 9 would be more difficult to use. He says “fairly precise manoeuvres” would be required of those driving into carpark 9 given the turning circle about reception. Mr Kelly also believes the modification attracts risk, for motorists would be turning 90 degrees in a likely populated area (given the presence of reception).

[29] Mr Kelly endorses the status quo for these reasons.

[30] John Parlane is also a traffic engineer. Mr Parlane believes the current arrangement is undesirable. It contains several bends that “do not meet the recommended clearance width” and reception “blocks a significant portion of the access at the ingress to the parking area”. Mr Parlane says Mr Kelly’s large vehicle point is something of a distraction, because the low ceiling precludes very large vehicles with a high roof from entering the Resort (they would get stuck if they tried to drive past reception). Mr Parlane also says the Resort has fewer than the 16 carparks it claims to have.

⁷ Under a resource consent granted by Far North District Council.

[31] Mr Parlane believes the modification will not aggravate the Resort’s position in relation to either safety or parking—and may improve it—provided there is a 10 kilometre per hour speed restriction. Mr Parlane says if carpark 10 remains empty, the modification should work “well”.

[32] Holton Liu is a manager at the Resort. Mr Liu says Mr Parlane is wrong; everything currently “works well”, including carparking arrangements.

[33] I again remind myself of the onus, and what Paihia Properties must establish.

[34] I am satisfied the Resort does not really have 16 carparks, so the modification will not cause significant injury through compromising a legal requirement vis-à-vis number of carparks. This was self-evident at my visit. Carpark 16, which is just outside reception, is encroached by a large stairwell. It would accommodate only a very small vehicle; say, a Mini or Suzuki Swift. Carpark 7 would not fit *any* car. A part of the building that houses the spa encroaches at least a third of this parking space.⁸ For this reason, a car in this area would need to park further to the right, thereby encroaching carpark 8 and causing a domino effect on the remaining carparks (9 and 10).

[35] Carpark 10 is problematical in any event. The position of reception means an incoming car will often have to deviate beyond the existing easement (a little further onto the burdened land) to use this carpark. The same would be true when a car leaves carpark 10.⁹

[36] All this may explain why these carparks are not marked, which is rather unusual. Most resorts, hotels and motels have clearly marked carparks, for obvious reasons. I consider it all but certain only three cars really fit across the space theoretically dedicated to the four carparks numbered 7, 8, 9 and 10 opposite reception.

⁸ I reject Mr Liu’s evidence this “is a car park space” (unless the phrase is confined to a motorcycle or bicycle). Mr Liu says a photograph at page 177 of volume II of the bundle shows “four vehicles parked one in each space in carparks 7 – 10”. The (poor quality) photograph does not show this. It shows two vehicles (perhaps three?) in this area. The photograph is taken from a very awkward angle.

⁹ Mr Parlane makes the same point.

[37] This means modification will not compromise the *true* carparking space in this area, even if a very large vehicle enters the Resort. Moreover, very large vehicles should not enter the Resort for the reasons Mr Parlane identifies.¹⁰ Mr Kelly's concerns about carpark 9 are not significant.

[38] This leaves Mr Kelly's evidence about the risk arising from vehicles turning 90 degrees about reception:

The 90-degree corner into the carpark area is located near the entrance to the reception, likely an often congested area with a risk of arriving and departing guests and their luggage spilling into the easement area. This presents a hazard for guests and motorists at a point where a motorist's visibility could be reduced whilst performing a relatively tight turning manoeuvre. Furthermore, the 90-degree right-turn adds another layer of complexity as drivers entering the site are determining where to go, as well as looking for and avoiding pedestrians and other vehicles.

[39] I am satisfied the risk is more theoretical than real. Reception's external walls comprise large glass windows and doors. Someone inside reception has an excellent view outside. Oncoming traffic would be clearly visible. A driver approaching reception using the modified right of way will have a clear view of that area before and during the turn. So too the area outside reception (where people may be). Moreover, while the turn is 90 degrees, the existing arrangement requires a slight twist to the right, then a correction. It is far from obvious this is any safer than what is proposed. Traffic flow should also be improved through the modification as the turn is clean; no correction is needed.

[40] In short, I am satisfied the Resort will not suffer serious injury in relation to carparking, access or safety if the easements granting the right of way are modified as proposed.

Planning harm?

[41] David MacPherson is a very experienced planner. He believes modifying the right of way requires an amendment of the resource consent held by the Resort despite the resource consent obtained by Paihia Property. Mr MacPherson says that resource

¹⁰ Rubbish trucks do not drive beneath the Resort. It was evident from my visit they collect rubbish from large, wheeled bins at the back of the Resort via Davis Crescent only.

consent does not refer to the 16 carparks and anticipates vehicles smaller than 10-seater ones. Mr MacPherson says he has:

... done RMA diligence on buildings being purchased and this type of situation if picked up can discourage buyers and result in downward prices being negotiated or worse sale problems. So there is an unresolved Resource consent problem if the existing access is extinguished and replaced with a different access.

[42] David Badham is also a planner. He disagrees with Mr MacPherson on the basis the latter “incorrectly ... links the need for resource consent to the hotel activity undertaken on the [Resort’s] land”. Mr Badham says, in 2014 Far North District Council amended the resource consent in relation to the resort by deleting the requirement for common ownership of the benefitted land and burdened land, and by relocating parking on the burdened land to the benefitted land. Mr Badham says the resource consent for the Resort now relates solely to its land (the benefitted land), so modification will “not impact the resource consent held by the [Resort]”. That said, Mr Badham considers the modification requires Paihia Property to obtain a resource consent as Marsden Road is also State Highway 11, and access to state highways invoke special rules of the Far North District Plan. Mr Badham continues:

24. As a discretionary activity, the application would be subject to the standard notification tests in sections 95A-95G of the RMA. Pursuant to 15.1.6C.3 of the Far North District Plan, the New Zealand Transport Agency will likely be considered as an affected party for any resource consent application pursuant to Rules 15.1.6C.1.1(e)(i) and 15.1.6C.2(a).
25. Following a notification decision, the application would be considered [by] Council under section 104 of the RMA. Pursuant to section 104B of the RMA, Council may grant or refuse the application, and if it grants the application, may impose conditions. In my opinion, the key consideration would involve determining that the new location and access arrangement is no worse in terms of traffic and pedestrian safety at the entrance onto the State Highway.
26. I wish to make it clear that I consider the above discretionary consent is a separate matter and should have no bearing on the current application for reconfiguration before this Court. It also has no bearing on the resource consent for the Interested Parties’ Land. To my knowledge, it otherwise does not affect the Interested Parties or the hotel activity. Though, I note for completeness that the Applicant will need to obtain consent before the reconfigured easements can be used.

[43] I prefer Mr Badham’s analysis for the reasons he gives and one other. I have already concluded the Resort does not really have 16 carparks. This is true irrespective

of the outcome of this application. It follows any parking problems arising from possible breach of the resource consent held by the Resort are not a product of *modification* of the easements or right of way. The same reasoning applies to the Resort's inadequate space for very large vehicles and resource consent implications, if any. True, this litigation has revealed these matters, but neither arises *because* the easements have been modified.

[44] For these reasons, I am satisfied modification will not injure the Resort, substantially or otherwise, in relation to its existing resource consent. The state highway point identified by Mr Badham is something Paihia Property must confront—and fund.

Summary

[45] Caution is required when someone wishes to modify easements. Interference with property rights—and contracts—is no little thing. These observations are underscored by Ms Yang's evidence Chin Yun was unaware of Paihia Property's interaction with the previous owner about modification; apparently the issue did not surface during Chin Yun's due diligence (pre-acquisition). However, I am quite satisfied the statutory test is met. Modification of the easements will not substantially injure the Resort.

[46] For completeness, I accept Paihia Property's submission everyone will be better off if the easements are modified.¹¹ Existing arrangements are frankly, dotty. A first-time guest at the Resort likely spends some time looking for the entrance, which is approximately 40 metres away from the Resort, and unmarked. To avoid access to the burdened land much beyond the easements, a very low (and unattractive) fence winds across the burdened land to reception. I would be surprised if guests were not a little bemused by these arrangements, which must sit awkwardly with its market. Modification will make access obvious and direct, with no significant injury to the Resort. I acknowledge what may be the Resort's real concern: it cannot know what may be built next door. This, however, is beyond my purview.

¹¹ As I have sought to stress, this is not the test.

Result

[47] The application is granted. The right of way easements (easement instruments D435872.3 and D435872.5) granted over the land located at 116–128 Marsden Road, Paihia, identifiers NA120B/600, NA425/151 and NA623/171, are modified in the manner specified in the schedule attached to the application.

Costs

[48] I incline to the view Paihia Property should have 2B costs, especially as the Resort did not engage with it about modification. If the Resort has a different view, I will receive memoranda of not more than seven pages:

- (a) The Resort – by **13 October 2020**.
- (b) Paihia Property – by **27 October 2020**.

Compensation?

[49] The Resort wishes to be heard on this. Submissions and evidence on this topic must respect this judgment’s findings. No collateral attack will be countenanced; error, factual or otherwise, is for the Court of Appeal. Subject to these remarks, evidence and submissions in relation to possible compensation are to be filed and served by:

- (a) The Resort – **3 November 2020**.
- (b) Paihia Property – **24 November 2020**.

[50] Each submission should identify if a hearing is sought. If any party wants a hearing, I shall convene one.

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Downs J

Schedule II

