IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA601/2020
[2021] NZCA 411

BETWEEN	BODY CORPORATE 193056 Appellant
AND	CHIN YUN HOLDINGS LIMITED Second Appellant
AND	PAIHIA PROPERTY HOLDINGS CORPORATE TRUSTEE LIMITED Respondent

Hearing:	23 June 2021
Court:	Gilbert, Mander and Hinton JJ
Counsel:	D K Wilson for First and Second Appellant L M Van and R A Idoine for Respondent
Judgment:	31 August 2021 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The High Court judgment modifying the right of way easements is set aside.

C The High Court costs judgment is set aside. Costs in the High Court are to be determined by that Court in the light of this judgment.

D The respondent must pay costs to the appellants for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gilbert J)

[1] This is an appeal against a judgment of Downs J modifying, by completely relocating, right of way easements over the respondent's land that provide access to the appellants' property.[1] The order was made pursuant to s 317(1)(d) of the Property Law Act 2007 (the Act); the Judge being satisfied the proposed modification would not substantially injure the appellants.[2]

Background

[2] The second appellant, Chin Yun Holdings Ltd, owns and operates the Paihia Beach Resort & Spa (the resort), a luxury five-level hotel situated at 130 Marsden Road (the benefitted land) on the beachfront at Paihia in the Bay of Islands. The resort is a unit title development comprising of 28 principal units. The first appellant is the body corporate that owns the common property and the registered owner of the benefitted land.

[3] The respondent, Paihia Property Holdings Corporate Trustee Ltd, is the registered owner of the adjoining land at 116–128 Marsden Road (the burdened land), which is comprised of three titles and is currently undeveloped.

[4] Resource consent for the development of the resort was originally granted by the Far North District Council (the Council) in June 1996. The right of way easements were registered on 1 October 1999, providing access to the resort by cutting across the burdened land. At that time, both the benefitted land and the burdened land were in the common ownership of a company called Paihia Beach Resort Hotel Ltd. Vehicular access to the resort has always been provided by way of a 55-metre single-lane, one-way, driveway to the east from Marsden Road. The driveway crosses the burdened land and leads directly to the reception and parking areas. Vehicles exit by continuing through the undercover car park area and out onto Davis Crescent on the western side of the resort. Davis Crescent links back to Marsden Road.

[5] Attached to this judgment as Appendix 1 is a plan showing the present location of the right of way easements. The resort (on the benefitted land) is lot 1 on this plan.

---

1 *Paihia Property Holdings Corporate Trustee Ltd v Body Corporate 190356* [2020] NZHC 2462, (2020) 21 NZCPR 385 [High Court judgment].

2 At [45].

The burdened land to the east comprises lots 2, 17 and 18 and the right of way easements are over those areas marked C, A and B on these lots.

[6] In early 2014, Northland Corporate Trustees Ltd, the then owner of the land and a company associated with Paihia Beach Resort Hotel Ltd, decided to sell the whole of the land, both the burdened land and the resort/benefitted land. It sold the burdened land to the respondent on 19 May 2014. At that time, Marble International Ltd (Marble) was in the process of acquiring the resort. Marble expressed interest in also acquiring the burdened land from the respondent. In its reply letter dated 27 May 2014, the respondent agreed that common ownership of the land was "desirable" and "should prevail into the future". The respondent noted that a resource consent had been granted in May 2012 to expand the resort facilities by adding 85 accommodation units, conference facilities, a new restaurant and bar and associated parking and facilities. The respondent observed that the combined land therefore had "significant approved development capability". The respondent went on to caution Marble about what it perceived to be difficulties with the existing right of way easements, including that an extension to the reception area had restricted access to the basement area of the resort. We will return to this issue later in the judgment. The respondent concluded by saying:

> It is clear that separate ownership of the Paihia Beach Resort and the adjoining Marsden Road Land is not an ideal situation. A merging of ownership interests offers significant operational benefits to the Resort together with enabling a profitable development opportunity on the land.

[7] Despite the obvious synergies, the discussions about merging the ownership interests came to nothing. Marble completed its purchase of the resort on 29 August 2014 and transferred title to a related entity, Kai Trustee Ltd (KTL), on 9 September 2014.

[8] As alluded to by the respondent in its correspondence with Marble, the location of the driveway across the middle of the flat section of the burdened land significantly constrains its development potential.[3] In late 2016, the respondent approached KTL with a proposal to relocate the driveway in order to overcome this problem.

---

[3] There is a steep bank on the southern part of the land.

The proposal was that KTL would surrender the existing easements over lots 2, 17 and 18 and the respondent would grant a new right of way easement over lot 2 to provide access from Marsden Road on a new driveway it would construct along the boundary between lots 1 and 2. KTL did not agree to this proposal.

[9] In an attempt to progress the matter, and notwithstanding the lack of any agreement with KTL, the respondent applied to the Council in early 2018 for consent to create the proposed right of way on lot 2.[4] Consent was duly granted in May 2018.

[10] The appellants acquired the resort from KTL on 29 May 2018 without knowledge of the respondent's discussions with KTL about "merging" ownership interests or the proposal to relocate the driveway.

[11] In September 2018, after learning that the appellants had acquired the resort, the respondent advanced the same driveway relocation proposal to them. However, like KTL, the appellants were not prepared to agree to this.

[12] A year later, in September 2019, the respondent again wrote to the appellants seeking agreement to the relocation proposal. On 26 September 2019, the appellants responded stating that they did not agree to any variation of the easements. No reasons were provided for declining to consent.

High Court proceedings

Originating application

[13] In April 2020, the respondent filed an originating application in the High Court at Auckland seeking an order under s 317 of the Act that the right of way easements be "modified" in the manner set out in a plan, a copy of which is attached to this judgment as Appendix 2. This plan was the same as the proposal advanced to KTL in 2016 and to the second appellant in 2018.

---

[4] This was necessary as the terms of the easements required Council consent to be sought and given in writing.

[14] The modification was described in the application as the "Adjusted Easement Rights". The application was made on the ground that:

> The proposed modification or extinguishment will not substantially injure [the appellants]:
>
> (i) The Adjusted Easement Rights preserve [the first appellant's] existing nature and level of access to the [benefitted land].
>
> (ii) [The respondent] has arranged for a right to convey water easement for [the first appellant] to cover an existing storm water pipe, which is not currently documented by an easement.
>
> (iii) The Adjusted Easement Rights will make the use of the entryway safer for vehicles accessing the [benefitted land].
>
> (iv) [The respondent] has offered to pay for all reasonable costs associated with the extinguishment of the existing [right of way] Easements and the registration of instruments to give effect to the Adjusted Easement Rights.
>
> (v) [The respondent] has made multiple attempts to engage with [the appellants] on the relocation of the [right of way] Easements and to seek their consent.
>
> (vi) [The appellants] have not provided any meaningful response to those requests nor has it asserted that it will be prejudiced by the modification/extinguishment of the [right of way] Easements and the granting of the Adjusted Easement Rights.

Affidavits

[15] The application was supported by an affidavit from Mr Ross Porter, asset manager for Urban Partners Ltd, a group of companies involved in property investment. The respondent is a special purpose vehicle and is part of that group, having been incorporated in May 2014 to acquire and hold the burdened land. Mr Porter set out the relevant background and detailed the proposal to extinguish the existing easements on lots 2, 17 and 18 and create a new easement on lot 2. Mr Porter referred to the extension to the reception area that had been carried out some time prior to the appellants acquiring the resort. He said this extension impedes vehicular access to the basement along the route of the existing easements and creates a tight turning circle for vehicles entering and exiting the basement. He said the gap between the extended reception area and the easement boundary is now only 2.45 metres which he understands is less than the minimum required by the Council.

[16] Mr Porter concluded by stating his belief that:

> … the proposed adjusted easement rights maintain the position of [the appellants] (and in some instances, betters its position), because:
>
> (a) It regularises access and use rights in relation to the Land (currently non-compliant due to location of reception area).
>
> (b) It preserves access rights to the Resort ….
>
> (c) It now provides for drainage rights, where before there was none.

And that:

> … there is no substantial injury/prejudice to [the appellants] if the Court approves the new proposed easement rights for registration. In addition to the above, it is important to note that [the appellants] will not be left out of pocket, because [the respondent] has already offered to meet all the costs associated with the surrender of the existing Easements and creation of any new easements. It has also paid for the cost of seeking Council consent and obtaining survey plans, and it has offered to contribute to some of [the appellants'] legal costs.

[17] The appellants filed a notice of opposition asserting that the proposed extinguishment of the easements and replacement with a new easement would substantially injure them. The appellants filed four affidavits in support of its opposition, including one from an expert transportation engineer and one from an expert planner. The respondent filed two affidavits in response, one from an expert traffic engineer and the other from an expert planner. We briefly summarise the substance of these affidavits below.

[18] Ms Yuhan Yang is a director of the second appellant. She said that when the appellants purchased the property (two years earlier, in May 2018), they were satisfied with the existing arrangements for access to the property and had no idea of any issues between the respondent and the previous owners. Ms Yang said the appellants were "alarmed" when they received the respondent's proposal in September 2018 to change the access arrangements. After taking legal advice, the appellants advised that they would not agree to the proposed changes. Ms Yang said she was not aware of any stormwater issue but would rectify this if discharge was occurring.

[19] Ms Yang described the present access as being "easy", by way of a "virtually straight one way route of approximately 55 metres leading to the reception and the carparking". She said the "access widens at the end providing ample space in front of the reception area for cars, taxi vans and minivans to safely and comfortably manoeuvre". Although the appellants had not yet obtained expert advice, Ms Yang summarised what she considered were the disadvantages of the proposed new access as follows:[5]

> [T]he alternative accessway proposed by the [respondent] does not have the same safe and ample manoeuvring area at the end of it.
>
> [T]he accessway proposed has a very sharp right turn into the carparking and comes too close to our car park 10.
>
> [I]t would be much more difficult to reverse from the carparking or the reception to the road along the proposed alternative access.
>
> [T]he proposed accessway 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.
>
> [T]he change proposed by the [respondent] to the access will affect the desirability and therefore the value of the property.

[20] Mr Peter Kelly is a senior transportation engineer retained by the appellants. In his affidavit, Mr Kelly set out his views on the disadvantages of the proposed accessway. In summary, these were:

(a) Hazard — Mr Kelly considered that the 90-degree corner into the often congested car park area near the reception would present a hazard for guests and motorists. He said that a motorist's visibility could be reduced at this point while performing a relatively tight turning manoeuvre.

(b) Loss of car park 10 — vehicles making the right turn into the car park area were not likely to be able to consistently manoeuvre around any vehicle parked in the first space on the inside of the right angle corner

---

5 Ms Yang explained that the appellants had difficulty instructing experts at that time because of problems associated with the COVID-19 level 3 lockdown.

opposite reception (car park 10). Mr Kelly produced vehicle tracking curves to demonstrate this.

(c) Impact on the usability of car parks 9 and 10 — Mr Kelly considered that the proposed right of way would negatively impact the usability of car park 10 and the next car parking space (car park 9) noting that, for a vehicle to enter car park 9, "fairly precise manoeuvres are required in addition to the 90-degree turn into the carpark area".

(d) Less desirable entrance from Marsden Road — Mr Kelly considered the current obtuse angle of the existing entrance from Marsden Road is superior to that proposed because it complements the direction of movement to the site and offers better visibility for motorists throughout its full length. By comparison, the proposed accessway would require visitors to execute two 90-degree corners carrying an increased risk of pedestrian/vehicle conflict.

[21] Mr John Parlane is also an experienced traffic engineer. He was engaged by the respondent to comment on the views expressed by Mr Kelly. Mr Parlane considered that there were a number of issues with the present access to the resort making it unsuitable for use by many larger vehicles:

(a) There are several bends in the existing access that do not meet the recommended minimum clearance for vehicles larger than a standard passenger car.

(b) The height of the egress from the parking area is limited to two metres, restricting the size of vehicles that can use this exit.

(c) The width of the egress is also below the minimum recommended clearance, limiting the size of vehicle that can safely utilise it.

(d) Access to the parking area is restricted by the extension to the reception such that larger vehicles would have less than 85mm of clearance to

the respondent's land, well below the minimum recommended clearance.

[22] Mr Parlane also considered there are problems with the existing car parking spaces. He notes that the affected car park spaces referred to by Mr Kelly (9 and 10) are not marked and he does not believe that all four car parks in this line (7 to 10) could be used simultaneously because they are positioned too close to each other. He also said car park 10 is directly in front of a door to the pool room which he suggested would be unusable if this car park was in use.

[23] Mr Parlane then addressed the proposed access way. He put to one side Mr Kelly's concerns regarding larger vehicles because he did not consider the existing arrangements offer feasible access for these vehicles in any case. He suggested a small modification to the proposed accessway to alleviate the concern about the adequacy of clearance at the 90-degree turn into the parking area. He described this level of clearance as consistent with the egress to the parking area and considered it "both safe and tolerable for the site".

[24] Mr Holton Liu is the office and administration manager employed by the first appellant. He completed an affidavit in response to Mr Parlane's affidavit. Mr Liu considered the current access arrangements work well. He said there have been no incidents with people entering and exiting the reception into the parking area. He considered that the proposed accessway requiring a sharp turn into the underground parking across the pedestrian access would be less desirable from an accessibility perspective and also because those staying at the resort would be more exposed to vehicle movement, both visually and audibly.

[25] Mr Liu noted that consent for the extension of the reception area was granted in 2008 and the original requirement for 22 car parks was reduced to 16 in a consent variation granted in 2014. He said that car park 10 has been used by the resort and its customers for years without difficulty. The doors to the pool service area in front of car parks 9 and 10 open inwards and access is not hindered by vehicles parking in these spaces unless they are parked too close to the doors. Mr Liu also said there had never been a problem using car parks 7 to 10 at the same time and he produced

a photograph depicting this. Finally, Mr Liu disputed that stormwater is discharged from the resort on to the respondent's land. He produced a photograph of a drainage pit near the exit of the parking area and said this is where stormwater discharges.

[26] Mr David MacPherson is an experienced planner engaged by the appellants. Mr McPherson expressed the view that any change to the access arrangements would compromise the existing resource consent held for the resort because this was approved on the basis of the existing easements, which therefore form an integral part of the consent.

[27] The final affidavit came from Mr David Badham, a planning consultant engaged by the respondent to reply to Mr MacPherson's affidavit. Mr Badham considered that no further application to vary the resource consent would be necessitated by the proposed relocation of the driveway. However, he said that a discretionary activity resource consent would be required under the relevant provisions of the Far North District Plan prior to the use of the proposed accessway.

Hearing

[28] On 6 July 2020, Moore J made timetable directions for the completion of reply evidence and the exchange of submissions. He allocated a fixture for the matter to be heard on 15 September 2020.[6]

[29] Downs J was assigned to hear the application. The Judge issued a minute on 9 September 2020 advising that he would like to view the properties because the issues were intensely factual and he considered the photographs were not informative. The Judge proposed that instead of conducting a hearing, a site view would be taken on the scheduled hearing date and he would decide the matter on the papers with the benefit of that view.[7]

---

6 *Paihia Property Holdings Corporate Trustee Ltd v Body Corporate 193056* HC Auckland CIV-2020-404-593, 6 July 2020 (Minute of Moore J).

7 *Paihia Property Holdings Corporate Trustee Ltd v Body Corporate 193056* HC Auckland CIV-2020-404-593, 9 September 2020 (Minute of Downs J).

[30] A telephone conference was convened the following day. The parties agreed to the Judge's proposal and he then made the following directions regulating the view:[8]

> [5] The sequence at the view is to be this:
>
> (a) Ms Van [counsel for the respondent, who was the applicant in the High Court] should first identify all areas of interest and concern to her client. At each, Ms Wickes [then counsel for the appellants] may make a brief response.
>
> (b) Ms Wickes is then to identify all areas of interest and concern to her clients. Ms Van may make a brief response at each.
>
> (c) I will then ask to be shown anything I consider potentially important. Ms Van may make a brief statement in relation to each, followed by a brief statement by Ms Wickes.
>
> (d) My associate will make a shorthand note as we go (so a record exists).
>
> [6] I do not expect the view to take long.
>
> [7] This leaves one matter. Ms Wickes said if I find against her clients, she would like the opportunity to address compensation. Ms Van was circumspect about this, observing [the appellants] had long known of the possibility of the easements being varied. I will reflect on this issue. My judgment will address it and related arrangements, if any.

[31] The view duly proceeded in this manner and the Judge issued his judgment one week later.[9]

High Court judgment

[32] The Judge commenced his analysis by referring to the view that had taken place in substitution for a hearing. He stated:[10]

> 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.

---

8 *Paihia Property Holdings Corporate Trustee Ltd v Body Corporate 193056* HC Auckland CIV-2020-404-593, 11 September 2020 (Minute No 2 of Downs J)

9 High Court judgment, above n 1.

10 At [19].

[33] The Judge then addressed the issues under three headings, being (1) "More noise? Visual disturbance?", (2) "Fewer carparks? Greater risk?", and (3) "Planning harm?".[11]

[34] As to the first of these — noise and visual disturbance — the Judge was satisfied the proposed modification would not have the effects identified by Ms Yang (detrimental effect to guests' enjoyment by reason of vehicle noise and lights) for the following reasons:

> [22] I am satisfied the modification will not have the effects Ms Yang identifies. No guest rooms adjoin the proposed right of way; this is 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.

[35] Turning to the second issue of car parking, the Judge stated:

> [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. 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.

---

[11] At [20], [25] and [41].

> [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.
>
> [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. Mr Kelly's concerns about carpark 9 are not significant.
>
> (Footnotes omitted.)

[36] The Judge rejected Mr Kelly's evidence about the increased risk posed by the 90-degree turn in front of reception that would be required if the driveway was relocated:

> [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.

[37] The final issue was described as "[p]lanning harm". After reviewing the competing contentions of the two experts as to the necessity of amending the existing resource consent by virtue of relocating the driveway, the Judge preferred Mr Badham's analysis:

> [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.

[38] The Judge therefore concluded that the statutory test under s 317(1)(d) of the Act was met in that the proposed modification of the easements would not

substantially injure the appellants.[12] Indeed, the Judge went further and said everyone would be better off if the easements were modified. In reaching this conclusion, the Judge acknowledged that the appellants' real concern related to the likely development of the respondents' land and how this might affect the resort. However, the Judge considered this was beyond the scope of the relevant enquiry for the purposes of the present application:

> [46] For completeness, I accept Paihia Property's submission [that] everyone will be better off if the easements are modified. 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.
>
> (Footnote omitted.)

[39] The Judge granted the application and directed that the right of way easements be modified in the manner specified in the schedule attached to the application (as shown in Appendix 2 to this judgment).[13] He expressed his provisional view that the appellants should pay costs but set a timetable for the filing of submissions if this was opposed. The Judge addressed the appellants' wish to be heard on the topic of compensation as follows:

> **Compensation?**
>
> [49] [The appellants wish] 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 [in accordance with a timetable set].

[40] The Judge subsequently awarded costs and disbursements of $19,995 to the respondent.[14]

---

12 At [45].
13 At [47].
14 *Paihia Property Holdings Corporate Trustee Ltd v Body Corporate 190356* [2020] NZHC 3030 [High Court costs judgment].

Appeal

Appellants' submissions

[41] Mr Wilson, for the appellants, contends there were deficiencies in the hearing. He notes that the respondent's application was filed on 20 April 2020, during the first COVID-19 lockdown. The case proceeded to a hearing in September 2020, during an Auckland lockdown. Mr Wilson suggests the decision to have a site visit without any actual hearing may have been a response to the COVID-19 restrictions, but he contends it has led to several unsatisfactory aspects in respect of the conduct of the case. In particular he submits the judgment was overly influenced by the Judge's site visit, rather than an analysis of the evidence. Further, there was no cross-examination and the "hearing" was somewhat rushed.

[42] Mr Wilson observes that the application is in effect for the extinguishment of the existing right of way and the creation of a new one. He says a generous interpretation is required to view this as a modification. However, Mr Wilson did not press this point before us and invited us to proceed on the basis that the proposed relocation can be brought within the meaning of the word "modify" in s 317 of the Act.[15]

[43] Nevertheless, Mr Wilson argues that the complete relocation of the driveway is itself a detriment to the appellants generally in two respects (leaving aside the specific issues addressed by the High Court such as car parking and noise). First, he points out that the easements were formed in 1999 (when all of the land was in common ownership) and it can be inferred that it was established in this particular location because it enhanced access to the entrance to the resort. This is supported by the appellants' evidence that the current access works well for them and they wish to retain it. Mr Wilson submits that the existing driveway is more satisfactory because it has only two small bends and leads straight to the resort whereas the proposed driveway requires two sharp right-hand turns. He says the appellants take strong exception to the Judge's remark that the existing arrangements are "dotty".[16]

---

15 See *Re Lewis* [1959] NZLR 1040 (SC) at 1041, where a change in the position of a right of way easement from the centre of the burdened land to the side was considered to be a "modification". This decision was followed in *Organic Farming Ltd v Bryson* (2007) 7 NZCPR 939 (HC) at [59].

16 High Court judgment, above n 1, at [46].

Mr Wilson submits that the resort operators should be taken to be the best people to decide which form of access is better for the resort and the Judge's site visit impressions have been taken too far on this point.

[44] Secondly, Mr Wilson argues that the Judge was wrong to disregard the appellants' concern about future development on the respondent's land as being beyond his purview. Mr Wilson submits that the Judge should have taken into account the likelihood, or almost certainty, that there will be a building close to the boundary if the driveway is relocated. This would result in the luxury resort being left with access by way of what he describes as "a mean looking alleyway between two buildings".

[45] Turning to the more specific issues that attracted attention in the High Court, Mr Wilson submits the Judge was wrong to find that these did not, even taken together, constitute substantial injury. He accepts that car parking issues in isolation would not amount to substantial injury under s 317(1)(d) to justify declining the respondent's application. However, he says the Judge was in error to conclude there was no injury because there are existing problems with some of the car parks. Mr Wilson argues that the correct approach is to take the car parking as it is, with whatever faults exist, and assess whether the proposed relocation of the driveway will make it worse. Based on Mr Kelly's evidence, the answer is there will be some loss of parking facility if the driveway is relocated. Mr Wilson also says that there will be increased noise because cars will be driving right beside the hotel building and will then make a sharp turn. Mr Wilson argues the resource consent issue ought not to have been put to one side. He submits the Judge did not adequately explain why he preferred Mr Badham's evidence over Mr MacPherson's expert evidence on this point. Finally, Mr Wilson submits the Judge erred by not carrying out an overall assessment of whether the concerns, when taken together, amounted to substantial injury under s 317(1)(b).

Respondent's submissions

[46] Ms Van, for the respondent, submits there is no basis for criticism of the process adopted in the High Court. The Judge had jurisdiction to make directions

about the conduct of the hearing and to conduct it on the papers following a site visit.[17] In any event, the appellants agreed to the process adopted.

[47] Ms Van argues that the Judge made no error of law or fact and there is no basis for this Court to intervene. The Judge considered the various complaints raised by the appellants and found there was no substantial injury. Ms Van submits that the Judge's conclusions on these matters are well-supported by the evidence and cannot be impeached. The site visit gave the Judge a considerable benefit in assessing these issues. This Court does not have that same advantage.

Assessment

[48] While the appellants are entitled to this Court's assessment, they carry the onus on appeal of persuading the Court that the Judge's factual findings were wrong. We agree with Ms Van that this Court should hesitate before interfering with the Judge's conclusions given the real advantage he had of being able to assess the evidence in the light of his observations at the site visit. We consider this is a particularly important consideration in respect of three of the sub-issues identified by the parties in their agreed list of issues — increased noise, increased danger to pedestrians and reduction in parking and vehicle manoeuvrability. We are unable to see any error in the Judge's analysis on these matters. Nor have we been persuaded the Judge was wrong to conclude that the proposed relocation of the driveway would not cause material injury in these three respects, whether considered alone or in combination. The Judge's findings on these issues were fully supported by evidence he was entitled to accept.

[49] The next sub-issue in the agreed list of issues is prejudice to the existing resource consent for the resort. We consider this to be something of a side issue that can be readily accommodated by making any modification order conditional on all necessary resource consents being obtained at the respondent's cost.

[50] In our view, the more significant issues are those advanced by Mr Wilson at [43] and [44] above. It appears that these matters received greater emphasis before us

---

[17] Relying on High Court Rules 2016, rr 7.43A and 19.11.

than was the case in the High Court. This may explain why the Judge gave little attention to them, focusing instead on the more tangible issues such as noise, visual disturbance and car parking.

[51] We respectfully disagree with the Judge that the likely redevelopment of the respondent's land that would be enabled by the relocation of the driveway is a matter beyond the Court's purview on an application such as this. Ms Van accepted this as a matter of law. However, she responded that it is a question of fact and evidence and here there was none. Ms Van argues that this is what the Judge meant by his "beyond my purview" comment. However, that is not how we read it. The statement — "beyond my purview" — would be an odd way of acknowledging the relevance of the appellants' "real concern" that "it cannot know what may be built next door" but dismissing this concern on the basis there was no evidence of what may be built and therefore no injury.[18]

[52] While Ms Van conceded the point as a matter of law, we think it appropriate to record that we consider her concession was properly made. The issue was addressed by the Supreme Court of New South Wales in *Tujilo Pty Ltd v Watts* in the context of s 89(1)(c) of the Conveyancing Act 1919 (NSW) which is in materially the same terms as s 317(1)(d) of the Act.[19] Section 89(1)(c) provides that a court may modify or extinguish an easement, profit à prendre or restrictive covenant where "the proposed modification or extinguishment will not substantially injure the persons entitled to the easement". Campbell J noted that the grant of an easement over land permits a particular type of activity on the burdened land but the grant of such an easement has incidental benefits of preventing development of the land in a manner inconsistent with the activities the easement expressly allows.[20] The Judge considered such benefits could appropriately be taken into consideration when deciding whether there was substantial injury to the grantee by a proposed modification or extinguishment of an easement so long as there was a sufficient connection between the injury and the grantee's ownership or interest in the benefitted land.[21]

---

18 High Court judgment, above n 1, at [46].
19 *Tujilo Pty Ltd v Watts* [2005] NSWSC 209, (2005) 12 BPR 23,257.
20 At [40].
21 At [86]–[88].

[53] Substantial injury in terms of s 317(1)(d) means injury that is more than insignificant, unreal or trifling.[22] Injury need not be physical, it may be intangible such as an impairment of a view, intrusion upon privacy, unsightliness or an alteration to the character or ambience of the neighbourhood.[23] Subjective tastes and preferences may qualify.[24] The onus is on the applicant to show that the proposed modification will not cause any such injury.[25]

[54] The respondent's efforts to relocate the driveway are obviously driven by its legitimate commercial interests in maximising the development opportunities on its land. However, despite needing to prove the appellants will not suffer any substantial injury by the proposed modification, the respondent has not offered any evidence as to the likely development that will occur on its land if the driveway is relocated to the boundary between lot 2 and the resort. We are not persuaded that any lack of evidence on this issue counts against the appellants given the onus is on the respondent. As the Judge correctly stated, the appellants "cannot know what may be built next door".[26]

[55] In assessing whether any substantial injury will be suffered, the court must carry out a counterfactual analysis comparing the appellants' position with the right of way easements in their present location with their position if those easements are extinguished and granted over land along the boundary between the two properties.[27] An obvious consequence is that this will enable a much more substantial development on the respondent's land. There is evidence that a major extension to the existing resort has already been consented. While it is unlikely this will occur unless the ownership interests are merged, as earlier discussed with Marble, some other significant development on the land is likely, if not inevitable. The appellants' concern that they will be left with access by way of "a mean looking alleyway between two buildings" if the order is made seems to us to be a legitimate concern that cannot be

---

22 *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657 at [104], referring to *Plato v Ashton* (1984) 2 NZCPR 191 (CA) at 194 and *Jansen v Mansor* (1995) 3 NZ ConvC 192,111 (CA) at 192,115.

23 *Synlait Milk Ltd v New Zealand Industrial Park Ltd*, above n 22, at [105].

24 *Mogensen v Portuland Developments Pty Ltd* (1983) NSW ConvR 56,855 at 56,856; adopted in *Chand v Auckland Council* [2021] NZCA 282 at [51].

25 *Chand v Auckland Council*, above n 24, at [21].

26 High Court judgment, above n 1, at [46].

27 *Synlait Milk Ltd v New Zealand Industrial Park Ltd*, above n 22, at [106].

discounted. Depending on the nature of the development enabled by the relocation of the right of way easements, the appellants may suffer other loss of amenity to the resort of a character recognised as constituting an injury for the purposes of s 317(1)(d). Absent any evidence to address this issue, we do not consider the respondent has discharged the onus on it of demonstrating that the appellants will suffer no substantial injury, even of an intangible character, if the driveway is relocated.

[56] We also accept Mr Wilson's submission that it is relevant that the driveway and corresponding right of way easements were created in their present location some 20 years ago when all of the land was in common ownership and there was freedom of choice. The then owners chose not to relocate the driveway even when they decided to sell the whole of the land in parcels in 2014, presumably knowing that the value of the burdened land would be compromised by leaving the driveway where it is. Marble/KTL desired to retain the driveway in its present location. So too did the appellants. It is a reasonable inference that all these owners and operators of this luxury resort considered this was the preferred location for the driveway. We do not consider their views should have been so readily disregarded by the Judge based on his subjective impressions formed following a brief site visit.

[57] In summary, we do not consider the respondent has proved that the appellants will not suffer any substantial injury if the right of way easements are modified in the manner proposed. We therefore conclude that the appeal must be allowed.

Result

[58] The appeal is allowed.

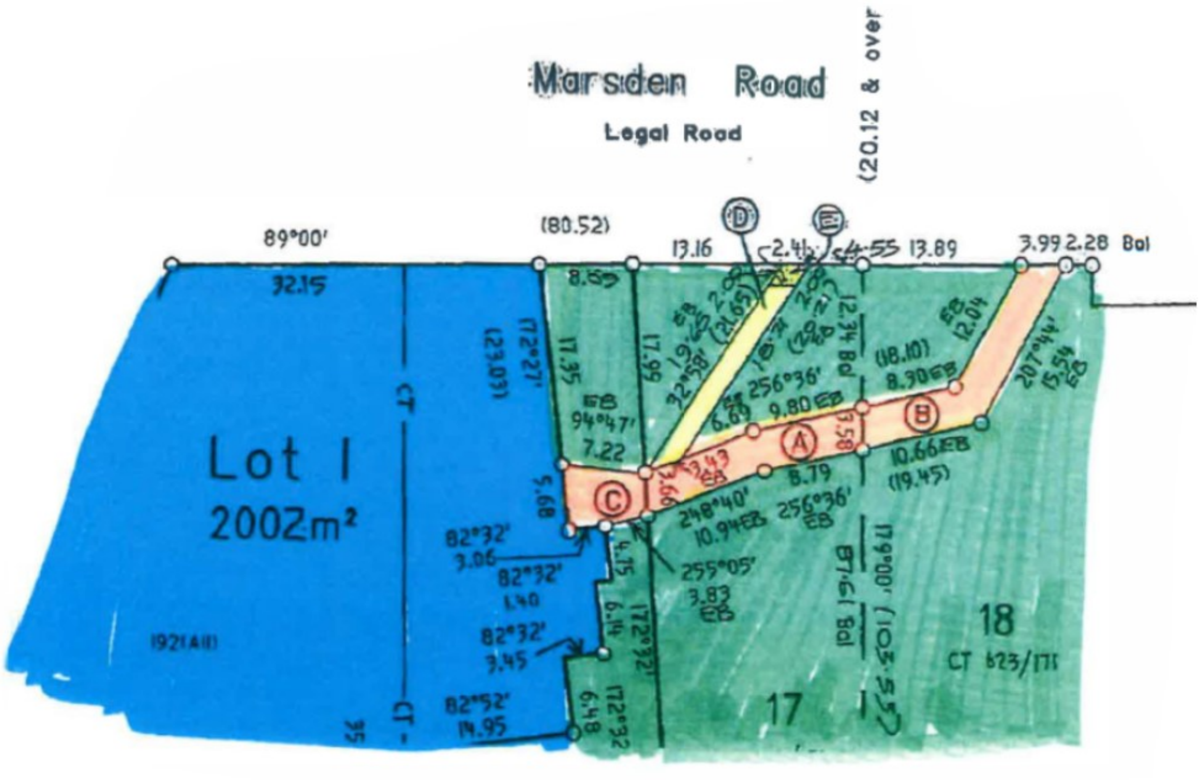
[59] The High Court judgment modifying the right of way easements is set aside.

[60] The High Court costs judgment is set aside. Costs in the High Court are to be determined by that Court in the light of this judgment.

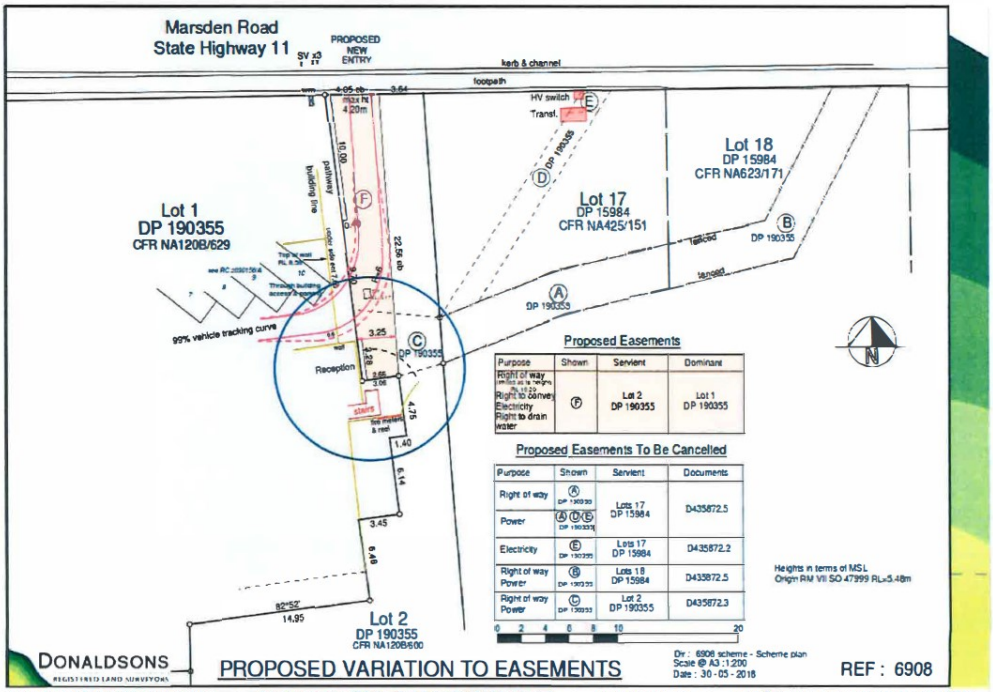
[61] The respondent must pay costs to the appellants for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Loo & Koo, Auckland for First and Second Appellants
Anthony Harper, Auckland for Respondent

Appendix 1


Marsden Road
Legal Road
(20.12 & over
89°00'
32.15
(80.52)
13.16
2.46
4.55
13.89
3.99
2.28
Bal
Lot 1
2002m²
CT
192(All)
A
B
C
D
E
17
18
CT 623/171

Appendix 2



301.0033