IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-198

UNDER	the Property Law Act 1952
IN THE MATTER OF	an application under section 129B of the Act for reasonable access to landlocked land
BETWEEN	SAM MURRAY AND BRENDAN TUOHY Plaintiffs
AND	BC GROUP (2003) LIMITED, JOHN MOLYNEUX AND JUDITH SHIRLEY MOLYNEUX First Defendants
AND	ELIZABETH RUTHERFORD Second Defendant
AND	SARAH JUNE STUART Third Defendant
AND	SUSAN MARGARET STOKES Fourth Defendant
AND	HILARY CATHERINE LOW Fifth Defendant
AND	THOMAS PETER GOTT AND JOCELYN ANN CRANEFIELD Sixth Defendant

Hearing: 21 and 22 October 2008

Counsel: P Withnall for the Plaintiffs
B A Gibson for the First Defendants
J M Morrison for the Second Defendant

Judgment: 12 February 2009

JUDGMENT OF JOSEPH WILLIAMS J

This judgment was delivered by the Hon. Justice Joseph Williams
on 12 February 2009 at 11.00am
pursuant to r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

The facts

[1] On 30 May 1989, Sam Murray and her partner Brendan Tuohy bought a house at 3 Iwi Street ("No. 3") in the Wellington suburb of Ngaio. It is a modest home enhanced in appeal and value by the fact that it is nestled into a hillside and surrounded by lush green indigenous vegetation. Nearly 20 years later Sam and Brendan still live there.

[2] The lot at No. 3 has an area of 811 square metres. It was created in 1963 and the house appears to have been built shortly after that subdivision.

[3] No. 3 has never enjoyed vehicular access. Instead, in order to meet the technical requirement that every lot must have a road frontage, the lot was configured with a 29 metre long panhandle connecting it to Iwi Street. The panhandle is just over half a metre wide along its entire length. Of itself the panhandle is of little use. It is not a formed path and is overgrown with vegetation. Its only advantage is that it adjoins for its 29 metre length, a much wider Council footpath. The footpath begins at Fox Street at its highest elevation and ends about 30 metres lower in elevation at Iwi Street following a relatively steep descent past six adjoining properties including No. 3. No. 3 is situated at about the half-way point between Fox and Iwi Streets. This Council owned footpath is No. 3's practical access. The access is lit and paved though Sam argued that the quality of both was poor, making use of the access dangerous at night or in the wet.

[4] From Fox Street above, Sam and Brendan must walk about 70 linear metres from the kerb down a steady gradient to their home. Over that distance the fall is about 15 metres. From Iwi Street at the lower end, the rise is steeper. Sam and Brendan must walk up a zigzag path of about 75 metres from the street to No. 3. The difference in elevation between Iwi Street below and No. 3 is also about 15 metres but over a much shorter distance. The zigzag path from Iwi Street helps mitigate the steepness of the rise. The overall gradient of the path from Fox Street to Iwi Street would therefore be about 1:4. It would take between 2 and 5 minutes for an able bodied person to walk the entire path uphill, and about half those estimates to access No. 3. Times would be much slower if the person in question were carrying a load.

[5] Access arrangements were thus when Sam and Brendan purchased their property 20 years ago. But they are both 20 years older now and they have health problems. Brendan suffers from an eye condition called keratoconus for which he has had two cornea transplants. His eyes, according to Sam who gave evidence on their joint behalf, are very sensitive to light, wind and grit. For her part, Sam injured her back in 2000 and is still being treated for it. Walking is good for it she says – indeed both she and Brendan walk from their offices in central Wellington to and from their home most days. But Sam says she suffers pain from lifting and carrying heavy items such as grocery bags so that gaining access on foot via the Council path as I have described it, can present considerable difficulty on occasion.

[6] From shortly after they acquired No. 3 until September 2003, Sam and Brendan say that they gained occasional vehicular access to their property by way of a formed driveway shared by their neighbours at 4A and 4B Fox Street. This helped to alleviate some of the difficulties just described. Both properties adjoin No. 3 on its northern boundary. The driveway is approximately 80 metres long, running from Fox Street and ending at the boundary of 3 and 3A Iwi Street. The driveway straddles the 4A/4B Fox Street boundary line for the greater part of its (the driveway's) length.

[7] I have annexed to this judgment a cadastral map showing the locations of the relevant properties and the alignment of the Council footpath together with Fox and Iwi Streets.

[8] Before they purchased their first car in 1992, Sam and Brendan used the driveway to bring shopping and firewood to their property. After 1992 they were given an informal car park at 4B by the then owner, Barbara Cutler, in return for the use of their clothesline which was situated at the rear of Sam and Brendan's property and close to the boundary with 4B. Sam and Brendan did not use the car park every day, but they used it regularly pursuant to the arrangement with Barbara Cutler.

[9] On the eastern boundary of No. 3 is 3A Iwi Street. Since 1996, 3A Iwi Street has been owned by John and Judith Molyneux – although more latterly by their company BC Group (2003) Limited. In 2003, BC Group (2003) Limited also bought 4B Fox Street from Barbara Cutler. 3A Iwi Street and 4B Fox Street also share a 20 metre boundary. John and Judith now rent both properties to tenants.

[10] On 14 September 2003, the Molyneux' tenants advised Sam and Brendan that they could no longer use the driveway in accordance with the old arrangement with Barbara Cutler the previous owner. They have not used the driveway since.

[11] After 2003 the driveway was extended and modified following an agreement between Elizabeth Rutherford (the owner since 1996 of 4A Fox Street) and John and Judith Molyneux who, as I have said, own both 4B and 3A Iwi Street. This modification and extension provided vehicular access for 3A Iwi Street for the first time. Prior to that time, 3A's access was also via the Council footpath connecting Iwi and Fox Streets.

[12] Sam and Brendan were initially very opposed to this extension because it would increase traffic and noise at the rear of their site. In time however their perspective changed. They came to think that they too might be able to use the new driveway by hooking on to the end of it.

The application and the law

[13] In 2007 Sam and Brendan filed an application under s 129B of the Property Law Act 1952 claiming that they were effectively landlocked. They asked the Court to grant them access along the formed driveway now owned jointly by Elizabeth

Rutherford at 4A and John and Judith Molyneux at 4B Fox Street. They also seek an, as yet, undefined area of access for vehicular manoeuvring across the north-western tip of 3A Iwi Street.

[14] Elizabeth, John and Judith are obdurate in their opposition to giving up any use of the access to Sam and Brendan.

[15] Since the proceedings were filed, the Property Law Act 1952 has been repealed and replaced by the Property Law Act 2007. By virtue of s 18 of the Interpretation Act 1999, I must decide the matter under the old law rather than the 2007 Act. Counsel agreed however that the equivalent sections in the new Act have introduced no material change so that the question of which Act to apply was uncontroversial in this case.

[16] Section 129B(2) provides:

> The owner of any piece of land that is landlocked … may apply at any time to the Court for an order in accordance with this section.

[17] Section 129B(1)(a) provides:

> A piece of land is landlocked if there is no reasonable access to it.

[18] Reasonable access is defined in s 129B(1)(c) to mean:

> … physical access of such nature and quality as may be reasonably necessary to enable the occupier for the time being of the landlocked land to use and enjoy that land for any purpose for which the land may be used in accordance with the provisions of any right, permission, authority, consent, approval, or dispensation enjoyed or granted under the provisions of the Resource Management Act 1991.

[19] In short therefore, before the application can be considered under s 129B, I must be satisfied that physical access to No. 3 is insufficient in nature and quality to give reasonable use and enjoyment of the land for any purpose for which it may be used in accordance with the provisions of the Resource Management Act, or any right or entitlement under any relevant district planning instrument or resource consent.

[20] It is only after I am satisfied that the land is landlocked within the meaning of the statutory definition that I can go on to consider the factors outlined in s 129B(6) that go to the Court's discretion. Subsection 6 provides:

> (6) In considering an application under this section the Court shall have regard to –
>
> (a) The nature and quality of the access (if any) to the landlocked land that existed when the applicant purchased or otherwise acquired the land;
>
> (b) The circumstances in which the landlocked land became landlocked;
>
> (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;
>
> (d) The hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order; and
>
> (e) Such other matters as the Court considers relevant.

I begin, as required, with the question of whether No. 3 has reasonable access.

The arguments

[21] Sam and Brendan argue that the land is landlocked. They say that access via the public walkway is poor, dangerous and inconvenient. They say that their health issues make steep pedestrian access impractical. They say that the long term arrangements for their vehicular access that were in place until 2003 demonstrate that the only reasonable form of access is vehicular access.

[22] John and Judith Molyneux and Elizabeth Rutherford disagree. They say that Sam and Brendan purchased No. 3 without vehicular access. This situation was considered reasonable by the local authority when the subdivision was approved in 1963 and it was considered reasonable by Sam and Brendan when they purchased in 1989. They say that if the current method of access is becoming burdensome for health reasons, then Sam and Brendan should sell up and move.

The applicable principles

[23] A property will be landlocked in terms of s 129B(1)(c) if the physical access to the property is not reasonable for its allowable uses (*Wilson v Rush* [1980] 2 NZLR 577 at 583). Just what is reasonable is very much a question of fact in the particular context of the case. But the cases point to some general propositions of principle that provide broad parameters to assist in determining what is reasonable. They are as follows:

a) S 129B is remedial in its intent. There is no presumption in favour of non-interference in the respondent's title (*BA Trustees v Druskovich* [2007] NZCA 131 (para 15));

b) Respect for the exclusive possession of registered proprietors affected by an application for access is to be found instead in the requirement that the applicant must prove that his or her current access is unreasonable in the circumstances. The reasonableness test is a substantial barrier to be overcome by the applicant;

c) If the land cannot be accessed on foot, it is landlocked (*Wilson v Rush* (*supra*) at 583);

d) If the land cannot be accessed by motor vehicle, it will be a question of degree whether that is unreasonable (*ibid*);

e) Reasonable access is not invariably vehicular but the circumstances in which non-vehicular access will be reasonable will be few. Those circumstances are to be considered in light of:

    i) contemporary standards particularly reliance on the motor vehicle;

    ii) the topography of the area;

iii) other local contexts;

(*Asmussen v Hajnal* (2005) 6 NZCPR 208 at 221-222);

f) It is not sufficient to show that access arrangements are merely inconvenient for the applicant or that upgrading access would be desirable in general terms (*Brankin v McLean* [2003] 2 NZLR 687).

[24] The western dedication to the motor vehicle is such that in most places in New Zealand, a property that can only be accessed on foot could not be said to enjoy reasonable access in accordance with contemporary standards. But that is not invariably so. The exceptions tend to be remote holiday locations that can only be accessed by sea (see for example *Kingfish Lodge (1993) Ltd v Archer* [2000] 3 NZLR 364 (CA) case) and a small number of urban enclaves in hilly areas where the contour and the age of the neighbourhood are such that;

a) it was never intended that lots within them should support vehicular access; and

b) the nature of foot access is not unreasonably burdensome to the occupier in accordance with contemporary standards and in light of the impact of the proposal on affected properties.

Access to 3 Iwi Street

[25] In this case, No. 3 is used as a residential dwelling. There was no suggestion that this will change or intensify in terms of the lawful uses of the land under the Resource Management Act and I have proceeded on the basis that vehicular access is sought to support a single residential dwelling.

[26] When the lot at No. 3 was created in 1963 it was clearly not intended to have vehicular access. The lot was designed to provide foot access only. This reflected two facts:

a) The contour of the neighbourhood made it very difficult to provide vehicular access to every lot; and

b) While the motor vehicle was ubiquitous in the 1960s, it had not completely taken over the lives of New Zealanders in the way that it has today. There were still many families that did not own a car and who relied upon public transport for their daily travel needs.

[27] If foot access only to No. 3 was reasonable in 1963, have circumstances changed to make it unreasonable now? This is quintessentially a question of degree. The rise of the motor car and sedentary lifestyles in modern New Zealand life can in some circumstances make what was acceptable 45 years ago seem quite unreasonable today. For example, in *Brankin v McLean* (*supra*) John Hansen J was emphatic that foot access along a track of 280 metres or 400 metres (depending on where one parked) involving a 49 metre drop in elevation was unreasonable in the Christchurch hills even though, presumably, the lot in that case was originally created with that limited form of access only.

[28] In this case, the question of degree comes down to whether it is reasonable to expect Sam and Brendan to complete a 1-3 minute walk of 70 metres in length and 15 metres elevation up or down a sealed but poorly lit path whenever they wish to access their property. In my view, in the context of the neighbourhood and the topography, access by this means is reasonable.

[29] On the other hand, if the distances or elevations were twice what they are in this case, I would not have hesitated to say that in 2009, foot access is insufficient and only vehicular access would be reasonable. It is, I admit, very much a question of balance and while I find it difficult to identify a tipping point with precision, I am clear that the circumstances of No. 3 fall short of that point. In my view, we have not, in the context of a hilly enclave in a city in which foot access only is relatively common, yet become so reliant on the motor vehicle that a 1-3 minute uphill walk should be seen as unreasonable. Vehicular access remains primarily a matter of convenience for No. 3, and that is not enough to enable the Court to utilise s 129B.

The evidence of Sam and Brendan's occasional rather than constant use of the informal car park at 4B Fox Street prior to 2003 tends in my view to support this.

[30] I find therefore that Sam and Brendan have reasonable access to 3 Iwi Street. The land is therefore not landlocked and I do not have jurisdiction to grant the relief sought in this case.

[31] It is unnecessary for me to further consider the factors contained in s 129B(6).

[32] The application is dismissed accordingly. The active respondents are entitled to costs. Memoranda may be filed accordingly.

"**Joseph Williams J"**

Solicitors:
Michael Chung Law Office, Wellington
I D Hay, Solicitor, Wellington
Gillespie Young Watson, Lower Hutt

ANNEXURE SHOWING 3 IWI STREET AND SURROUNDING PROPERTIES AND COUNCIL FOOTPATH