EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT PORIRUA

CIV-2017-091-000172
[2017] NZDC 17227

BETWEEN	J L HILL AND G J TICKLE Applicants
AND	S ELIMELCH, E D LOCATI AND TRAFALGAR TRUSTEE CORPORATION LTD First Respondents
AND	M L JONES, G M JONES AND PUBLIC TRUST Second Respondents
AND	B J HOLLOWAY AND N L HOLTOM Third Respondents

Hearing:	4 August 2017
Appearances:	Mr P Withnall for applicants Mr R Stewart for the first, second and third respondents
Date of Decision:	1 September 2017

RESERVED JUDGMENT OF JUDGE J M KELLY

A shared vehicle access way dispute

[1] A shared vehicle access way in Whitby is subject to a registered right of way easement in favour of the applicants' land at [address 1] and in favour of the first, second and third respondents' land at [address 2], [address 3] and [address 4] respectively.

[2] A dispute has arisen between the parties who have a registered interest under the easement regarding the use of the shared vehicle access way that I will refer to as [the Lot].

The substantive dispute

[3] The applicants claim the right of way created by Easement Instrument 9408783.7 (the Registered Easement) contains the rights and powers implied in the vehicular rights of way by Schedule 5 of the Property Law Act 2007 (the PLA).

[4] The applicants assert the rights conferred by the right of way easement are the usual rights to cross back and forth over [the Lot] and no more. The applicants assert there is no right to remain stationary, other than momentarily, to park vehicles or to leave any other items such as trailers anywhere on [the Lot], which includes the kerb and grass area adjacent to the access way.

[5] The applicants say that contrary to Schedule 5 of the PLA, the respondents have been parking vehicles regularly, or permitting the parking of vehicles regularly, on Lot 201 since November 2016.

[6] The applicants say that despite warnings, the respondents have nevertheless continued to regularly park and permit the parking of vehicles on [the Lot] and have asserted an entitlement to continue doing so.

[7] The respondents say the Registered Easement does not prohibit all parking on the right of way and that the right is to be able to pass and re-pass and not have the right of way obstructed. The respondents say that the practice of parking or permitting vehicles to be parked on the right of way has not impeded the right to go, pass and re-pass or caused any obstruction.

[8] The respondents therefore assert that the temporary parking or leaving of vehicles on [the Lot] in a manner that does not unreasonably obstruct or otherwise create an unreasonable impediment to the applicants' reasonable use and enjoyment

of the right of way is not contrary to the applicable provisions of Schedule 5 of the PLA.

[9] Accordingly, the respondents say that the orders sought are unnecessary.

Preliminary issue as to jurisdiction

[10] The applicants have filed an originating application for orders for enforcement of an easement and ancillary orders under s 313 of the PLA. The applicants rely on the rights and powers implied in vehicular rights of way under Schedule 5 of the PLA.

[11] Section 313 gives the Court jurisdiction to determine a dispute concerning the effect of an easement and to make an order concerning any dispute concerning the effect of an easement.

[12] The respondents have filed a notice of opposition seeking a stay of proceedings on the basis that the Registered Easement incorporates the rights and powers prescribed by clause 14 of Schedule 4 of the Land Transfer Regulations 2002 (the LTR) and the applicants have failed to follow the implied dispute resolution procedure.

[13] Clause 14 provides that if a dispute arises between parties who have a registered interest under an easement, the parties must promptly meet and in good faith try to resolve the dispute using informal dispute techniques, which may include negotiation, mediation, independent expert appraisal, or any other dispute resolution technique which may be agreed to by the parties and if the dispute is not resolved, it must be referred to arbitration in accordance with the Arbitration Act 1996.

[14] It is acknowledged by Mr Withnall, for the applicants, and Mr Stewart, for the respondents, that clause 14 of Schedule 4 of the LTR is in conflict with s 313 of the PLA.

[15] It has been agreed by the parties that the preliminary issue of jurisdiction may be determined on the papers.

[16] I have considered the written submissions filed on behalf of the parties.

Submissions

[17] The applicants submit that because the Registered Easement provides "the rights and powers implied in specified classes of easement are those prescribed by the Land Transfer Regulations 2002 and/or Schedule Five of the Property Law Act 2007", they have a choice of seeking a court enforcement order as opposed to engaging in arbitration under the LTR.

[18] The applicants submit that the respondent's argument glosses over the words "and/or" and effectively endeavours to deprive the applicants of a choice.

[19] The applicants submit that unlike Schedule 4 of the LTR, Schedule 5 of the PLA is very specific. It implies rights and powers solely in vehicular right of way easements whereas Schedule 4 implies them in various easements as well as a vehicular right of way easement.

[20] The applicants submit that because the applicants rely on the parallel rights and powers implied in vehicular rights of way the Court can proceed to hear this case under s 313 of the PLA.

[21] The respondents reject this interpretation and say it is not supported by the statutory scheme. Under s 297(1) of the PLA every grant of a vehicular right of way contains the implied covenants in Schedule 5 of the PLA. However, s 297(6) also provides that the "rights and powers implied under s 90D of the Land Transfer Act 1952 (the LTA) prevail if and to the extent they are inconsistent with any covenants implied by this section". Additionally, the provisions in s 297 are "in addition to, and not in derogation of" the provisions of s 90D of the LTA[1].

[1] s 297(5) of the PLA

[22] The respondents submit that the effect of these provisions is that the applicants cannot "opt out" of the rights and powers conferred by Schedule 4 of the LTR unless expressly excluded by the Registered Easement and there is no such exclusion in this case.

[23] The respondent's refer to *Davey v Baker*[2] where the plaintiffs sought rectification, or modification of an easement directing the course of a right of way through the defendant's land. The plaintiffs also sought orders relating to the removal of an alleged obstruction on the right of way.

[24] When the defendants objected to the causes of action relating to the obstruction being determined by the High Court, the plaintiff suggested that as the matter was before the Court, the submission to arbitration contained in the easement by virtue of clause 14, could effectively be put to one side.

[25] Brown J rejected that suggestion when he said:

> [91] Consequently it is not open to the Court to elect to retain jurisdiction over claims on the grounds that the Court is in as good a position as an arbitrator to consider the issue or because the matter in dispute is a "jurisdiction legal issue". Only if there is in reality no dispute may the Court decline to order a stay of the proceeding.

[26] Brown J applied *Zurich Australian Insurance v Cognition Education Limited* [3] (which was a full sitting of the Supreme Court) and found that some of the issues raised by the Davey's, namely an order to remove several gum trees within the path of the right of way, and to trim a hillside bank, were subject to an agreement to arbitrate. Accordingly, the Court had no jurisdiction.

[27] In that case the defendant's protest to jurisdiction was upheld by the Court of Appeal.[4]

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[2] [2015] NZHC 2282
[3] [2014] NZSC 188, [2015] 1 NZLR 383
[4] Davey v Baker [2016] NZCA 313

[28] Further, in *Bourke & Tothill v Guo*[5] Duffy J noted that s 297(2) of the PLA provides for exceptions to the implied rights. One of those exceptions is an easement instrument registered under s 90 of the LTA.

[29] The respondents therefore submit that it is not open to this Court to exercise jurisdiction over the dispute.

[30] The respondents submit that the applicants are bound by the reference to arbitration incorporated in the Registered Easement creating the right of way by virtue of clause 14 of Schedule 4 of the LTR. It is submitted that this proceeding must be stayed and the parties must be directed to refer the dispute to arbitration.

[31] As a further and alternative submission, the applicants submit that the driveway in this case has its own legal description. It is a fee simple estate and is held by the applicants and the respondents in their respective titles, in each case, in an undivided one-fifth share. The applicants say this was required as an (amalgamation) condition of the subdivision resource consent creating the respective lots.

[32] Therefore, the applicants say that quite aside from the Registered Easement, Lot 201 is also an access lot in terms of the PLA and as a result s 298 of the PLA applies which provides:

> **298 Rights of proprietors of access lot that is or includes driveway or proposed driveway**
>
> (1) This section applies to the proprietors of an access lot that is or includes a driveway or proposed driveway.
>
> (2) Each of those proprietors has, in common with the rest of them, the same right to pass and re-pass over and along the access lot that the grantor and grantee of a vehicular right of way have (in common with one another) in respect of that right of way under clause 1 of Schedule 5.
>
> (3) Each of those proprietors has against one another in respect of the access lot the same rights that the owner and occupiers of the land for the benefit of which, and the land over which, a vehicular right of way

[5] [2016] NZHC 2932 at [19]

is granted have against one another in respect of that right of way under clause 2 of Schedule 5.

(4) Clause 3 of Schedule 5 applies to each of those proprietors in respect of the access lot in the same way as it applies to persons bound by, and persons entitled to enforce, in either case in respect of a vehicular right of way, the covenants in Schedule 5.

[33] The applicants submit that the rights and powers implied in vehicular right of way easements by Schedule 5 of the PLA are conferred in the same terms under s 298 of the PLA for access lots.

[34] Therefore, the applicants say that the originating application could be amended to plead Lot 201 as an access lot under s 298 of the PLA instead of the Registered Easement instrument thereby excluding the dispute resolution provision and referral to arbitration in the LTR.

[35] The applicants say the originating application could proceed to be heard under s 315 of the PLA, which applies the same court jurisdiction in s 313 of the PLA to s 298 access lots.

[36] The respondents have filed submissions in response to this alternative submission. They submit that the applicants' submission is flawed as it arbitrarily swaps the term "right of way" with "access lot".

[37] The respondents submit that the reference to an access lot is merely a reference to a piece of land providing access and it does not mean that an established right of way can be re-classified as an access lot once the easement is created. It only confers the same rights if no easement instrument exists. Accordingly, there is no basis to invoke s 298 to enforce the rights set out in Schedule 5.

[38] Further, the respondents submit that the Court must also be satisfied that there would be no benefit in requiring the parties to take the matter to arbitration.

[39] The respondents submit that the applicants conduct, which is characterised by a lack of good faith by adopting an adversarial approach, applying to the court for what are effectively restraining orders, and maintaining a belligerent unwillingness to

negotiate a mutually acceptable outcome is the antithesis of "good neighbourliness" and had added to the stress, anxiety and costs incurred by the respondents.

[40] The respondents submit that they are entitled to have the dispute resolved by arbitration in a private setting away from open court.

[41] The respondents also submit that if Parliament had intended for neighbours to be compelled to settle all their disputes, no matter how trivial, in Court the dispute provisions in the LTR would have been repealed by the PLA.

[42] The respondents submit that because that did not occur, and with regard to the cases referred to, the inference can be drawn that the arbitration provision in Schedule 4 of the LTR is enforceable at the option of the registered proprietor of the land concerned.

Discussion

[43] In *Perpetual Trustee Limited v Turner*[6] the issue before the Court was the right to maintain an existing driveway and the right to seek a contribution towards the cost of maintenance. Although that case has not been referred to by the parties in my view it is a helpful decision as the same issue as to jurisdiction arose in that case.

[44] Judge Somerville discussed the interplay between the LTR and the PLA and said:

> [13] The Land Transfer Regulations, therefore, introduced a standard dispute resolution process into all rights of way except those that had their own, conflicting, dispute resolution process.
>
> [14] Five years later Parliament passed the Property Law Act in which Sub Part 5 has five sections dealing with the service of notices of work required in relation to easements, and six sections dealing with obtaining court orders to enforce, modify or extinguish easements. It is puzzling why Parliament should enact provisions that empower courts to resolve such disputes so soon after implying conditions into all easements that include a reference of all disputes to arbitration.

[6] *Perpetual Trustee Limited v Turner* DC Timaru CIV-2011-076-000074, 22 August 2012.

[15] It helps to understand that:

(a) The conditions implied by Schedule 5 of the Land Transfer Regulations can be over-ruled by contrary provisions in the instrument creating the easement that vary, negative, supplement or substitute for those implied conditions. There is a real possibility, therefore, that easements might exist with dispute resolution processes different from those implied by the regulations.

(b) Just because an enactment refers to a dispute being resolved by a Court does not indicate that the dispute cannot be resolved by arbitration. Thus, if an Act refers to an issue being 'settled by a court," that does not mean that it cannot be resolved by arbitration. More particularly, when s 313 [of the Property Law Act] confers jurisdiction on a court to determine a question or dispute concerning the effect of an easement and gives it the power to make orders concerning whether any work is required to be done, who should bear the cost of that work, and in what proportions, that does not, of itself, indicate that such a question or dispute is not capable of determination by arbitration.

[45] Importantly, Judge Somerville notes that the effect of clause 14 is that it applies without modification to the dispute and acts as an agreement to arbitrate.[7] His Honour also notes that this automatic agreement to arbitrate would have been sufficient to discontinue the proceedings if a stay had been applied for.

[46] The reasoning of Judge Somerville in *Perpetual Trustee Limited v Turner* is consistent with the conclusion reached by the High Court in *Davey v Baker* and upheld in the Court of Appeal as referred to in the respondent's submissions as discussed above. It is also consistent with the reasoning of the Supreme Court in *Zurich Australian Insurance v Cognition Education Ltd*.

[47] Applying the same principles here, although there are co-existing rights under Schedule 5 of the PLA and Schedule 4 of the LTR and potentially under s 298 of the PLA regarding access lots, I am satisfied that s 313 of the PLA provides a discretionary power to the Court given the use of the phrase "a court may make an order".

[7] At [17].

[48] By way of contrast clause 14 in Schedule 4 of the LTR provides a mandatory dispute resolution processes into all easements unless otherwise provided for in the Registered Easement itself.

[49] I therefore reject the applicants submission that they may choose which remedy to seek, and by their choice exclude the provisions of Schedule 4 of the LTR.

[50] For the reasons given, I am satisfied that Schedule 4 of the LTR prevails in terms of jurisdiction.

[51] I am also satisfied that there is a genuine dispute between the parties who have a registered interest under the Registered Easement.

[52] It is clear that the applicants have initiated the dispute and have provided full written particulars of the dispute to the respondents.

[53] It is also clear that the parties have not met in good faith to try to resolve the dispute using dispute resolution techniques. In my view they are required to do that in accordance with clause 14 of Schedule 4.

[54] Likewise it is clear that if the dispute cannot be resolved by dispute resolution techniques, the dispute must be referred to an arbitrator in accordance with the Arbitration Act 1996.

[55] Clause 14 provides that the arbitration must be conducted by a single arbitrator to be agreed on by the parties or, failing agreement, to be appointed by the President of the New Zealand Law Society (being the New Zealand Law Society that has its headquarters closest to the land).

Result

[56] Accordingly, I make the following orders:

(1) An order staying the originating application and referring the applicants' claim to dispute resolution and arbitration pursuant to clause 14 of Schedule 4 of the Land Transfer Regulations 2002.

(2) As the respondents have succeeded in their application for a stay they are entitled to an order for costs.

(3) If costs cannot be agreed, the parties are directed to file and serve memoranda as to costs by 15 September 2017.

(4) The next call of this matter on 28 September 2017 is vacated.

Judge J M Kelly
District Court Judge