IN THE COURT OF APPEAL OF NEW ZEALAND

CA814/2012
[2013] NZCA 664

BETWEEN	ROSS DONALD MACRAE AND LYNETTE GWENETH JOY MACRAE Appellants
AND	ANTHONY PATRICK WALSHE First Respondent
AND	LESLEY ANN BERTRAM SMITH Second Respondent
AND	DOUGLAS SEYMOUR ALDERSLADE, RAYMOND JOHN BEECH AND CHRISTINE BEECH Third Respondents
AND	RICHARD HAMMOND AITKEN, ANGELA RUTH AITKEN, BRIAN HAMMOND AITKEN AND ROBERT JAMES AITKEN Fourth Respondents
AND	AUCKLAND COUNCIL Fifth Respondent

Hearing:	19-20 November 2013
Court:	O'Regan P, Stevens and French JJ
Counsel:	N R Campbell QC for Appellants G C Jenkin for First Respondent No appearance for Second to Fifth Respondents
Judgment:	19 December 2013 at 11.45 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The cross-appeal is allowed.

C **The easement granting the rights of way in Transfer No D365912.14 dated 18 February 1999 is to be modified pursuant to s 317(1) of the Property Law Act 2007 in such a manner as to reflect the conclusions in the judgment at [28]–[29], [38] and [50] on the basis that the easement granting rights of way will apply in favour of the following two properties as the dominant land:**

(a) the land contained in Lot 1 DP 387905 (Identifier No. 351983 North Auckland Registry) (Lot 1); and

(b) the land contained in Lot 2 DP 387905 (Identifier No. 351984 North Auckland Registry) (Lot 2).

D **The parties are to confer and appoint a conveyancing practitioner to document and implement the modifications to the easement as ordered at C above in order to provide that the easement granting rights of way will apply with full effect to both Lot 1 and Lot 2.**

E **We reserve leave to apply for further directions in the event that there are any practical difficulties documenting or implementing the conveyancing to reflect the relief granted in this Court.**

F **The order in the High Court pursuant to s 317(2) of the Property Law Act requiring the appellants to pay compensation comprising in total the sum of $289,365.75 is quashed.**

G **In its place there is an order that the appellants are required to pay the first respondent the following as reasonable compensation:**

(a) the sum of $100,000 prior to registration of the documents modifying the easements in favour of the two properties as the dominant land;

(b) the full costs of sealing the existing road by which the rights of way are enjoyed on the following basis:

(i) there is no change in scale, direction or location of the road; and

(ii) the type of seal used is to be a light chip seal to ensure that it is sealed to a standard that is safe and durable. The actual seal used may be agreed between the parties and in the absence of

agreement is to be decided by a civil engineer in practice on Waiheke Island; and

(iii) for the ongoing maintenance costs incurred towards the upkeep of the right of way a reasonable contribution assessed on the basis of appropriate use as provided for in the easements.

(c) the reasonable legal costs of the first respondent in respect of the registration of the modified easements granting rights of way.

H The order in the High Court that the appellants pay the first respondent's costs on a 2B basis uplifted by 50 per cent is quashed.

I In its place there is an order that the appellants pay the first respondent costs in the High Court on a 2B basis and reasonable disbursements to be determined by the Registrar of the High Court.

J In respect of the appeal there will be no order as to costs.

REASONS OF THE COURT

(Given by Stevens J)

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Introduction

[1] The parties own neighbouring properties running off Church Bay Road at Huruhi Bay, Waiheke Island. To reach their property Ross and Lynette MacRae (the MacRaes) enjoy a right of way over the property of Anthony Walshe. This appeal concerns the scope of, and potential modifications to, that right of way.

[2] In the High Court, Keane J first held that the easement allowed access to only one of the two lots into which the MacRaes' land has been subdivided.[1] Next, the Judge held the MacRaes were entitled to a modification of the right of way provided that Mr Walshe was paid $289,365.75 in compensation.[2] Finally, Keane J awarded Mr Walshe an uplift of 50 per cent on 2B costs.[3]

[3] This appeal raises the following issues:

(1) Is the building on one of the subdivided lots known as Windmill House a "dwelling" in terms of the easement?

(2) Does the right of way allow access only to a single dwelling on the dominant land and for naturally related or ancillary purposes (and therefore to only one of the two subdivided lots)?

(3) How should the easement have been modified?

(4) What is reasonable compensation under s 317(2) of the Property Law Act 2007 (the Act)?

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1 *Walshe v MacRae (No 1)* [2012] NZHC 296, (2012) 14 NZCPR 71 [HC judgment No 1].
2 Ibid and *Walshe v MacRae (No 2)* [2012] NZHC 3054, (2012) 14 NZCPR 91 [HC judgment No 2].
3 HC judgment No 2.

(5) What costs should have been awarded in the High Court?

Background

[4] The background facts are not in dispute. The following narrative is drawn largely from the High Court judgment.[4] The MacRaes owned all of the property at 88H Church Bay Road, known as "Koao Bay Farm". They purchased the property in 1980 in a single title.

[5] In 1998 Ms Smith, a neighbour who owned 88A Church Bay Road, applied for consent to subdivide her property into nine lots. The MacRaes, as adjoining owners, consented to the subdivision on the condition that they would be granted a right of way over two of those lots (Lots 5 and 7).[5] An agreement to this effect was entered into on 25 August 1998. The agreement contained a provision that the MacRaes would pay the sum of $30,000 inclusive of GST as "their contribution towards the formation of the right of way".

[6] The obtaining of right of way access from Church Bay Road was important to the MacRaes. This is because, while they had vehicle access to their property along the beach front bordering Huruhi Bay, such access was not available for two hours either side of high tide. This placed a real, albeit partial, limitation on their access to the property.

[7] Clause 4.2 of the agreement provided that:

> [The MacRaes] ... acknowledge that the Right of Way is to service 1 dwelling only on Koao Bay Farm. [They] further acknowledge that in the event that they wish to erect further dwellings on the Koao Bay Farm they will need to enter into negotiations with the then registered proprietor of the Right of Way.

[8] The agreement also annexed a form of transfer to be used to create the right of way for the purposes of registration under s 90 of the Land Transfer Act 1952. Clause 3 of that form provided that:

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4 HC judgment No 1 at [5]–[20].

5 Lot 7 is a jointly-owned lot created to provide access to five of the lots in Ms Smith's subdivision. The second to fourth respondents are the other owners of that lot. They, together with the fifth respondent (the Council) were joined in the proceeding but took no part in the appeal.

> The grants of rights of way shall be free of and appurtenant to each and every part of the dominant land save that the Easement of Right of Way shall only service one dwelling on the dominant land.

[9] At the beginning of 1998 there were two buildings on the MacRaes' land. The first was a two-storey house known as "Wild Bay Villa". The second was a "bach" used as an occasional sleep-out. In May 1998, when the agreement was still being negotiated, the MacRaes purchased a single-storey villa, now known as "Windmill House", with the intention of setting it on their land. The Council advised the MacRaes that, although they were not permitted to have more than one "dwelling" on their land, they were entitled to apply for consent to use the new villa as a "visitor facility". The MacRaes took up this option and obtained the relevant consents from the Council.

[10] In early January 1999 Mr Walshe inspected and agreed to purchase Lot 5, or 88E Church Bay Road. The right of way, along with telephone and energy supply easements, was granted by a transfer executed on 18 February 1999 and registered in March 1999.[6] Clause 5 of that transfer adopted the wording used in cl 3 of the proposed form of transfer as set out above at [8]. Because the 1998 agreement does not bind Mr Walshe, it is this transfer which gives rise to the parties' ongoing legal obligations. Finally, on 9 March 1999 a subdivisional plan was registered and Mr Walshe's title was issued. Since 1999 the land has remained vacant, although Mr Walshe intends to build a home there in the future.

[11] In August 2006 the MacRaes obtained consent to subdivide their land into two lots. The bach and Windmill House stand on the higher lot (Lot 1), while Wild Bay Villa stands on the lower lot (Lot 2). The certificates of title issued purport to give each lot the full benefit of the easement right benefitting the MacRaes' original single title. The MacRaes later began to advertise both of the properties for sale or

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[6] Transfer No D365912.14. Clause 2 of the transfer provided that the rights of way in the easement incorporated the terms in cl 1 of the 7th Schedule to the Land Transfer Act 1952 and the 9th Schedule to the Property Law Act 1952, subject to one amendment, namely, that the following words be added to cl 2(c) of the 9th Schedule of the Property Law Act 1952 after the word "standard": "such reasonable contribution shall be assessed on the basis of appropriate use to which the right of way is put by the respective occupiers and their servants agents contractors permitted occupiers, residents and invitees".

rent. Lot 2 was sold to a third party in November 2011.[7] For the purposes of this judgment, however, we will continue to refer to Lot 2 as the MacRaes' land.

[12] The plan set out at appendix one provides an overview of the relevant properties. Church Bay Road is represented by the area in brown. Mr Walshe's property is shown in orange, and the land shaded light blue was, until July 2011, owned by Ms Smith.[8] The MacRaes' land is shown at the bottom of the plan in red. The jointly owned access lot, or JOAL, is represented by the areas shown in dark and light pink.

[13] The right of way in favour of the MacRaes is made up of a combination of the dark pink, yellow, and green areas running contiguous with the eastern boundary of Mr Walshe's property. The distinction is made because the dark pink area is also part of the JOAL, and the yellow area is also a right of way in favour of Ms Smith's property. The green area is therefore the only part of the right of way solely in favour of the MacRaes. At present only the dark pink area and 100 metres of the yellow area is sealed.

[14] The subdivision of the MacRaes' land is shown in the plan in appendix two. Lot 1 is shown in dark red, while Lot 2 is in the lighter red. As the plan shows, the right of way provides immediate entry onto Lot 1 but not onto Lot 2. The buildings on the MacRaes' property are shown in yellow. Situated on Lot 1 are the bach (at the north eastern part of the plan) and Windmill House (on the western boundary). The building marked on Lot 2 is Wild Bay Villa.

High Court proceedings

[15] In December 2009 Mr Walshe issued proceedings in the High Court contending that the MacRaes were in breach of the "one dwelling" limitation.[9] Mr Walshe also applied for, and was granted, an interim injunction restricting the

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7 HC judgment No 2 at [59]. The price at which Lot 2 sold was relevant to the valuation discussed below at [74].

8 That land is now owned by an unrelated party: see HC judgment No 2 at [59].

9 See cl 5 of the easement transfer, explained at [8] and [10] above.

MacRaes from using the right of way to service more than one building on their land.[10]

[16] Keane J's first judgment was issued in February 2012. The Judge began by considering whether Windmill House amounted to a "dwelling". If it did, the MacRaes could not access that property without breaching the "one dwelling" limitation.

[17] Keane J noted that applying the ordinary meaning of the term, both Wild Bay Villa and Windmill House could be classed as "dwellings". However, the Judge acknowledged that "dwelling" was also capable of carrying a narrower meaning, such as in the context of the Resource Management Act 1991. Under the operative district plan, for example, Windmill House was designated as a "visitor facility" as opposed to a "dwelling". Ultimately, the Judge concluded that there was no suggestion in the relevant documents that "dwelling" was to be defined in a limited way:[11]

> The whole purpose of the one-dwelling limit on which she insisted, Ms Smith said in evidence, was to restrict the MacRaes' use of the right of way over the Walshe land. A "visitors' facility", she might reasonably have feared, would have caused as much traffic as a second dwelling, perhaps significantly more.

Accordingly, Keane J was satisfied that Windmill House constituted a dwelling for the purposes of the easement.

[18] Keane J also considered the scope of the right of way generally, concluding that although the easement provided for a right of way "free of and appurtenant to each and every part of the dominant land", it was the limiting clause "save that the Easement of Right of Way shall only service one dwelling on the dominant land" which defined its fundamental purpose. Despite the breadth of the right of access granted, the only purpose for the single dwelling exception was to limit traffic over

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[10] Woodhouse J ordered that in the event that the MacRaes sold one lot with the benefit of the right of way, they were enjoined from disposing of the other lot unless that lot was expressed to be without rights to access the property using the right of way: *Walshe v MacRae* HC Auckland CIV-2009-404-8259, 25 June 2010. The interim injunction was to apply "pending the final determination of this proceeding by Court Order".

[11] HC judgment No 1 at [46]. The purpose of limiting traffic over the right of way was also emphasised by the Judge at [52].

the right of way to the occupants of a single dwelling and their natural invitees. Thus if the MacRaes sought access for any "equally basic purpose", an enlarged grant was required even where that purpose did not involve a dwelling.[12]

[19] Those conclusions necessitated an application by the MacRaes under s 316 of the Act for an order modifying the easement pursuant to s 317. Section 317 provides that the Court may modify or extinguish an easement or covenant if satisfied as to the existence one of the statutory grounds in s 317(1)(a) to (d). The Judge found the MacRaes' only arguable ground was s 317(1)(d), namely, that "the proposed modification or extinguishment will not substantially injure any person entitled". For that reason, it was necessary to determine how "substantial" Mr Walshe's injury would be.

[20] Three detriments to Mr Walshe were assessed as being relevant: a likely increase in traffic, an intrusion on privacy and quiet enjoyment and a loss of value to his land.[13] Keane J held that none of these detriments were so "substantial" as to be decisive. In relation to the traffic, sealing would resolve most of the concerns. The loss of privacy was unlikely to be substantial and Mr Walshe had had that predicament from the outset. The residual detriment was the effect on the market value of the property. However, this could be adequately dealt with by compensating Mr Walshe pursuant to s 317(2).

[21] Keane J held that in a case where s 317(2) applies, compensation should be assessed by reference to what a willing seller and a willing buyer would arrive at, during friendly negotiations, taking into account the particular potentialities of the land in respect of each party.[14]

[22] The quantum of compensation was determined in a second judgment, delivered in November 2012.[15] The Judge held in summary that Mr Walshe was entitled to compensation of $289,365.75 comprising:

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12 HC judgment No 1 at [52]. The examples given were a visitors' centre or a commercial enterprise.

13 HC judgment No 1 at [78]–[81].

14 At [82]–[92], applying the principles in *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324 (CA).

15 HC judgment No 2, above n 2.

(a) half of the value of the increase in the MacRaes' land, being $185,000;

(b) the loss in value of his own land, being $90,000; and

(c) compensation for loss and inconvenience to the sum of $14,365.75.

[23] On the question of costs, the Judge awarded Mr Walshe costs on a 2B scale, uplifted by 50 per cent on the basis that the MacRaes had pursued arguments that lacked merit. The Judge declined to award the MacRaes costs on their counterclaim (the application for a modification) on the basis that such an award was not in the interests of justice. Finally, Keane J allowed Mr Walshe's claim for the fees of his two valuers on the basis that both were "reasonably necessary".

Issue 1: Is Windmill House a "dwelling" in terms of the easement?

Submissions

[24] As this issue is central to the scope of the easement we deal with it first. Mr Campbell QC for the MacRaes submits that "dwelling" simply means a place in which someone dwells or "resides". He refers to the Oxford English Dictionary meaning ("a place of residence") which focuses on the use to which the building is put: is it used for someone to dwell or reside in? He submits that a building that is capable of being used for someone to dwell in or reside in, but which is actually used for some other purpose, is not a "dwelling".

[25] Mr Campbell also submits that the text of the easement supports this interpretation. Because the "one dwelling" limitation is intended to restrict the purposes for which the right of way may be exercised, it follows that it is appropriate to focus on the purpose for which a building is actually being used rather than on other possible uses for which it is capable of being used.

[26] Counsel advances five aspects of the factual context as being relevant to the interpretation. First, the word "dwelling" has been used in a formal document, drafted by a lawyer. Second, when the parties entered the agreement, there were two

buildings on the MacRaes' land (Wild Bay Villa and the bach). Both were capable of being used as a "dwelling". If Ms Smith had intended to prevent the use of the right of way to service the bach, even when used as something other than a "dwelling", the parties could have adopted a broader word, such as "building". The parties must have intended the term "dwelling" to have a narrow meaning, because if it had a broad one it would have captured the bach, and that was clearly not intended. Third, at the same time that the relevant easement was granted, Ms Smith granted other neighbours a right of way which employed more specific language. Fourth, the operative district plan distinguished between a "dwelling" and a "visitor facility". Finally, Mr Campbell submits that for most of the time it has been on the MacRaes' property, Windmill House has been used as an office or for storage. It was also used as a visitor facility between December 2009 and April 2011, for a total of 76 nights. However, the house is not, and never has been, a dwelling.

[27] Mr Jenkin for Mr Walshe submits that Keane J applied the Oxford English Dictionary meaning of the word "dwelling", as he was entitled to do. There was nothing in the document or in the surrounding circumstances to suggest that a more restrictive meaning of the term was intended. Although the operative district plan drew a distinction between a "dwelling" and a "visitor facility", the Judge was correct to conclude that there was nothing in the August 1998 agreement or the transfer to suggest that the parties had adopted that distinction.

Our assessment

[28] We are satisfied that the assessment of Keane J as to whether Windmill House constituted a "dwelling" was correct, and for the reasons he gave. As a furnished home providing accommodation for visitors, Windmill House clearly falls within the ordinary meaning of "dwelling". Unlike the bach, which was originally considered to be an ancillary dwelling associated with Wild Bay Villa, Windmill House is part of a separate and valuable piece of real estate. We agree with Keane J that the purpose of the right of way points towards a broad interpretation of the term "dwelling". As is apparent from Ms Smith's evidence, the limitation on the right of way was intended as a control on the total amount of traffic entering the site.

Adopting the narrow interpretation of "dwelling" contended for by Mr Campbell would run directly counter to that intention.

[29] Finally, we do not consider that the argument relying on meanings drawn from the operative district plan assists the MacRaes. Although it is correct that the district plan distinguished between "dwellings" and "visitor facilities", that is a technical distinction drawn for planning purposes and is of little assistance in the present context. There is no suggestion that the wording of the covenants creating the right of way in the transfer was intended to draw on the meaning of "dwelling" in another unidentified source.

[30] This ground of appeal therefore fails.

Issue 2: Does the right of way allow access only to a single dwelling on the dominant land and for naturally related or ancillary purposes (and therefore to only one of the two subdivided lots)?

[31] If our conclusion on the first issue is correct, this point is of limited significance.[16] If Windmill House is classified as a second "dwelling", the MacRaes accept that the right of way does not provide access. However, if Windmill House is *not* a dwelling, it remains to be determined whether the terms of the right of way would allow access to that property.

[32] After referring to the MacRaes' identifiable reasonable needs for access at the time of their grant, the Judge concluded that access would not be available even if Windmill House was not a "dwelling":[17]

> [50] The Macraes' lifestyle block, 6.1032 hectares, then within a single title, consists of a ridge and two bush clad valleys running down to the high water mark with orchards and a garden. The Macraes, or their successors in title, might well need help with fencing, pruning, cropping, the servicing of machinery and equipment. They might naturally offer access to campers and mountain bikers, bush walkers and swimmers.
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> [51] To the extent then that Mr Walshe contends that access to the whole of the Macraes' land is denied to them and to their invitees for such ordinary purposes, I disagree. But if, as I understand to be his essential point, the

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16 Although we note that it is of course relevant to the question of the form that the amended right of way should take.

17 HC judgment No 1, above n 1 (emphasis added).

> exception to the grant defines its fundamental purpose, and that is to allow access to a single dwelling and for naturally related or ancillary purposes, then that, I consider, conveys accurately the balance struck.
>
> [52] Despite the breadth of the right of access granted, the only purpose for the single dwelling exception, I consider, is to limit traffic over the right of way to the occupants of a single dwelling, presently the Macraes, and to their natural invitees. *If they, or their successors, wish access for any equally basic purpose, like another dwelling, or a visitors' centre, or a commercial enterprise, that will call for an enlarged grant*.

Submissions

[33] Mr Campbell challenges this characterisation. He argues that the right of way allows the MacRaes access to any part of their land for any legitimate purpose on the condition that, to the extent that they wish to use the right of way for the purpose of servicing a dwelling, they can only service one.

[34] First, Mr Campbell argues that the Court should give weight to the wording of cl 5 of the transfer creating the easement. That clause provides for a wide right of access "free of and appurtenant to each and every part of the dominant land" before imposing a limitation: "save that the Easement of Right of Way shall only service one dwelling on the dominant land". This suggests that the limitation is to be read as a narrow exception to the general rule.

[35] Second, Mr Campbell submits that if the Judge's meaning is adopted, the phrase beginning "free of and appurtenant to ..." becomes meaningless. That is because a grant of a right of way carries with it such ancillary rights as are reasonably necessary for the effective and reasonable exercise and enjoyment of rights expressly granted. Accordingly, when Keane J held that the grant could be used "for naturally related or ancillary purposes", his Honour was not adding anything to what would have been granted if cl 5 had simply contained the words of exception. The effect of Keane J's decision is to treat cl 5 as if it read:

> ~~The grants of rights of way ... shall be free of and appurtenant to each and every part of the dominant land save that~~ the Easement of Right of Way shall only service one dwelling on the dominant land.

[36] Third, under the operative district plan the MacRaes' land had a number of permissible uses. If the parties wished to restrain the MacRaes from using the right

of way for these purposes, it would have been easy to express that. Fourth, under cl 4.2 of the easement agreement the MacRaes acknowledged that if they wished to erect further dwellings on their land they would need to enter into negotiations with the owner of the servient land.[18] There was nothing in this clause to suggest that the MacRaes would have to enter into such negotiations if they wished to engage in other activities on their land.

[37] In response, Mr Jenkin submits that Keane J was correct to conclude that the words did not permit unrestricted access to any buildings that were not dwellings. The fact that the visitor facility can accommodate 10 persons for short-stay accommodation shows that allowing such access would be contrary to the purpose of the right of way. If the parties intended to allow for unrestricted access to permitted commercial or part-commercial buildings, they would have made this clear. There is no logic to a restrictive covenant with the main purpose of restricting traffic that would prohibit access to a second dwelling yet permit unrestricted access to a visitor's facility with a commercial use. Accordingly, the exception must be taken as prohibiting all purposes other than the servicing of one dwelling.

Our assessment

[38] There is some superficial attraction to the MacRaes' submissions on this issue. On a first reading of cl 5 it appears that there is nothing explicitly preventing access to facilities other than "dwellings". However, we are satisfied that Keane J's conclusion on this point was correct. When read in context, the purpose of the right of way was to allow the MacRaes access to their property as it existed at that point in time, but to preserve Mr Walshe's position in respect of future developments. Accordingly, even if we are wrong in our conclusion that Windmill House constituted a "dwelling", the MacRaes would not have been able to access that property pursuant to the right of way as it currently stands. The plain wording of cl 5 permits the owners to service "only ... one dwelling on the dominant land".

[39] We agree with the Judge's reasoning set out at [32] above. Accordingly this ground of appeal also fails.

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[18] See [7] above.

Issue 3: How should the easement have been modified?

[40] The parties are agreed that the manner in which Keane J has proposed to amend the easement is not satisfactory. The order of the High Court was made in the following terms:

> The easement granting right of way in Transfer No. D365912.14 dated 18 February 1999 is modified pursuant to s 317(1) of the Property Law Act 2007 by ratifying the registration of that easement against the two titles into which the dominant land referred to in that Transfer has been subdivided, namely Computer Freehold Register Identifier 351983 North Auckland Registry (Lot 1 DP 387905) and Computer Freehold Register Identifier 351984 North Auckland Registry (Lot 2 DP 387905).

[41] Mr Campbell submits that the order contemplated does not amount to a modification to the easement. In its current form, the right of way provides that only one dwelling "on the dominant land" may be serviced by the right of way. The subdivision of the dominant land into Lots 1 and 2 did not change the meaning of "dominant land". Accordingly, even after the issue of new titles only one dwelling could be serviced by the right of way.

[42] The modification sought by the MacRaes is to replace cl 5 of the easement transfer with the following clause:

> 5(a) The grants of right of way, telephone easements and energy supply easements shall be free of and appurtenant to each and every part of the dominant land.
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> 5(b) However, the right of way shall only service one dwelling on each of the two lots into which the dominant land was subdivided in 2008 (that is, one dwelling on Lot 1 Deposited Plan 387905 and one dwelling on Lot 2 Deposited Plan 387905).
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> 5(c) *For the avoidance of any doubt, covenant 5(b) above merely limits the number of dwellings that the right of way shall service. The right of way may be used to access the two lots generally and each part of them.*
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> 5(d) The owner of the part of the dominant land that is Lot 1 Deposited Plan 387905 will, not later than 6 months after the transferor obtains consent to build a dwelling on the servient land, arrange for and complete the sealing (to the same standard as the sealed areas of the right of way) of the balance of the right of way that is not presently sealed. The cost of the sealing shall be borne as to two-thirds by the owner of the part of the dominant land that is Lot 1 Deposited Plan 387905, and as to one-third by the transferor.
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> (Emphasis added.)

[43] Mr Walshe has filed a notice of cross-appeal in respect of this issue. Mr Jenkin acknowledges that some amendment is necessary in order to clarify that access will be available to one dwelling on each lot. However, he submits that the right of way should not be amended to a greater degree than is necessary.

[44] Mr Walshe contends that cl 5 ought to be amended to read:

> 5. The grants of right-of-way, telephone easements and energy supply easement shall be free of and appurtenant to each and every part of the dominant land save that the easement of right-of-way shall only service one dwelling on Lot 1 DP 387905 (Identifier no. 351983 North Auckland Registry) [and, on the other title, Lot 2 DP 387905 (Identifier no. 351984 North Auckland Registry] and for any naturally related and ancillary purposes. *For the avoidance of doubt, any other purpose such as to service a visitors' facility or other commercial enterprise is expressly prohibited.*
>
> (Emphasis added).

[45] The major point of different between the parties, therefore, is whether the right of way provides access to the two lots generally or, alternatively, to one dwelling on each lot and to naturally related and ancillary purposes.

[46] The answer to this question flows from our determination of the first and second issues above. We have upheld Keane J's conclusions on both points. At the hearing we canvassed with counsel the possibility of using a different formulation for restricting traffic over the right of way. This could be done for example by providing for a maximum number of vehicle movements on a given day over a particular period. The parties were, however, unable to reach any agreement to adopt this approach.

[47] It remains to determine the form of an appropriately-worded easement granting a right of way serving both of the subdivided lots on the MacRaes' property. The fact that there are two lots, and their respective positions in relation to Mr Walshe's land, the subject of the right of way, creates difficulties in the conveyancing required. In particular, access to Lot 2 from the right of way can only be achieved by passing through Lot 1.

[48] At the hearing we asked counsel whether any consideration had been given to implementing the modification sought in order to ensure that the easement is able to service both lots. There should be no difficulty regarding the formulation of the easement granting right of way serving the subdivided Lot 1 on which both Windmill House and the bach are situated. However, counsel acknowledged that access to Lot 2, on which Wild Bay Villa is situated, will be more challenging because of the need to pass through Lot 1.

[49] Counsel accepted that this aspect required further consideration. For this reason we consider that the correct course is for the parties to appoint a conveyancing practitioner to document the modifications to the easement as ordered, in order to provide that the easement granting rights of way will apply in favour of both Lots 1 and 2. We will give a direction implementing this approach.

[50] As to the terms of the easement creating the right of way to each of the two lots, the content and scope of the easement is to reflect our conclusions upholding the Judge on the first and second issues. There is no need for us to enter the drafting arena. The formal wording should reflect our conclusions as to the meaning of dwelling at [28]–[29] and the scope of the easement at [38]. The key finding is that the modified easement is to service one dwelling on each of the two Lots. To the extent reasonably possible the terms of the easement are to remain in their unamended form.[19]

[51] We do not anticipate that the conveyancing practitioner appointed will have any difficulties and the parties are expected to cooperate to achieve a practical outcome. However, in the event of unexpected difficulties we reserve leave to apply for further directions as set out at order E in the Judgment of the Court.

Issue 4: What is reasonable compensation under s 317(2)?

Interpretation of s 317(2)

[52] Section 317(2) of the Act provides that:

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[19] In particular cl 2, incorporating the terms in the Land Transfer Act 1952, sch 7, cl 1 and the Property Law Act 1952, sch 9: see above n 6.

> (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.
>
> (Emphasis added).

[53] However, the section does not elaborate further on what constitutes "reasonable compensation". As noted by Wylie J in *Cambray North Island Ltd v Minister of Land Information*, subsection 317(2) is "conspicuously silent as to how compensation is to be assessed".[20]

[54] The High Court has chosen to interpret s 317(2) consistently with the principles applicable to assessing compensation in cases of landlocked land.[21] Those principles were set out by Cooke P in *Jacobsen Holdings Ltd v Drexel* as follows:[22]

> ... the hypothesis is a willing seller and a willing buyer. Compulsion on either side is to be disregarded: the seller is not to be treated as one forced by circumstances to sell his potentiality to for anything he can get, the buyer is not to be treated as one driven to buy. It is the price that willing parties would arrive at in friendly negotiation that has to be found, on such materials as are available.
>
> ...
>
> In assessing compensation purely sentimental matters have to be put aside... So too of course any question of personal impecuniosity or affluence ... Subject to these qualifications, all factors of benefit or detriment on either side are material under the section, including for instance any inconvenience or disturbance that the owner of the servient or transferred land may suffer and any advantage he may gain. These are all considerations which would legitimately influence the parties in the hypothetical friendly negotiation.

[55] Somers J reached a very similar conclusion:[23]

> ... an inquiry into compensation must include consideration of the sum which a reasonable purchaser placed in the position of the Drexels would be willing to pay for the right-of-way. This will no doubt reflect the need for the way and the increase in value which it gives the landlocked area. But the hypothesis also includes a reasonable seller so that no case of "blackmail", of a price forced to unreasonable heights by necessity, can arise.

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20 *Cambray North Island Ltd v Minister of Land Information* (2011) 12 NZCPR 721 (HC) at [15].

21 Section 330 of the Property Law Act 2007 provides that in making an order in respect of landlocked land, the Court may impose any conditions it thinks fit, including the payment of compensation. A similar power was found in s 129B of the Property Law Act 1952.

22 *Jacobsen Holdings Ltd v Drexel*, above n 14, at 328–329.

23 At 334.

[56] Finally, Casey J held:[24]

> ... the owner of land affected by an order under [s 129B] can expect to have its value assessed on the basis of a sale of the interest involved on the open market between a willing vendor and purchaser, that market including the person in whose favour the order is made.

[57] This Court has subsequently affirmed the willing buyer/willing seller test.[25] *Lowe v Brankin* concerned land near Sumner Beach, Christchurch. In the High Court, John Hansen J found that the land was landlocked and ordered access to a multi-party residential lane in favour of Mr Brankin. The Judge also awarded $40,000 compensation and costs to the appellants, who were the "proprietors" of that land. On appeal, the appellants challenged the quantum of compensation. In allowing the appeal, this Court held:[26]

> ... this Court has consistently ruled that such compensation must be assessed on a willing buyer/willing seller approach, notwithstanding the very real difficulties of application that such a test may have in practice.
>
> ...
>
> There were a great many things which were relevant to such an exercise. As to the existing residents in the lane, there was the physical effect on Whitewash Head Lane itself; there was the particular effect on the residents' individual properties, including any loss of amenities; there was the fact that they would be giving up what could be broadly termed "the exclusivity" of the grouping of owners who had control of access over Whitewash Head Lane, and related factors.
>
> As to Mr Brankin, quite apart from the fact that in such a negotiation he could reasonably be expected to absorb any actual costs to the existing residents (including their transaction costs of getting advice on a disturbance of the status quo), and any direct losses, Mr Brankin could reasonably expect to pay a premium for gaining this access. He was in no sense a "usual" buyer. Strictly speaking, in economic theory, he could be expected to bargain right up until the last dollar of profit to be had out of his own development. But that would be too purist a view. Both parties could be expected to know that Mr Brankin would go ahead with his projected arrangements only if there was at least a respectable margin of profit for him.
>
> The short, and practical, point is that it must be taken to have been known to the parties, within the traditional formula, that Mr Brankin would pay more (a "premium") but at some point Mr Brankin would also have said: "The amount of compensation I am being asked to pay is such that there is not

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24 At 335.

25 See, for example, *Cleveland v Roberts* [1993] 2 NZLR 17 (CA); *Lowe v Brankin* (2005) 6 NZCPR 607 (CA); and *Hajnal v Asmussen* [2010] NZCA 410, (2010) 12 NZCPR 169.

26 At [38]–[46].

> enough in this for me and I would elect not to take up the opportunity afforded by the Court."
>
> In the result, in our view the Judge approached the assessment of compensation on an unduly constrained footing, and thereby erred in principle.

The Court placed particular weight on the fact that Mr Brankin stood to make a "respectable profit" from the development of his property. Ultimately, the quantum of compensation was increased to $100,000.

[58] The "willing buyer/willing seller" principle seems to have been first applied in the context of s 317(2) in *Cambray North Island Ltd v Minister of Land Information*. At issue in that case was the amount of compensation the applicants ought to pay in return for orders extinguishing an easement. Wylie J held:[27]

> ... the legislative provisions discussed in *Jacobsen Holdings* are similar to those contained in s 317(2) and I accept the general proposition that compensation under s 317(2), when properly payable, should fall to be assessed on a willing seller/willing buyer approach; that is, what would the owner of the servient tenement reasonably expect to pay for extinguishment of the easement or covenant and what would the owner of the dominant tenement reasonably expect to receive if they were extinguished.

[59] This approach has since been adopted by Duffy J in *Mikitasov v Little*[28] and by Keane J in the present case.[29] In his decision declining Mr Mikitasov leave to appeal to this Court, Allan J noted that there was no suggestion of any difference in approach in the High Court on this issue and that the position was "relatively well settled".[30]

[60] As there are some similarities to the landlocked land cases, we agree that there is merit in using the approach enunciated by this Court in *Jacobsen Holdings*. We consider it is proper to apply consistent principles when the Court is essentially engaged in a similar task of valuing compensation for releasing value to the applicant in respect of previously restricted real estate. Like this Court in

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27 At [25].
28 *Mikitasov v Little* [2012] NZHC 1100, (2012) 13 NZCPR 271.
29 HC judgment No 1, above n 1, at [82]–[92].
30 *Mikitasov v Little* [2013] NZHC 1340 at [25]. We note that this Court has recently dismissed an application for special leave to appeal: *Mikitasov v Little* [2013] NZCA 604.

Lowe v Brankin, we do not underestimate the difficulty involved, given that the Court is engaging in a hypothetical exercise.

Valuation evidence and conclusions in the High Court

[61] Keane J was originally presented with evidence from three specialist valuers: Matthew Taylor and Matthew Tooman for Mr Walshe, and Robert Lawton for the MacRaes.

[62] First, each expert assessed the value of Mr Walshe's property and Lot 1 of the MacRaes' property "before" modification (on the basis that the right of way provided access to Lot 2 only) and "after" modification (on the basis that both Lot 1 and Lot 2 enjoyed access).

[63] The conclusions of the three valuers were set out in the first High Court judgment at [96]–[116]. They are summarised in the table below.

Name	**Walshe property**		**MacRae property (Lot 1)**	
	Initial	*Final*	*Initial*	*Final*
Taylor	1,230,000	1,140,000	1,250,000 or 1,500,000[31]	1,900,000
Tooman	800,000	700,000	637,500	1,275,000
Lawton	-	No change	1,420,000	1,780,000

[64] Next, the valuers were asked to assess compensation on the basis of the test in *Jacobsen Holdings*. Given the divergence of views on this point, it is necessary to set out the detail of each expert's evaluation.

[65] Mr Taylor considered that willing buyer/willing seller negotiations would result in two categories of payment. First, the MacRaes would agree to compensate Mr Walshe for the diminution in value of his property, on the basis that such value had been "taken" by the expanded easement. Second, the MacRaes would agree to grant to Mr Walshe a 50 per cent share in the increased value of Lot 1. This was explained as follows:

[31] Depending on whether or not vehicle access was available via the beach.

> Adopting the willing buyer/willing seller scenario in friendly negotiations, we consider that it would be reasonable to expect that the party granting the easement ... would receive approximately 50% of the beneficial increase in value to Lot 1. We consider this to be equitable, and provides a "win", "win" situation for both parties.

In total then, Mr Taylor proposed compensation of 100 per cent of the loss of value the Walshe land and 50 per cent of the increase in value of Lot 1. This amounted to $415,000.

[66] Mr Tooman considered that the willing buyer/willing seller exercise would result in the following outcome:

> If a third party were to acquire Lot 1 as is (without any right of modification) but with an intention to attempt to modify the right-of-way, I consider they would have full regard to the probable cost of achieving this outcome.
>
> In order to make a proposal attractive to the dispossessed party, I believe they would not only compensate the owner [of the Walshe land] for the reduction in value of their Lot but also for the improvement in the value of their property. To be clear, any value improvements of their property would not be available without achieving a right-of-way modification.
>
> At the same time, a third party would not wish to over-capitalise the value of Lot 1, and in fact may wish to achieve a margin to reflect the risk in undertaking this exercise.
>
> I believe anyone seeking to modify the right-of-way must make it sufficiently attractive to the owner of [the Walshe land] as their preference is not to modify the right-of-way. To reflect this my assessment of compensation is 50% of the combined loss in value to [the Walshe land] ($100,000) and improvement in value to Lot 1 ($637,500). This equates to half of $735,500 or $368,750.

[67] Mr Tooman concluded that this level of compensation would achieve a balance between satisfying the owner of the Walshe land for the loss in value of that land and for the improvement in value of Lot 1, and over-capitalising the value of Lot 1.

[68] Mr Lawton's brief of evidence did not provide any detailed discussion on this point. He simply stated:

> Taking all matters into account, I do not accept that there is any impact on the value of the plaintiff's property but I would consider that a sum of up to $50,000 would be adequate compensation.

[69] In the course of examination in chief Mr Lawton explained how he reached this conclusion:

> Given all those considerations, I determined that there was a 20% diminution in value [in lot 1 as a result of the absence of normal vehicle access]. That was then going to leave me the question as to what proportion of that value would it be fair for another party to ask for that wasn't giving any land, wasn't contributing in any way to the costs, was in no way affected, from my reading of the situation, by the easement, really life was going to move on in the same manner as it had done before. It would be impossible to determine a difference in value of [the Walshe land], with a second easement or not, and so I felt that any money they would gain is the term windfall comes to mind, it may not be quite right, should represent that just low proportion and I determined that that figure should be in the range of 5% to 10% of the difference of the two values.
>
> Q Five to 10% of $360,000?
>
> A That's correct.
>
> ...

In cross-examination, Mr Lawton elaborated as follows:

> My ultimate approach to this was to sit back and look at it as a buyer, as an agent, as somebody promoting this property for sale and to say I have a property as it exists now, with an easement up the side, servicing a lot at the back, three buildings that are on the back lot and have been there for a long while. And then I'm going to have a second easement registered on the property to service that same lot that's been chopped into two with no more allowance for any further buildings than were there before, the building or potential lot coverage has been reduced by way of the subdivision process and said to myself "Will a buyer who hasn't been a part of this property beforehand see any difference?" And I was very much led to the conclusion that no, they wouldn't see any difference, there would be no identifiable difference to another party buying this property.

[70] In summary, then, the three proposals were as follows:

(a) Taylor: 100 per cent of loss of value of the Walshe land, 50 per cent of increase in value in Lot 1.

(b) Tooman: 50 per cent of loss of value of the Walshe land, 50 per cent of increase in value in Lot 1.

(c) Lawton: five to 10 per cent of increase in value in Lot 1.

[71] For reasons that were in part explained by counsel[32] there was relatively little cross-examination of the valuers in the High Court. In particular the critical issue of whether a figure of 50 per cent of the increase of Lot 1, or the approach of Mr Lawton (supporting a five to 10 per cent increase) was appropriate was not specifically put to either Mr Taylor or Mr Tooman in cross-examination. Although the approaches of Messrs Taylor and Tooman were briefly put to Mr Lawton in the course of cross-examination, the point was not seriously pursued. Neither was he challenged in any detail on his own methodology in adopting a figure of five to 10 per cent of the increase in Lot 1.

[72] With the leave of Keane J, however, both Mr Taylor and Mr Tooman provided supplementary affidavits following the oral hearing in response to Mr Lawton's evidence. In essence, both stated that the parties to a hypothetical negotiation would not agree on a figure of five to 10 per cent, as that would not represent a "win win" situation for both parties. Mr Walshe would not agree to give away his property rights for such a minimal return, when he was aware that the MacRaes stood to gain a significant increase in value.

[73] After hearing this evidence, Keane J adopted the approach taken by Mr Taylor. He held:

> [120] For the purpose of fixing this compensation, I accept the evidence of Mr Taylor, who has very extensive experience valuing Waiheke properties, and whose values stand very close to those of Mr Lawton, who also has such long local experience. I accept also Mr Taylor's proposals for the fixing of the compensation to which Mr Walshe should be entitled, but subject to two qualifications.
>
> [121] Mr Walshe, I am satisfied, should be fully compensated for the 7.5% discount to the value of his property resulting from the enlargement of the easement, $90,000. But I take Mr Lawton's point that Mr Walshe purchased his property subject to the right of way, that it has been formed without cost to him, and that it is to be improved by the MacRaes sealing it. One third of that sealing cost should be offset against the $90,000 sum to which Mr Walshe is otherwise entitled.
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> [122] I accept, secondly, that Mr Walshe should receive one half of the increase in value to lot two, just as Mr Taylor proposes, but he has valued on two bases depending on whether lot two currently enjoys vehicle or foot

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[32] Particularly Mr Jenkin who was the only counsel engaged in the appeal who was involved in the first High Court hearing.

> access. Whether vehicle access exists as a matter of right will have to be established definitively before this figure can be fixed.
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> ...
>
> [124] Finally, though the Macraes succeed in resisting the injunction that Mr Walshe seeks and will obtain the modification they seek, the merit of the case clearly lies with Mr Walsh, and he is entitled to receive compensation, not just under the heads identified, but for cost and inconvenience, a right that has been held to extend beyond an ordinary award of costs, even indemnity costs, that is not the subject of any specific claim as I recall; and that issue also needs to be clarified.

[74] Keane J issued his second decision in November 2012 after receiving further evidence on these issues.[33] The Judge first held that the MacRaes did have vehicle access to Lot 1 along the foreshore. Accordingly, Mr Taylor's higher figure of $1,500,000 was adopted as a starting point. However, Keane J also asked Mr Taylor to revise his valuation in light of the recent sale of Ms Smith's property for $1,580,000 and the sale by the MacRaes of Lot 2 for $1,900,000. Mr Taylor concluded that a revised valuation of Lot 1 of $1,390,000 was appropriate. After modification of the easement, he considered that the value of Lot 1 would be $1,760,000.

[75] Accordingly, the Judge awarded compensation of 100 per cent of the loss in value of Mr Walshe's land ($90,000) and 50 per cent of the increase in value of Lot 1 ($185,000). Importantly, the Judge gave limited consideration to why he adopted a figure of 50 per cent of the increase. It seems the only discussion of this point was the reference to the use of that figure in [122] quoted at [73] above. Such an approach was merely repeated at [62] of the November judgment.

[76] The Judge then considered whether Mr Walshe was also entitled to be compensated for loss and inconvenience. The Judge held that such compensation fell within the ambit of s 317(2).[34] Accordingly, compensation for airfares, loss of income, and other costs was awarded in the sum of $14,365.75.

[77] The total compensation awarded was therefore $289,365.75.

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33 HC judgment No 2, above n 2.

34 Relying on *Lowe v Brankin*, above n 25, at [43].

Submissions

[78] The MacRaes now submit that Keane J erred in assessing reasonable compensation under s 317 by failing to take into account evidence of negotiations prior to the litigation. Mr Campbell argues that those negotiations demonstrate that the compensation award was considerably higher than the likely result of hypothetical friendly negotiations.

[79] First, in 1998 there was a dispute between the MacRaes and Ms Smith as to whether the right of way could service more than one dwelling. Ms Smith's position was that she was prepared to allow the easement to service up to four dwellings, provided the MacRaes paid her an additional $17,000 and paid any additional costs for work required by the local authority. Second, in August 2000 the MacRaes proposed to Mr Walshe that the easement be changed to accommodate up to three dwellings. Mr Walshe's position was that his agreement would be conditional upon, inter alia, the MacRaes meeting the cost of any necessary legal or survey work and of sealing the driveway. No additional compensation was sought.

[80] Mr Campbell submits that factual evidence of what the party in question would have agreed to is very good evidence of the outcome of hypothetical negotiations.[35] Here, the Judge erred in only having regard to the expert opinion evidence. Had the Judge also taken into account the evidence of prior negotiations, he would not have reached a figure of $289,365.75.

[81] Mr Campbell contends that reasonable compensation would be that the MacRaes seal the driveway at their cost, reimburse any legal costs that Mr Walshe incurs in giving effect to the modification, and pay an additional $36,000 to Mr Walshe.

[82] Mr Jenkin first notes that awards of compensation under s 317(2) are discretionary.[36] He submits that the MacRaes have not previously suggested that the prior negotiations constituted a relevant factor that ought to be taken into account by the Court. Furthermore, the negotiations with Ms Smith were conducted over

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35 Citing *Hajnal v Asmussen*, above n 25, at [50].
36 Citing *Mikitasov v Little*, above n 28, at [4].

14 years ago and did not involve Mr Walshe. Similarly, the MacRaes have overestimated the importance of the 2000 negotiations. Mr Walshe in fact had no intention of agreeing to an amendment that would permit access to more than one dwelling on the MacRaes' land.[37] Mr Jenkin submits that the evidence of the expert witnesses was "much more compelling and cogent" than any evidence of prior negotiations. Accordingly, the Judge did not err in failing to have regard to that evidence.

Our assessment

[83] We do not accept the MacRaes' argument that evidence of prior negotiations is of assistance in assessing the level of compensation under s 317(2) in this case. The negotiations concerned took place many years ago between different parties, were not completed and were not shown to have been based on any reliable valuation framework, let alone applicable compensation principles. We consider that the evidence is too remote and is not helpful in any material way.

[84] That is not the end of the analysis, however. We have considered the calculation of compensation by the Judge, noting two essential components. The first is to award 100 per cent of the claimed detriment to the Walshe land ($90,000) and second, to award 50 per cent of the agreed increase in value to Lot 1, namely $185,000; the total being $275,000. We do not consider that this figure reflects a proper application of the approach in *Jacobsen Holdings* to the circumstances of this case. We do not consider that a willing buyer and a willing seller would have settled on that sum. Neither do we consider that a figure of $275,000 correctly takes into account all factors of benefit or detriment on either side. In particular it does not take into account the limited nature of the proposed right of way, given the restriction to servicing one dwelling on each property only.

[85] We first address the claimed diminution in value to the Walshe land. The starting point is the MacRaes' agreement to undertake the sealing of the right of way. Once it is appreciated that the servient land owned by Mr Walshe will have the benefit of a fully sealed right of way, which can be used to access his property from

[37] Relying on the affidavit evidence of Mr Walshe.

any point along the full length of the eastern boundary, the alleged detriment or loss of value needs to be reassessed.

[86] Mr Lawton considered the designated dwelling site for a future building on the Walshe property and observed that it was "reasonably well removed from the access way". Further, he noted that in between the access way and this proposed house is a planting of trees. The driveway is largely concealed from view by the trees and other vegetation. This led Mr Lawton to conclude that the expansion of the right of way would not have any identifiable impact on the value of Mr Walshe's property. We agree with this assessment.

[87] Moreover, Mr Taylor does not, in his evidence, provide any adequate justification for a reduction of around 7.5 per cent in the value of the Walshe land. We consider that such a figure is overstated and does not properly take into account the various geographical features of the land and any likely future building site, together with the limited increase in traffic that would occur. In addition, the effects of such increase would be mitigated by the fact that the driveway will be sealed.

[88] When addressing the claimed detriments that had been the subject of evidence, the Judge referred to the following:

> [79] As to the increase in traffic, Mr Goodwin's evidence is that each "dwelling" is likely to attract ten traffic movements a day; and, even if that were a conservative estimate, as I consider it is very likely to be, the access road is unlikely to become overburdened. It is unlikely that there will be a significant increased risk of accident or in noise, dust, or in the play of headlights at night. The sealing of the road will counter all but the last.
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> [80] The loss of privacy that Mr Walshe will suffer again is unlikely to be "substantial". Though his 2.76 hectare property is relatively narrow and extends down the hillside, and the easement may reduce where he can situate his house to shield it from the road, he has had that predicament from the outset. His privacy is also to an extent compromised by the public walkway down the western boundary. He will need to plant screening trees in any event.
>
> [81] The residual detriment that Mr Walshe would suffer, and this is the subject of the valuation evidence, is rather the effect on the market value of his property that a right of way giving access to two properties, not one, is likely to have. Purchasers on Waiheke Island in this area, as in others, very much value their privacy.

[89] Applying the approach in *Jacobsen Holdings* we do not consider that any of these claimed detriments will have a negative impact on the value of the Walshe land. Rather, we consider that the impacts on traffic, privacy and overall value are minimal. If anything, Mr Walshe will obtain a benefit from the sealing of the right of way. The slight increase in traffic will be mitigated by such sealing. The privacy loss can be reduced or eliminated by effective planting. As to value, we prefer the approach of Mr Lawton who assessed the loss of value at nil.

[90] Turning then to the assessment of compensation in respect of the additional lot, we accept the amount of $370,000 assessed by the Judge is the increase to the value of Lot 1 from modification of the easement.[38]

[91] Where there was a marked difference was in what portion of the sum of $370,000 should be awarded by way of compensation. The difference lay between 50 per cent assessed by Mr Taylor and Mr Tooman and between five and 10 per cent used by Mr Lawton.

[92] We are not persuaded that the Judge was correct in choosing a figure of 50 per cent. While the Judge had made such a finding in his first judgment for the purpose of fixing compensation, he did so indirectly by accepting the evidence of Mr Taylor.[39] He did not present any reasons for choosing this percentage ahead of that suggested by Mr Lawton. We are satisfied that there is no principled basis for accepting a figure of 50 per cent in the circumstances of this case. We therefore approach the matter afresh, appreciating that assessment in this area is difficult.

[93] The task is made more difficult in the present circumstances where the topic of the applicable percentage was not seriously addressed in cross-examination by either counsel. Accordingly, the markedly differing positions of the expert valuers on either side were not thoroughly tested or challenged. We raised with counsel whether this should result in the matter being referred back to the High Court for further evidence. Neither party welcomed this suggestion. In the end we consider

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[38] HC judgment No 2 at [62]. We note that there were not major discrepancies between the valuers on this aspect of their valuations.

[39] HC judgment No 1, above n 1, at [120].

that we must do the best we can on the limited evidence available. This approach is adopted in the interests of bringing finality to this long-running dispute.

[94] Taking the Judge's figure for the total increase in value of Lot 1 at $370,000, we consider that, applying the *Jacobsen Holdings* test, an appropriate figure would be between 25 and 30 per cent. In identifying this figure we have sought to assess all factors of benefit or detriment on either side including any inconvenience or disturbance to the owner of the servient land and any advantage Mr Walshe may gain. We also take into account the benefit to the MacRaes from having an easement granting right of way that serves two properties rather than one. However, we also take into account the fact that the easement is subject to the significant limitations discussed in relation to the first and second issues above.

[95] Making the best assessment we can, we consider that a fair and reasonable figure for compensation would be $100,000. This is close to the mid-point between the 25 and 30 per cent referred to above.

[96] It remains to address the final category of compensation for loss and inconvenience awarded in the High Court in the sum of $14,365.75. We agree with Mr Campbell that none of the amounts awarded under this category can be justified.

[97] The amounts awarded in the High Court comprised:[40]

Legal fees for advice pre-litigation	$8,388.75
Airfares to and from New Zealand	$2,750.14
Notary and courier costs	$159.61
Loss of income from closing dental practice for two weeks	$3,067.25

[98] We accept the legal fees incurred strictly in connection with a request for modification of the right of way might be recoverable. However, legal fees on any wider basis would not be properly recoverable under the head of inconvenience and disturbance. We consider that any recoverable legal fees would be likely to be minimal and we therefore decline to make any extra allowance for it. The notary and

[40] HC judgment No 2 at [70]–[71].

courier costs may perhaps qualify as disbursements to a costs award in the High Court but ought not normally included in an award of compensation. The airfares of the plaintiff to the litigation would not fall to be dealt with as compensation. Neither could they be treated as witness' expenses as a party cannot claim under that category.[41] We also reject the claim for claimed loss of earnings from being away from a professional practice. None of these claims should be regarded as compensation.

[99] The result is that for the modification of the easements, as discussed under issue 3, the MacRaes must pay Mr Walshe reasonable compensation under s 317(2) of the Act of $100,000. We also direct that the undertaking given by the MacRaes to seal the existing road by which the rights of way are enjoyed is to be treated as part of the reasonable compensation payable. The terms upon which such sealing is to occur will be addressed below.

Issue 5: What costs should have been awarded in the High Court?

[100] The MacRaes appeal against three aspects of the costs award. First, they challenge the uplift of 50 per cent on 2B costs as excessive. Mr Campbell submits that by the time the matter came before Keane J, the MacRaes had accepted they were not entitled to access one dwelling on each lot. Instead, they merely sought to argue that Windmill House did not constitute a "dwelling". The fact that Keane J had rejected this argument did not mean that the jurisdiction under r 14.6(3) of the High Court Rules[42] to order increase costs was invoked.

[101] Second, Mr Campbell submits that Keane J erred in failing to award costs to the MacRaes on their counterclaim. While the MacRaes succeeded in obtaining a modification of the easement, they did not receive any reduction in 2B costs to reflect this. Third, the MacRaes challenge Keane J's decision to allow Mr Walshe to recover the fees of two expert valuers. It is submitted that it was not reasonably necessary for the conduct of the proceeding for Mr Walshe to call two expert witnesses.

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41 Fees allowances and expenses payable to witnesses are not applicable to parties.

42 Rule 14.6(3)(b)(ii) provides that the Court may order a party to pay increased costs if that party has taken or pursued an unnecessary step or an argument that lacks merit.

[102] In response, Mr Jenkin submits that findings with respect to costs are discretionary and there is nothing to suggest that Keane J failed to take into account relevant considerations, took into account irrelevant considerations, or that his decisions were plainly wrong. The Judge was entitled to award an uplift because the appellants had acted unreasonably in pursuing their argument that the right of way entitled them to access both Wild Bay Villa and Windmill House. Similarly, there is no merit in the suggestion that the appellants are entitled to costs because they were successful in their application for modification of the easement. Although the appellants succeeded in that respect, Mr Walshe was "overwhelmingly successful" with respect to his claim for compensation. There are no fixed rules as to costs in this type of case.[43]

Our assessment

[103] We do not consider that any uplift to the award of 2B scale costs was justified, let alone a 50 per cent uplift. We do not agree with the Judge's assessment that the arguments lacked merit. The defendants in the High Court were entitled to run the arguments they did. The issues were not straightforward and were in our view at least arguable. We allow the appeal with respect to the uplift of 50 per cent. In all other respects the costs award is upheld.

Result and costs

[104] For the reasons set out above, the appeal is allowed. The cross-appeal is allowed.

[105] We order that the easement granting the rights of way in Transfer No D365912.14 dated 18 February 1999 is to be modified pursuant to s 317(1) of the Act in such a manner as to reflect the conclusions in the judgment at [28]–[29], [38] and [50] on the basis that the easement granting rights of way will apply in favour of the following two properties as the dominant land:

(a) the land contained in Lot 1 DP 387905 (Identifier No. 351983 North Auckland Registry) (Lot 1); and

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[43] Citing *Lowe v Brankin*, above n 25.

(b) the land contained in Lot 2 DP 387905 (Identifier No. 351984 North Auckland Registry) (Lot 2).

[106] The parties are to confer and appoint a conveyancing practitioner to document and implement the modifications to the easement as ordered at [105] above in order to provide that the easement granting rights of way will apply with full effect to both Lot 1 and Lot 2.

[107] We reserve leave to apply for further directions in the event that there are any practical difficulties documenting or implementing the conveyancing to reflect the relief granted in this Court.

[108] The order in the High Court pursuant to s 317(2) of the Act requiring the appellants to pay compensation comprising in total the sum of $289,365.75 is quashed.

[109] In its place there is an order that the appellants are required to pay the first respondent the following as reasonable compensation:

(a) the sum of $100,000 prior to registration of the documents modifying the easements in favour of the two properties as the dominant land;

(b) the full costs of sealing the existing road by which the rights of way are enjoyed on the following basis:

(i) there is no change in scale, direction or location of the road; and

(ii) the type of seal used is to be a light chip seal to ensure that it is sealed to a standard that is safe and durable. The actual seal used may be agreed between the parties and in the absence of agreement is to be decided by a civil engineer in practice on Waiheke Island; and

(iii) for the ongoing maintenance costs incurred towards the upkeep of the right of way a reasonable contribution assessed on the basis of appropriate use as provided for in the easements.

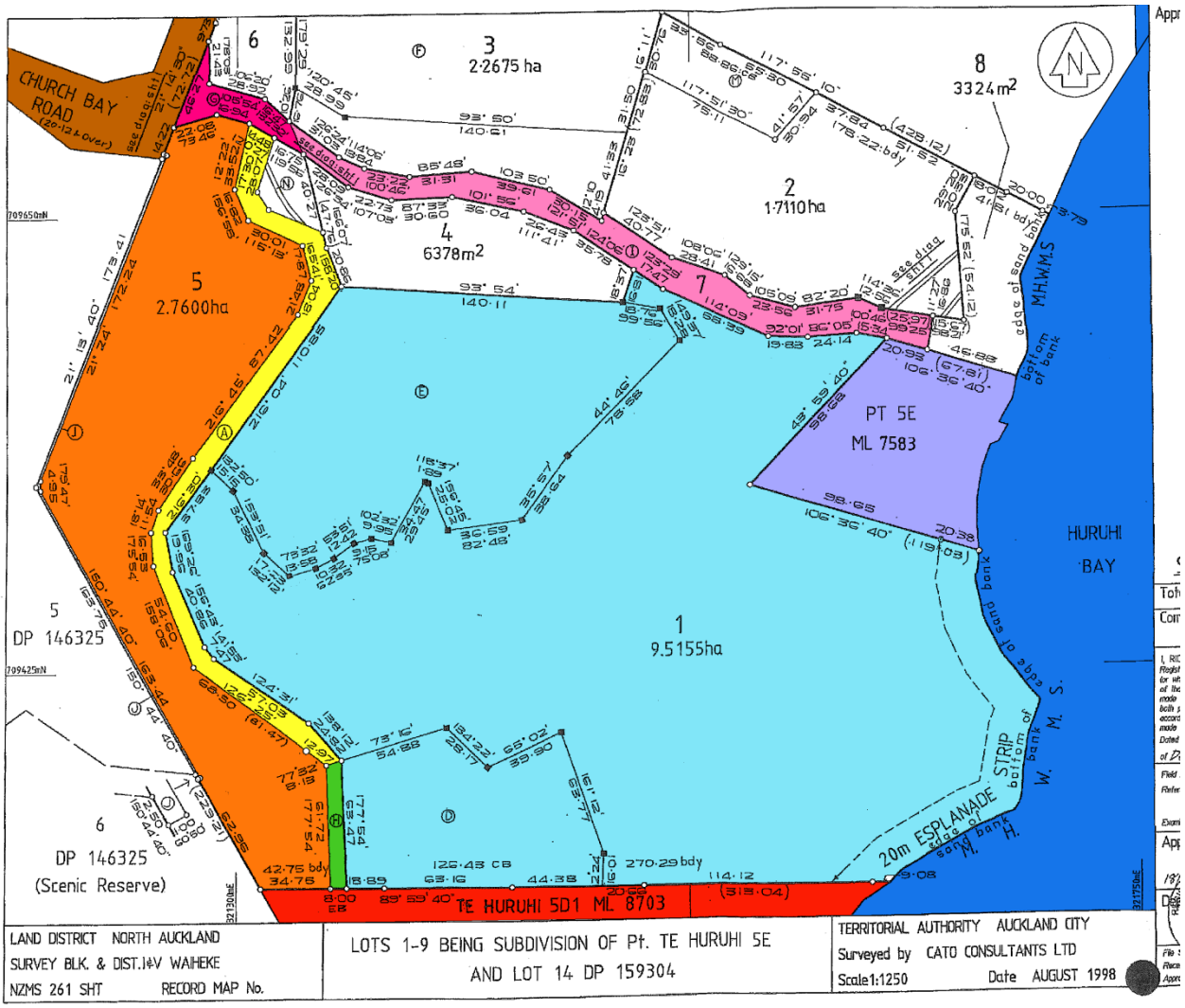
(c) the reasonable legal costs of the first respondent in respect of the registration of the modified easements granting rights of way.

[110] The order in the High Court that the appellants pay the first respondent's costs on a 2B basis uplifted by 50 per cent is quashed. In its place there is an order that the appellants pay the first respondent costs in the High Court on a 2B basis and reasonable disbursements to be determined by the Registrar of the High Court.

[111] In respect of the appeal there will be no order as to costs. This reflects the fact that on the issues raised in this Court each party had a measure of success. Overall the honours were essentially shared.

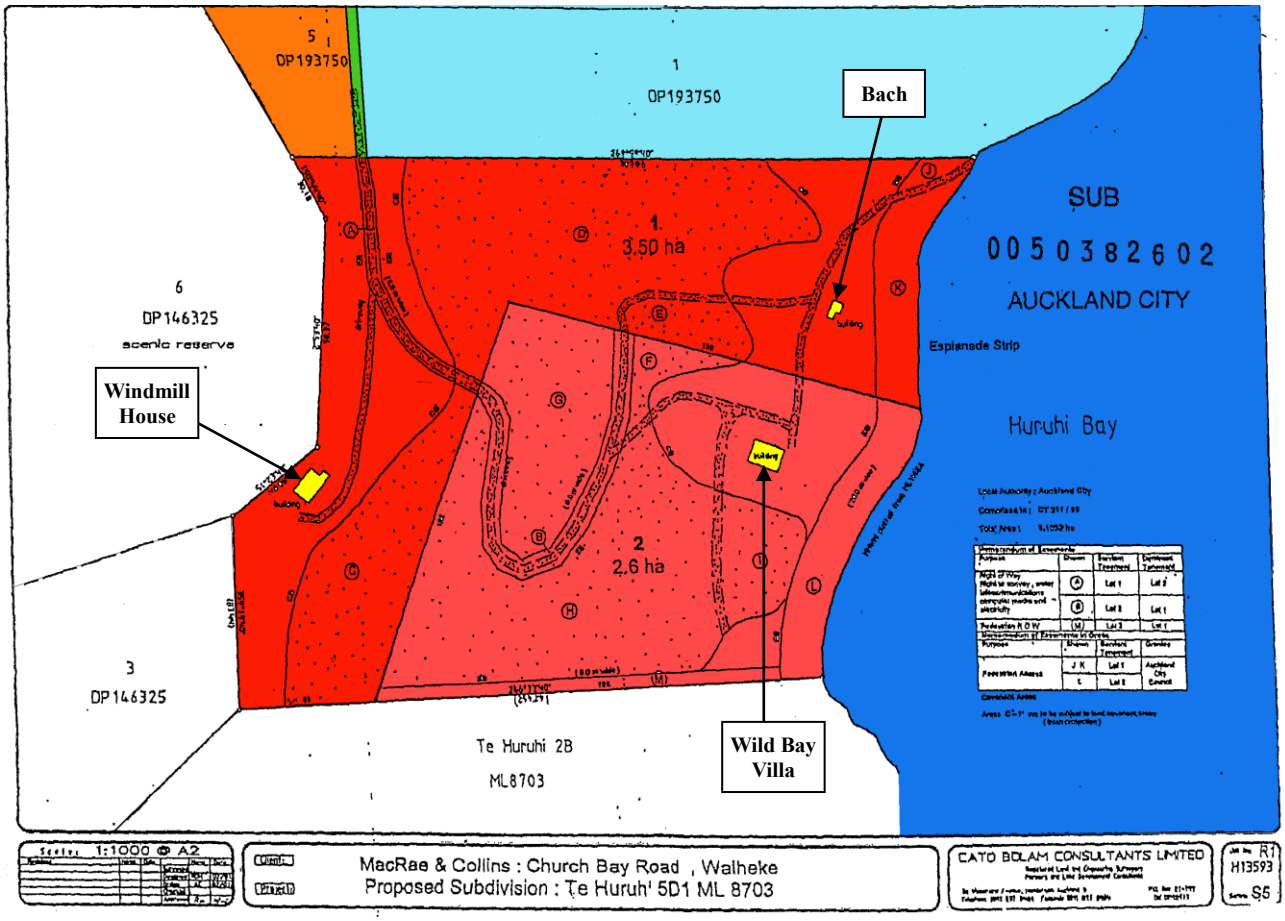
Solicitors:
McVeagh Fleming, Auckland for Appellants
Bruce Dell Law, Auckland for First Respondent

APPENDIX ONE[44]



[44] These versions of the plans are based on coloured copies provided by counsel. They are for explanatory purposes only.

APPENDIX TWO[45]



[45] Although this plan is of the proposed subdivision, the final subdivision was in all relevant respects identical. We have made a small modification to reflect the fact that the right of way is contiguous with the eastern border of Mr Walshe's land.