

YOU AND YOUR PROPERTY

IN EACH ISSUE RESIDENTIAL PROPERTY LAWYER, MICHAEL HOFMANN-BODY COMMENTS ON A PROPERTY CASE WHICH HAS COME BEFORE THE COURTS. IN THIS ISSUE HE LOOKS AT A DISTRICT COURT CASE INVOLVING A DISPUTE BETWEEN RURAL NEIGHBOURS OVER A RIGHT OF WAY.



Rights of way are a type of easement. They confer entitlements of access and egress over a neighbouring property. The property receiving the benefit of a right of way is called the dominant tenement. The property subject to the right of way is called the servient tenement. The extent of the rights, entitlements and obligations conferred by a right of way are often misunderstood by property owners. In the case of *Robinson v Lindsay* heard in the District Court at Upper Hutt, Judge Thomas was called on to resolve the issue of whether or not the benefits of a right of way should be extended to other properties owned by the owners of the dominant tenement adjoining the dominant tenement.

The properties were situated in Whitemans Valley. The Robinson's property, the servient tenement, had an access leg to Johnsons Road. The dominant tenement owned by the Lindsay's backed onto the Johnson's lot. The right of way enabled use of the access leg so the Lindsay's property had access to Johnsons Road. The Lindsay's also owned other back lot properties adjoining the dominant tenement. Those properties had legal frontage to Whitemans Valley Road, but no formed access. The Court's

decision records the servient tenement had been acquired for the purpose of securing access to Johnsons Road, over the right of way, for the back lots. The Lindsay's carried out a subdivision of their properties which included the servient tenement and the two back lot properties. The subdivision created three new lots each with access to the right of way over the Robinson's property. As each lot included part of the original servient tenement, an entitlement to use the right of way was recorded on each new title.

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Section 126G of the Property Law Act confers a jurisdiction upon the District Court to modify easements to limit their application. The case involved an application by the Robinsons to prevent the

use of the right of way by two of the three lots – effectively the two back lots.

Had the two back lots been able to take advantage of the right of way there would have been significantly greater use of it than intended at the time it was created. In particular, there was the prospect of it being used for logging access to a large stand of trees.

The Court held the extension of the right of way rights to the additional land was a change of circumstances entitling it to modify the right of way. It did so by partially extinguishing the right of way so it only applied to one of the three lots created by the subdivision – the one comprising the bulk of the original dominant tenement.

Subdivisions are a common feature of rural and residential property development. The message from this case is where access to subdivided lots relies on a right of way care needs to be taken. Often it will require the consent of the owner of the servient tenement. When purchasing a property reliant on a right of way you need to get legal advice as to your rights, entitlements and obligations.

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