IN THE SUPREME COURT OF NEW ZEALAND

SC 16/2014
[2014] NZSC 96

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

Court:	Elias CJ, William Young and Arnold JJ
Counsel:	N R Campbell QC for Applicants G C Jenkin for First Respondent
Judgment:	22 July 2014

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the first respondent costs of $2,500.

REASONS

[1] The applicants, the MacRaes, and the second respondent, Mrs Smith, owned neighbouring properties on Waiheke Island. In 1998, Mrs Smith obtained consent to subdivide her land into nine lots. As part of that process, she agreed to grant a right of way over two lots, lots 5 and 7, in favour of the MacRaes, thus allowing vehicle access to their six hectare property from a local road. Mrs Smith granted the right of way by a deed dated 25 August 1998, cl 5 of which provides:

> 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 save that the Easement of Right of Way shall only service one dwelling on the dominant land.

After the right of way was granted but before it was registered, Mrs Smith agreed to sell lot 5 and a share in lot 7 to the first respondent, Mr Walshe.

[2] From 1999 the MacRaes used the right of way to access their property. The property had several buildings on it, including a two storey house known as Wild Bay Villa, a bach used as a sleep out, two sheds, an art studio and a building known as Windmill House. The MacRaes transported Windmill House onto the property after the grant of the right of way but before registration. It was used as an office and for storage and occasional visitor accommodation.

[3] In August 2006, the MacRaes obtained consent to subdivide their property into two lots, one containing Windmill House and the bach, the other Wild Bay Villa. Despite the subdivision, the MacRaes continued to use the property as a whole, until they sold one lot to a third party in 2011. The titles for the two lots purported to give each lot the full benefit of the right of way easement that applied to the MacRae's original unsubdivided property.

[4] A dispute arose between the MacRaes and Mr Walshe concerning the extent of the rights granted by the easement, which resulted in the present proceedings. In case they were wrong on the interpretation issues, the MacRaes applied under s 316 of the Property Law Act 2007 for orders which had the effect of enlarging the easement so that it would operate to the benefit of both of the lots into which they had subdivided their property.

[5] In the High Court, Keane J found that Windmill House was a dwelling within the meaning of the right of way easement and that the easement allowed access only to a single dwelling and for any naturally related or ancillary purposes. The Judge granted the MacRaes' application to modify the easement so that it operated to the benefit of both of their lots and fixed compensation.[1] The Court of Appeal upheld Keane J's interpretation of the easement and his conclusion that Windmill House was a "dwelling" as that term is used in the easement.[2] However, the Court agreed with the parties that the Judge's modification to the easement was unsatisfactory and also disagreed with him on the quantum of reasonable compensation for the modification. Whereas the Judge had assessed the compensation payable at $239,365.75, the Court of Appeal assessed it at $100,000.

[6] The MacRaes seek leave to appeal on several questions relating to the approach to the interpretation of the right of way easement. They also raise the question of the approach to the interpretation of "dwelling" and to the award of costs in the High Court and Court of Appeal. If leave to appeal is granted, Mr Walshe seeks leave to cross-appeal in relation to the quantum of compensation.

[7] We do not consider that it is necessary in the interests of justice that we hear and determine this appeal. On any view, the MacRaes require a modification of the easement so that it applies to both lots. The issues of interpretation and the meaning of "dwelling" are relevant principally because they may impact on the amount of compensation payable, although the MacRaes also say that the easement, as interpreted and modified in light of that interpretation, creates practical difficulties. Against this background, we do not see the questions identified as raising issues of general or public importance. Rather, they are issues relating to the application of a particular bespoke easement. Moreover, we do not accept that there is a real risk of a substantial miscarriage of justice if leave is not granted.

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1 *Walshe v MacRae* [2012] NZHC 296 and *Walshe v MacRae* [2012] NZHC 3054.
2 *MacRae v Walshe* [2013] NZCA 664.

[8] The application for leave to appeal is dismissed. The applicants must pay the first respondent costs of $2,500.

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