

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CIV-2012-004-000666  
[2017] NZDC 16274**

BETWEEN	LAWRENCE MICHAEL RAJALINGAM First Applicant
AND	ARUNA KAMINI RAJALINGAM Second Applicant
AND	GULABBEN RANGGODBHAI PATEL Respondent

Hearing: 16 November 2016 and 1 May 2017

Appearances: C Andrews and P Kim for the Applicants  
E Werry for the Respondent

Judgment: 31 July 2017

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**DECISION OF JUDGE NICOLA MATHERS**

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[1] The applicants, Mr and Mrs Rajalingam, wish to extinguish a registered easement encumbering their property at [address on street 1 deleted], Auckland. The easement permits both pedestrian and vehicular passage.

[2] The respondent, Mrs Patel, is an elderly woman who opposes the application. However, her counsel, Mr Werry, at paragraph 5 of his submissions advises that while opposing the extinguishment "if the court is minded to seek an alternative to extinguishment of the easement she would support the proposed modification of the easement being reduced from 3.05 metres to 1.5 metres together with compensation". Also if the easement is modified she opposes the applicants' request that any amended easement should only last during her lifetime.

[3] Mr and Mrs Rajalingam rely upon s 317 Property Law Act 2007 and in particular s 317(1)(a) and (d) which I set out below:

**317 Court may modify or extinguish easement or covenant**

- (1) On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the easement or covenant) if satisfied that—
  - (a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
    - (i) the nature or extent of the use being made of the benefited land, the burdened land, or both;
    - (ii) the character of the neighbourhood;
    - (iii) any other circumstance the court considers relevant;
  - ...
  - (d) the proposed modification or extinguishment will not substantially injure any person entitled.

[4] Stripping the facts to the essential points, Mr and Mrs Rajalingam wish to remove the easement, or at least half of it, so that they may build a bigger house taking advantage of a reduced or removed easement. They rely upon a change since the creation of the easement, and the nature and extent of the use being made by Mrs Patel, and that Mrs Patel will not be substantially injured if the easement is removed or modified.

[5] Mr and Mrs Rajalingam point to the fact that the easement was most likely put in place to avoid the vacant land, now owned by Mrs Patel, being landlocked. Since then, and before the Patels bought their land and built their house, a subdivision took place giving road frontage to Mrs Patel's property to [street 2]. This gave unrestricted vehicular access to Mrs Patel to [street 2], as well as the easement to [street 1]. Mr and Mrs Rajalingam point to this as being a substantial change and also point to evidence that it is unlikely, so they say, that the Council would grant vehicular access to [street 1] because it is so close to an intersection. Mr and Mrs Rajalingam, however, acknowledge that Mrs Patel does use the access occasionally for pedestrian access and apparently once a vehicle made it up the easement.

[6] Mrs Patel denies that there has been a substantial change. She confirms that she uses the easement for pedestrian access. She points to her age and says that she may wish to create a downstairs flat and which would then make it important for her to have access over the easement to the upper level of her house. Also her evidence points to the fact that her section is large and is subdivisible, and therefore the easement may become important.

[7] In these circumstances it would be easy to simply compromise the position by reducing the width of the easement to 1.5 metres. However I am required to apply s 317 and it is for the applicants to satisfy me, on the balance of probabilities, that reasons exist for any order that is sought.

[8] This is the second application Mr and Mrs Rajalingam have made, the first they discontinued after an unsuccessful settlement conference. I note that in the intervening period Mrs Patel arranged to concrete the full length and width of the easement, although it does appear rather ugly.

[9] There has been some evidence of the local Council somehow extinguishing its interest in the easement, but I place little weight on that evidence because I must apply s 317.

[10] So balancing all the evidence and in the exercise of my discretion, am I satisfied that Mr and Mrs Rajalingam have made out the grounds sought pursuant to s317 (1)(a) or (d)? I am satisfied that the original intention for creating the easement has been reduced or removed entirely due to the subdivision change and the vehicular access from [street 2]. I am also satisfied that this does constitute a sufficient "change" since its creation, bearing in mind the nature and extent of its use. Also there is the fact that Mrs Patel has not used the easement for vehicular use. However, pursuant to s317(1)(d) there will obviously be some "injury" to Mrs Patel. Is it, however, "substantial injury"?

[11] I accept that it is unlikely that vehicular access will ever be granted to [street 2], due to the evidence I heard. Therefore, although I accept there will be some injury, I consider it does not meet the test of being "substantial " and that in any event if I

simply reduce the easement to 1.5 metres wide, as I am minded to do, then this reduces further any "injury " to Mrs Patel.

[12] Taking into account all the circumstances and all the evidence I am therefore satisfied, on the balance of probabilities, that Mr and Mrs Rajalingam have made out their case but limited to the reduction of the easement to 1.5 metres wide. I am not, however, prepared to limit the reduction to the lifetime of Mrs Patel. In my view these matters should relate to the land and not the age of the respondent.

[13] This brings into play consideration of s 137(2) as to whether reasonable compensation should be paid to Mrs Patel. I consider compensation should be paid because I have found that there will be some "injury" and that there will also be an acknowledged benefit to Mr and Mrs Rajalingam.

[14] The valuers, who gave evidence, were able to agree on the value of the respective properties but unfortunately were not able to agree as to what diminution in value there would be to Mrs Patel if the easement was reduced to 1.5 metres. I am not a valuer and must do the best I can with the difference in opinion of the respective valuers.

[15] There does appear to be agreement that the benefit to Mr and Mrs Rajalingam will be \$15,000. Mr Swan, their valuer, says there will be no reduction in value to Mrs Patel's land. I do not accept that. I prefer the approach of Mr Wigmore, Mrs Patel's valuer, on the basis that he refers to a willing seller and willing buyer, which must be a preferred approach in my view. He has assessed a sum of \$83,500. I consider that figure to be too high in all the circumstances. Although I prefer Mr Wigmore's approach, nevertheless Mr Swan assesses no benefit. I propose to assess an overall figure which I consider is fair and reasonable in all the circumstances and I assess that figure as \$40,000. This figure includes the benefit to Mr and Mrs Rajalingam and the reduction in value to Mrs Patel.

[16] I therefore make the following orders

- (1) The easement is modified as follows

- There will be no right for vehicular access, other than mobility scooters.
  - Its width is reduced to 1.5 metres measured from its eastern boundary
- (2) The respondent's reasonable costs, including legal expenses, incurred in completing/executing documents to effect registration of the easement modification, if any, are to be reimbursed by the applicants.
- (3) The physical costs associated with reducing the width of the easement on the ground to conform to the modification will be the applicants' responsibility.
- (4) The terms implied into the easement by the Property Law Act 2007 are otherwise to remain unaltered and unaffected except to any extent that they need to be interpreted in a manner to give effect to the foregoing change of width and use.
- (5) The applicant is to pay the respondent the sum of \$40,000, such sum to be held in the respondent's solicitors trust account, to be released upon the registration of the modified easement.

[17] In my view this is a claim where each party should bear their own costs but I will receive memoranda should either party wish to persuade me otherwise.

Nicola Mathers  
District Court Judge