To Sebastian Hartley,

Clerk to the Rules Committee,

Po Box 60,

Auckland.

Personal Submission :- **Improving Access to Civil Justice.**

from Ian W. DAVEY.

1st September 2020

**The book “Thirty Pieces of Silver” by Anthony Molloy, QC (**one of NZ’s most respected barristers and Queen’s Counsel, assisting in the “Wine Box” Inquiry) shows up how NZ legal ethics have given way to greed and corruption.

**Justice a disposable comodity?**

Quote from “Thirty Pieces of Silver” page 11 - “It is easy to lose sight of the fundamental values of fairness and equity that our system of laws are designed to foster.  **When lawyers push these values aside, justice is redused to a disposable comodity.”**

**Evan Whitton** in his book **“Our Corrupt Legal System: Why Everyone Is a Victim (Except Rich Criminals)”**  traces the origins and development of the two major legal systems and how they work.

The Adversary System as in NZ adopted from England.

The Inquisitorial System used in Europe.

He shows that the Adversary System is broken and not fit for purpose. It needs more than minor changes as invisaged by this and other Reforms as in the past.

**It needs a complete overhall, to adopt and marry, the best of the Adversary and Inquisitorial Systems.**

Read **“Justice in the 21st Century” by Hon Russel Fox Q.C.** who researched the two Systems for 11 years after he retired from the Australian Federal Court.

**His damming observation**  - Quote :- **“The Adversary System** does not try to find the truth. Lawyers are trained in sophistry, control evendence and question witnesses. Judges are untrained, uninformed and passive. Jurors are isolated, and do not give reasons for their verdicts. At least 1% of people in prison are inocent (5% in USA.) A majority of guilty defendants get off. Civil litigation is a lottery.”

**“The Inquisitorial System** tries to find the truth. In France, trained judges control evidence and question witneses. Lawyers are not allowed to question witnesses directly least they polute the truth with sophistory. Jurors and judges sit together and give reasons for their verdicts. The inocent are rerely charged, let alone convicted ; 95% of guilty defendants are convicted. Civil litigation is presumably no less accurate.” (end of quote)

**Our personal experience of over 10 years of the NZ Justice System** highlights the fact that the Justice System rewards those with money and determined to use the System for their own gain.

As one brought up with Christian Principals, I am aghast that there is no penalty for being untruthful in Court, half your Affidavit can be false, or can make wild character assasinations with impunity. The System Rewards Dishonesty!

It is an inditement on the NZ Justice System that in our case something as straight forward as forming a Right of Way, even though large eucalyptus trees were growing on the registered Right of Way, would in 10 years, have to go from District Court, Settlement Conference, 2 Arbitrations, High Court and Appeal Court and is in the final throws of settling costs at Arbitration, September 2020.

We had 15 neighbours bordering our hillcountry farm up the Motueka Valley and previously had 6 boundary changes, 3 Water Rights and 3 Power easements to different neighbours all settled over a cup of tea. With this 5 metre Right of Way, it gave access to a title and the neighbour didn’t want a house built on the hill behind (even though the surveying had been done several years before they bought) therefore they used the large gum trees as blackmail.

We offered to fell the trees and clean up afterwards at no cost to the neighbours, but we were told that we could only dismantle the 30 trees within the 5 metre RoW and were not to trespass onto their land. This was an imposibility for 40 metre high gum trees.

To progress our case, we took it to the District Court (April 2011) thinking that it was a simple case for the Court to rule on who was responsible to remove the trees but instead the neighbours insisted that the dispute be decided by Arbitration.

Twice the District Court Judges gave us the opportunity to use the Settlement Conference process but the neighbours rejected both offers. This was after Judge Zohrab said to the neighbours lawyer – “that he couldn’t understand why they would want to pay for an arbitrator rather than use the free service the court offers.”

We suggested that because the neighbours were concerned about the unstable hilside, that a simple solution would be to re-survey the RoW down hill an average of 3 metres to avoid the gum trees and line up with existing farm track which would require far less earthworks but the neighbours again rejected this at the 1st Arbitration. Because the neighbours would not give consent, the Arbitrator said it was beyond his powers to make a rulling therefore we would have to take our case to the High Court.

Our case shows also that when you add up all the parties costs, it is completely out of propotion to the cost of forming the RoW. The Tasman District Council Compliance Officer still maintains that the RoW could have been formed without a Resource Consent (approximately $30,000 including gravel) but the neighbours forced us to spend a horendus amount on lawyers, surveyors, geotech engineers, Resource Management experts extensive plans and TDC Resource Consents. T his, before trees could be felled or doing any roadway formation.

Our accounts for legal and other experts fees, total $473,540. We are indebted to our senior lawyer who felt so strongly about the unfairness of the case that he reduced his charge out rate to equal Legal Aid rates ($135p/h) otherwise the bill would have been much larger. Add on the neighbours account and Settlement Conference, District Court, High Court, Appeal Court and Judges fees and there would not be much change from one million dollars total cost!

We feel we have been shafted by the NZ Justice System.

**Judges Above the Law.**

We asked the High Court to deliver decision on :-

1st & 2nd Claim - Whether the RoW could be re-surveyed an average of 3 metres down-hill to avoid felling the trees – whether rectification or modification of Easement could be granted.

3rd Claim - If neither rectification or modification of RoW Easement was posible, we asked the High Court to order the neighbour to remove the trees and stumps from the RoW as the trees were their property and were an “impediment” Schedule 5, 2 (c) of the LGA.

4th & 5th Clauses were for Breach of Good Faith and Aggravated or Exemplary Damages.

The High Court Judge made a decision that neither rectification or modification was an option which was fine, **but then he “referred to arbitration the balance of the plaintiffs Claims.” That was in June 2015**

**After spending 4 and half days in Court and a site visit, the Judge failed to carry out the simple task of making a Court Order for the neighbour to remove trees and stumps from RoW instead referred balance of our Claims to Arbitration.**

We also had to pay Court costs of $97,000 within 4 days (including false evidence from Expert Witness) without any progress or benefit to us. It is now 5 years later and the case is yet to be finalized. Both parties have put in recently, an Application to the Arbitrator for Costs.

The High Court Judge also said only the neighbour who owned the land over which the RoW ran, was able to bring case to Court as we “are not a qualifing person for the purposes of s316 (1). They (we) lack standing to apply for orders under s317,”

This completely reverses standard understanding of centuries and common sense, where the RoW Easement is an agreement between both parties and therefore either party can ask Court for direction.

It was because the Judge failed to resolve the case by not ordering the neighbours to remove the trees or issue directives on our other Clauses and the Judgment that only the Servient Tenement could apply to a Court, that we felt the Judge neglected his Duty, therefore Appeal Court was the only place to get Justice because even if Arbitration gave a directive to the neighbours to remove the trees, they wouldn’t carry it out till forced by a Court Order.

**Expert Witness in High Court.**

The Expert Witnesses interpretation of the Tasman District Council, TRMP Planning Rules giving Evidence in High Court stating that we had to get a Resource Consent to fell gum trees with a Chainsaw, was false.

When we asked the TDC for clarification, two Planners wrote saying we needed a Resource Consent but the TDC Compliance Officer who deals with this regularly, was adamant that we didn’t, as using a chainsaw to fell trees was a permitted activity if you read the whole Section and not cherry-pick to suit your argument.

Because of the incompetence of some TDC staff, the Expert Witness false interpretation still stands and was able to be used against us by the neighbours lawyer, to delay progress.

**It is disgraceful that we had to pay for the Expert Witnesses time in High Court and that there is no penality for giving false information in Court.**

**Appeal Court**

There were 3 judges sitting and at he Hearing they were quite scathing of the neighbours lawyer ‘s argument of just the Servient Tenement being able to bring case to Court. The Judges sited the LGA Schedules that involve two parties as a contract, therefore either party should be able to bring case to Court.

Unfortunately what the Judges said in Appeal Court bore no relationship to their written Judgement which followed the High Court Judgment almost to the letter.

The Appeal Court Judges also said, that they can only look at the decisions that the High Court Judge made and as no decision was made on the balance of our Claims they couldn’t comment except to reinforce the law by saying that - “we have the right to an unobstructed path and this places mutual obligations on both parties to ensure that the right of way can be made possible.”

When I asked for the Appeal Court Transcripts one of the Judges replyed by letter saying that he didn’t consider that the Transcripts would assist us and sited the cost to the Court for transcribing.

**There are two major flaws here.**

**1.**  It is like expecting the wolf to look after the chickens! If the Transcripts showed that what the Judges said at the Hearing differed completely from the written Judgement, then it could be imbarrasing to the Judges so why isn’t this handled by independent Court Staff? A Transcript should be automatic. We had no trouble getting the High Court Transcripts.

**2.**  The Judge complained about the cost of transcribing. The first hour of the Hearing was wasted because of an outdated system of our lawyer trying to get the three Judges familiar to case and boundaries by taking the papers up to the 3 Judges bench to point out exactly what to look for. After an hour of this nonsence, the chief Judge exclaimed that he had being trying to read the Plan only to realize he had the Plan up-side down! The cost to the Court of 3 Judges would have paid for modern technology for Power Point presentation which would have completely overcome this debarkle.

The two lawyers that were with us to present our case, were both flamagasted at the 180 degree change in the Judges speaking at the Hearing and their written Judgment. The only explanation is that the Old Boys Club is at work. It is more important to protect one of their own even at the expense of “Justice.” It makes it very much easier if the Transcripts are not available!

Summary

Under the present Civil Justice System, some have described it as a lottery or say you may as well toss a coin, as lawyers and Judges are more concerned about the “Letter of the Law” rather than the “Spirit of the Law.”

Right of Way Easement not worth the paper it is written on as High Court Judge and Appeal Court Judges have overturned law which has been in place for centries. Considering the numerous RoW boundaries that are not on legal boundary, this has potential to cause grief to many.

No accountability or penalities for lawyers or Judges. No incentive to get results as on hourly rate.

Judge Burton Katz former Prosecuter who had been involved in virtually every aspect of the criminal justice system in America wrote **the book “Justice Overrulled” states page 307 - “The system has been developed by and for judges and lawyers.”**  Our first hand experience reinforces this!

Only too happy to supply extra info.