

# **Improving Access to Civil Justice**

## **Personal Submission**

**by Lawson Neil Davey**

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I have only recently become aware of the consultation paper by the Rules Committee to update the procedure to Improve Access to Civil Justice and the request for submissions in the past couple of days so my submission is very brief and based on a letter I sent to Amy Adams in 2015, outlining my concerns.

For the public to have confidence in the Justice System, it is essential that the Civil Justice System provides justice in an affordable and timely manner. My experience is that the so called Civil Justice System is in fact a legal system which is overly complicated by lawyers and judges, is extremely inefficient and time consuming, exorbitantly expensive and essentially rewards those with money. It has been unable to provide justice in a timely or affordable manner, and without any consequences for being unreasonable and vexatious, for those who are prepared to make false statements in court, actually rewards them! This is based on personal experience having been involved with a case where my parents have tried to resolve a long running dispute over a Right of Way, which is still not fully resolved after 10 years!

Given my experience I feel I have a duty to comment, as I have lost confidence in the so called Civil Justice System (I now refer to it as the Legal System rather than a Justice System) and would not want others to have to go through what my parents and I have had to endure for the past 10 years. Despite my belief that the law is very clear regarding Right of Ways, it is an indictment that the legal system has been unable to uphold the law in an affordable and timely manner. It is little wonder people take matters into their own hands. In our case, trying to do the right thing and be law abiding, has only come at huge cost (hundreds of thousands of dollars (approximately 15 fold the cost to actually do the work to form the ROW) causing a huge amount of financial and emotional stress. The reality is that we would have been significantly better off to take matters into our own hands 10 years ago and form the right of way and with hind insight, I regret ever suggesting starting legal proceedings. As it turned out, given the in-ability of the legal system to enforce the law, after 10 years we had no option but to take matters into our own hands and are still awaiting the outcome of Arbitration Costs to be awarded.

The following is a very brief summary of the situation but I am more than happy to provide more detail should you require it. My parents owned an 185ha marginally economic hill country sheep and beef property consisting of several titles in the Motueka Valley, Nelson region for 50 plus years. When they were in their late 60's, in 2010 as a result of a change in circumstances over historical access to part of the farm and as a result of wanting to retire, they attempted to utilize an existing Right of Way access which was created in 1991 along an historical track, which was rarely used due to it being in relatively close proximity

to the neighbour's house. This would have allowed them to sell the title to provide some capital to assist with their retirement plans.

Unfortunately it only became apparent in 2010 when they went to upgrade the Right of Way that the easement didn't follow the existing track along its entire length, as they had been led to believe when the Right of Way was created (neither my parents, the neighbouring landowner at the time nor the Council were advised of this when it was created though, which I believe was negligence on the part of the surveyor). Unfortunately the "legal alignment" only covered approximately half the length of track – which is approximately 120m in total length. As a result, to allow for vehicular usage it required earthworks to widen the historical track and felling of approximately thirty 40-50m high eucalyptus & wattle trees which were on the legal alignment. After numerous failed negotiations with the neighbouring landowners (whose property the Right of Way crosses but not the original owners) in attempt to upgrade and be able to utilise the Right of Way where my parents offered to fell the trees at no cost and even suggested undertaking a land swap so the Right of Way could have been re-located so it was further away from their house. However after being threatened with Trespass and exhausting all other options, my parents after taking advice from and engaging a lawyer applied to the District Court to try and get the matter resolved, believing the purpose of a Right of Way and the law relating to obstructions being clear.

However the Court instead of making a ruling which would have saved significant costs (significantly more than actually removing the trees would have) and time, at the request of the neighbour directed the issue to be resolved by Arbitration. After many more months and legal bills they finally appeared before the Arbitrator, only to be told that the Arbitrator wasn't able to make a decision - which is why the matter was brought before the District Court in the first place!

In the following years the matter has since been through mediation, Disputes Tribunal back to Court several times, High Court, the Appeal Court and then sent back to Arbitration! Currently it is still at Arbitration awaiting a decision regarding costs, but although the ROW has since been formed, during the process it became apparent the Arbitration process has no powers to enforce decisions (which ended up with us taking matters into own hands to remove the trees from the ROW – otherwise we would still be no further ahead and be back in the courts arguing for the law to be upheld).

The High Court was asked (as a result of concerns raised by the neighbours regarding supposed land stability issues and not wanting the trees removed) for the alignment of the Right of Way to be slightly modified (by 5m at one end) so that it encompassed the alignment of the historical track (and a water pipeline which supplied other neighbours – which is protected by a water easement, although like the Right of way also didn't follow the water pipe for much of its length!). This would have meant that the trees would not have to be removed and very little earthworks needed to be undertaken. Under cross examination expert witnesses from both sides agreed this would be a sensible and practical option as would negate the need to undertake significant earthworks or removal of the trees. In the event that that couldn't be done, the court was asked to order the neighbours to remove the trees and form the Right of Way or alternatively give my parents the authority to do it without fear of Trespass or damages awarded against them.

In summary despite being previously informed by the settlement conference judge that the neighbours "only had two options, either remove the trees or shift the Right of Way so it was usable". Of extreme disappointment in his wisdom, the High Court Judge, Brown J ruled that he didn't have the jurisdiction to modify the alignment (which raises the question, if a High

Court Judge can't do it, who can?). He ruled my parents "*were not qualifying persons for the purposes of s 316(1) of the Property law Act and lack standing to apply for orders under s317*". As the decision stands, only the landowner whose property the Right of Way crosses can apply to the court to modify the easement - even if they have no incentive as they don't require the access! This ruling makes no sense. Regarding the other matters requested for him to make a decision about, I believe he shirked his responsibilities and although he made a declaration that the "*plaintiffs are entitled to form a driveway along the route of the right of way*" he referred the other matters back to Arbitration and the issues regarding felling the trees and forming vehicle access remained unresolved, which added to the time, costs and injustice. Given this decision, in essence in my opinion a Right of Way Easement is not worth the paper it is written on and given the number of instances where boundary fences don't match the legal boundary lines, this has huge implications throughout NZ.

The decision was appealed to the Appeal Court, which confirmed the High Courts decision that my parents had the right to "*form a driveway along the route of the right of way*" but also failed to address the other matters (such as being Trespassed and the fact it is nearly impossible and hugely expensive to fell 40m high trees with in a 5m width of the easement whereas it could be done relatively easily and inexpensively if access could be temporarily gained outside of the ROW easement) and referred the matter back to Arbitration, which only served as yet another delay and more costs. As the decision was contrary to many of the things said in the Court of Appeal, a copy of the transcripts were requested – however this was declined, which I find unacceptable and certainly doesn't lead to a feeling of an open and transparent Justice System.

My experience of the legal process is that is overly legalistic which leads to a loss of sight of solving the issue at stake and instead ends up focuses on relatively trivial matters. The legal system is archaic in its processes which leads to lots of duplication and wasted time, which ultimately adds to the significant cost. For example, in the Appeal Court rather than using modern media such as power point to present evidence and address the Judges, solely relying on paper meant that approximately an hour was wasted because one judge had a page of evidence which was back to front or upside down which caused confusion! There has been multiple duplications of evidence required for the different Courts – although the issues were fundamentally the same over the 10 years. There also appears to be little incentive for lawyers (some but not all) to resolve cases. When they charge out on an hourly basis, if the can keep the case unresolved for 10years it's a pretty good income earner! There also appears to be little accountability of expert witness, lawyers and judges or redress on the statements or decisions (or lack of) they make.

My parents have been put through huge financial and emotional stress as they were unable to sell their title for 9 years (has since been sold, although the legal process is still continuing), spent most of their retirement savings and were essentially forced to sell their farm (as didn't qualify for Legal Aid due to owning property – even though they only had little income and savings). As a consequence of the legal costs, they lost potential revenue from the farm (as weren't been able to fund fertilizer, fencing and weed control), used up their savings and were unable to retire as originally planned. In addition it caused (and still does) a huge amount of time and stress being soaked up that could have been spent on other more productive activities. Given the legal system and the cost and stress my law abiding parents and I have had to endure over the past 10 years and the ever increasing costs incurred (which is enormously out of proportion to the costs involve of forming the ROW and in fact is now significantly more than the value they sold the title for!). Although costs are yet to be resolved through Arbitration, given my experience I have little confidence that even a small

proportion of costs incurred will be recouped, even though they have had to endure vexatious, obstructive and a lack of good faith behaviour, as well as what I would regard as contempt of court actions.

While the law appears to be relatively clear regarding the purpose of a “Right of Way” my experience is it’s not worth the paper it is written on, if you have neighbours who are vexatious, unreasonable, prepared to misrepresent the truth and have money. Of significant concern were statements made by the surveyor who did the surveying who stated *“In my many years of experience in surveying in the local community, it is not uncommon for a formed or in this case, roughly formed farm track not to be fully included in the surveying right of way, particularly in steep or difficult country.”*

Who knows how many other potential issues are out there? But given the number of properties that rely on Right of Ways for access, this ruling has potential to detrimentally affect a significant number of people throughout the country. While most people are reasonable and issues may not arise, it only takes the property to change hands and circumstances change. From recent discussions with a number of people, I’m aware my parents are not the only ones having issues over Right of Way access.

This experience has highlighted how broken and fundamentally flawed the so called Civil Justice System in NZ is. It is beyond comprehension that after 10 years and hundreds of thousands of dollars incurred, as a result the so called Justice System hasn’t been able to deliver an outcome over such a relatively straight forward matter. God help you if it have the unfortunate experience of needing to resolve a complicated legal matter!

Of particular concern is the cost and time involved and the fact that it is essentially a lottery where the system in my opinion gets bogged down in process and legal arguments, instead of looking at trying to resolve the big picture issues in a practical and consistent manner, in accordance with the intent of the law. In my experience Judges have been unable/unwilling to make a ruling and keep passing the buck to someone else. Any other profession – you wouldn’t pay a bill for a job only partially completed! In my opinion this matter should have been able to be resolved in the matter of a couple of days at the most – at the District Court level.

Of particular irritation, is the fact that due to the High Court Judge’s ruling (or lack of by not ruling on all of the matters raised and failing to take into account the property rights of my parents and the additional costs and delays by referring the matter back to Arbitration) my parents not only were no further ahead, but had to pay the legal costs of their neighbours (although they were the ones blocking the usage of the right of Way)!

The system clearly hasn’t provided justice, nor is it affordable (particularly when not eligible for Legal Aid due to owning property, even though you don’t have significant income or cash reserves). Nor is the process expedient in resolving what I believe is a relatively straight forward matter, despite trying to go through the proper process.

For the sake of law and order in NZ, it is important the public have confidence in the Justice System. As outlined above, my experience of the Civil Justice system in NZ does anything but instill confidence in the system. In fact given the significant costs and delays involved, rather than encouraging people to be law abiding it does the opposite, which should be of significant concern to the Rules Committee. In my parents case, they would have been better off should they have taken matters into their own hands 10 years ago. Chances are that they would have sold the title and retired, long before they did without the huge financial and emotional stress it has caused, by going through due process.

Even if they were fined for trespass or damages, most likely it would have been significantly less than it has actually cost them trying to get an outcome through the proper legal process! In the end, due to the legal systems inability to enforce the law they had no option but to take matters into their own hands and remove the obstructions (trees) from the Right of Way. If they hadn't taken matters into their own hands they would still be arguing for the legal system to uphold the law. The saying of "its better to seek for forgiveness, than asking for permission" isn't too far from the truth, but is fundamentally wrong and urgently needs addressing.

Yours sincerely

Lawson Davey