IN THE COURT OF APPEAL OF NEW ZEALAND

CA539/2009
[2010] NZCA 410

BETWEEN	LASZLO HAJNAL AND MILA RELICH Appellants
AND	JONAS REINHOLD ASMUSSEN First Respondent
AND	NELSON CITY COUNCIL Second Respondent
AND	GLENYS ANN SCHOFIELD Third Respondent
AND	PAUL DONALD GALLOWAY AND ZAHANE RUTH GALLOWAY Fourth Respondents
AND	ADRIAN HEINZ STUDER Fifth Respondent

Hearing: 16 August 2010

Court: Arnold, Venning and Simon France JJ

Counsel: J O Upton QC for Appellants
J Fitchett for First Respondent
No Appearance for other Respondents

Judgment: 9 September 2010 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed, but in respect of the quantum of compensation only. The High Court award of $35,000 is increased to $50,000.

B In all other respects the appeal and cross-appeal are dismissed.

C There is no order for costs.

REASONS OF THE COURT

(Given by Simon France J)

Introduction

[1] The appellants and the first respondent are neighbours. They share a common driveway which runs across the face of, and over the land of, the lower property, "136", owned by the appellants. It then carries on to the higher property, "142", owned by Mr Asmussen. Prior to these proceedings, there was no formal easement or right of way protecting 142's use of the driveway. Successive owners of 142 had been using the driveway for more than 50 years.

[2] The High Court has granted Mr Asmussen's application for relief under 129B of the Property Law Act 1952.[1] Having rejected as unreasonable alternative ways of obtaining vehicular access for 142, Wild J directed that a right of way reflecting the existing driveway be registered. Mr Asmussen was ordered to pay Mr Hajnal and Ms Relich $35,000 compensation.

[3] Mr Hajnal[2] appeals the decision to legalise the existing driveway. He says the Court should have opted for an alternative route which he had proposed, and for which he had already obtained council consent. It is submitted that Wild J erred in concluding that this option was unreasonable. Both parties also appeal the quantum of the compensation award.

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1 *Asmussen v Hajnal* HC Nelson CIV-2004-442-148, 6 August 2009.

2 Mr Hajnal appeared on behalf of the appellants in the High Court proceeding. He has had superintendence of this drawn out saga on behalf of the appellants and it is convenient to refer to him as a shorthand for the appellants.

[4] Formally the challenge is to the conclusion that the land is landlocked. It is a limited challenge, however, in that it is said that what is known as the "S-bend proposal", which does not cross 136, is a reasonable alternative way of giving 142 vehicular access. If it is not reasonable, it is not argued that relief in the form of legalising the existing driveway was incorrect. Although at various times there have been other options considered, the matter has now resolved itself to either the S-bend proposal or the existing driveway.

Fuller Facts

[5] There was an initial hearing in late 2004 before Wild J. At the conclusion of that, his Honour held that without vehicular access 142 was landlocked.[3] There had been no less than 13 alternatives proposed as a way of providing access. Wild J indicated that Options 1, 4B, 5B and 10 would all provide reasonable vehicular access and should be pursued by Mr Asmussen. All would require Mr Hajnal's consent, and Wild J made some observations as to the validity of some of the reasons why consent had not so far been forthcoming. If Mr Asmussen could not obtain consent, both from his neighbours and then the Council, to one of these options, he could renew his application.

[6] Mr Asmussen immediately sought an indication concerning which option Mr Hajnal would give consent to. The short answer was none, although in a somewhat inconsistent way, Mr Hajnal indicated he wanted to himself pursue Option 4B, with some amendments, with the Council. Mr Asmussen agreed.

[7] As it turns out, in terms of the options as they were before Wild J, neither 4B or 5B would ever obtain Council consent, so Options 1 and 10 were the only viable ones. However, what happened was that Mr Hajnal significantly amended his 4B application to what became the S-bend proposal. Communications made on his behalf indicated to Mr Asmussen and his advisers that a significant amendment had been made, but they were not given an actual copy of the S-bend plans. Nor did they seemingly appreciate the scale of the changes. It was only some time after Council

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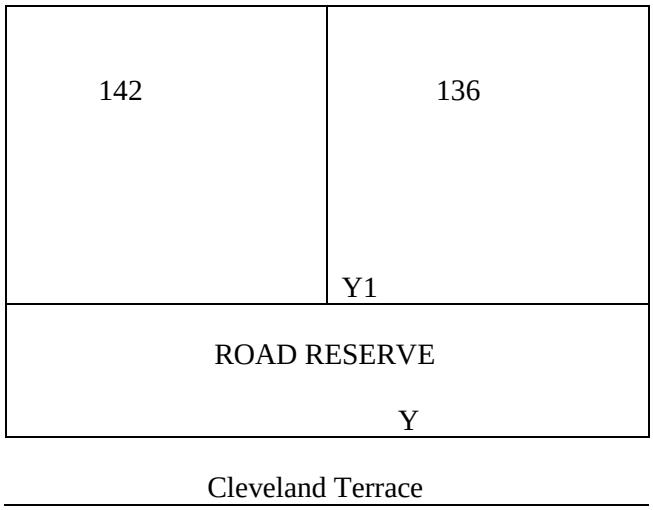
3 *Asmussen v Hajnal* HC Nelson CIV-2004-442-148, 15 February 2005.

consent had been obtained by Mr Hajnal that Mr Asmussen became aware of the true nature of the S-bend option. Objection was then immediately taken, and eventually the matter came back before the Court.

[8] Schematically the sections can be drawn this way:



[9] Y marks the point of entry of the S-bend proposal. It goes up to and touches Y1, and then turns back and down quite quickly onto the road reserve in front of 142. Then, just beyond the left hand boundary of 142 where the reserve ends, the proposed driveway does a full 180^{o} hairpin turn back up onto 142.

[10] It is a point of dispute how "aerial" this driveway would be. It is clear that it is suspended above the sloping road reserve ground at various points, and at the point of the hairpin the supporting poles are about 5 metres high. There is no doubt that from the road it would appear aerial, and would seem a large structure suspended above the viewer.

[11] The advantage from Mr Hajnal's viewpoint is that it barely touches his property.[4] Further, unlike other options such as Option 1 to which he would not consent, it uses only a small portion of the road reserve area in front of his property at 136.

[4] In fact where it touches at Y1, there is an existing small triangular right of way in favour of 142. Earlier owners had negotiated it to support an access option similar to what the present parties call Option 4B.

[12] Important to the factual context is the knowledge and expectation of the parties. Mr Asmussen bought 142 in 1988. At the time he asked the real estate agent about the driveway. The answer led him to believe that the driveway was legal. He did not ask his lawyer about it. Wild J concluded Mr Asmussen believed it was legal access, but it was a careless belief that could have been avoided had he asked the right person.

[13] Mr Hajnal bought in 2000. He made full inquiries about the driveway so bought knowing it had been used by 142, but also knowing it was not a legal right of way. It seems Mr Hajnal, who is an architect, always had development plans for the house and section. These plans involved utilising the land over which the current driveway runs. Reasonably early on he advised Mr Asmussen to consider alternatives, and then at some point a formal notice to quit using the driveway was issued. It seems clear that the continued existence of the driveway will significantly hinder Mr Hajnal's plans to develop his property as he would wish.

Appeal issue one – is the S-bend option reasonable?

[14] Wild J concluded that for reasons of cost, practicality and to a lesser extent visual impact, the S-bend proposal was not practical. Mr Upton QC takes issue with each and we address them in turn.

(a) Cost

[15] There were two figures available. In 2006, Fulton Hogan had quoted to do the work at $101,081.36, GST inclusive. This did not include building consent or resource consent fees. By contrast, in May 2009 a firm of quantity surveyors had estimated the cost at $180,000, inclusive of GST and of consent fees of $9,000. There was therefore a discrepancy, after adjusting for fees, of around $70,000.

[16] Shortly before the 2009 hearing, Mr Hajnal wrote saying he would guarantee the Fulton Hogan quotation at $110,000. This was the original quote, adjusted to allow $9,000 for three years' inflation. As we read the offer the building cost to

Mr Asmussen would therefore be capped at about $120,000, once one factored in fees.[5] Mr Asmussen was to hand over the $110,000, and thereafter Mr Hajnal would control the project. Another feature of the offer was that Mr Hajnal was free to pursue a different configuration at the point where the driveway met the road. If he could convince the Council to accept a tighter, less open accessway, there would be savings of $30,000, which, if obtained, would benefit Mr Hajnal and would not reduce Mr Asmussen's already paid contribution.

[17] Wild J viewed the cost figures with concern. He considered that the more recent quantity surveyor estimate was more realistic, and thought that a $70,000 over-run (above the $110,000 Mr Asmussen was to contribute) would be a source of friction between the parties even if Mr Hajnal had committed to bear the cost. He also noted that the offer explicitly excluded Mr Asmussen's contribution to the legal costs Mr Hajnal had incurred to date. Mr Hajnal estimated these as being between $100,000–$130,000. He did not say how much contribution he would be seeking from Mr Asmussen but accepted it would be a significant proportion. Based on this Wild J assessed the total cost to Mr Asmussen to be at least $200,000, which he considered unreasonable.

[18] Mr Upton disputes this figure. He submits it should be discounted by the likely increase in the value of 142, namely $45,000. Next, the judgment did not place sufficient weight on Mr Hajnal's commitment to cap Mr Asmussen's expenses at $110,000. Third, whatever the expectations of Mr Hajnal, it was unrealistic to assess matters on the basis that Mr Asmussen would have to pay such a large portion of Mr Hajnal's costs. Finally, it is submitted there was no basis to prefer a quantity surveyor estimate over a fixed quotation.

[19] Concerning cost, we are in complete agreement with Wild J. Even assuming the validity of some of Mr Upton's adjustments, it would seem inevitable that Mr Asmussen would have to pay, in cash up front and including some contribution to Mr Hajnal's legal fees, at least $150,000. Further, this figure takes no account of his own expenditure to date. Standing alone we consider an option which required that level of expenditure on a property then valued at $305,000 is unreasonable

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5 Mr Upton submitted fees were included in the $110,000 but that is not how we read it.

without more being said. It would be wholly disproportionate expenditure, especially given the increase in value to 142 would be $45,000 at best.

[20] Further, we accept the Judge was entitled both to give weight to a much more recent estimate by quantity surveyors, and to be concerned about the impact of any increased cost. The very protracted nature of this dispute justified a concern about having another substantial point of conflict, regardless of whether Mr Hajnal had committed to bearing that cost. Further, the whole proposal would have been quite unusual. Mr Asmussen would be paying over a significant sum of money to another person who would then obtain the benefit of any overpayment and who would control the erecting of Mr Asmussen's driveway. We accept Mr Upton's point that Council standards would have to be met, but nevertheless Mr Asmussen loses control and all the cost-cutting incentives rest with the person whose driveway it is not.

(b) Practicality

[21] Mr Upton's point is that the S-bend proposal has Council approval, and was described by Mr Asmussen's own valuer as reasonable access. It is therefore submitted the Judge was wrong to have doubts about practicality. We accept that the valuer, in a valuation report, described it as reasonable access. However, he also testified orally, and Wild J quoted extensively from this evidence. We do not repeat those passages, but note that they include observations that:

(a) no-one would contemplate reversing down it;

(b) it is like a parking building "where you are going on a tight spiral wondering where your nose and tail are";

(c) some people would find it nerve wracking driving on it. Users would have to negotiate two relatively tight bends while confined within a relatively tight and narrow carriageway;

(d) irrespective of value and legality, its nature and appearance would affect the saleability of the property. A number of purchasers would be put off and just not contemplate buying a property with such a structure for access;

(e) the witness could only think of two similar structures in Nelson but noted both were obscured behind trees and foliage rather than being open to view in this way.

[22] We see no reason to differ from the Judge's assessment which indeed accords with the instinctive assessment all three of us have towards the proposal.

(c) "Largely aerial?"

[23] The dispute here is as to the visual impact of the driveway. The parties disagree over the extent to which the driveway will be suspended above the sloping ground (Mr Asmussen's contention) or be largely at ground level, because of significant excavation to allow that (Mr Hajnal's contention).

[24] The dispute took a surprising and unfortunate twist. It emerged that there are two copies of the plans for the S-bend proposal. Mr Fitchett has asked the Court to draw inferences of dishonesty and falsification of documents on the part of Mr Hajnal which led to there being a set of incorrect and misleading plans before the Court. Mr Upton rejects this as being unfounded. He notes the two copies were before the High Court and there was no suggestion of impropriety, nor cross-examination of Mr Hajnal.

[25] We do not need to resolve this issue about how there came to be two sets of plans. However we make it plain that we do not consider that the current state of the evidence would allow a Court to draw the inferences against Mr Hajnal for which Mr Fitchett contends. To the extent that we had to rely on a set of plans, we would have used those which bear the Council stamp. However, the topic of how aerial the driveway would be is largely a red herring. Wild J indicated it was the factor on which he placed least weight. In our view there is a significant degree of overlap

with the topic of practicality, and we refer again to the valuer's evidence that many potential purchasers would be put off the property by the nature of the driveway.

[26] It is clear that the driveway will be exposed to sight, will be above the road, and will have the S-bend features, including the 180^{o} hairpin turn. The Judge was correct to recognise this as a factor to be taken account of when assessing whether the S-bend proposal offered a reasonable option for access.

(d) Conclusion on reasonableness

[27] We have identified Mr Upton's primary criticisms of the judgment but have not addressed all of them, nor given all the detail. Mr Upton fairly accepted it was very much a factual challenge.

[28] Nothing has led us to conclude the Judge erred in his assessment. He had seen the site in late 2004. He had the advantage of having considered a great number of options, and had the benefit of assessing the parties. All these factors informed his assessment.

[29] Finally, it has to be observed that, as appellate judges, none of us regard the proposal, as we have seen it on the plans, as a reasonable or particularly credible option to impose on anyone. When the cost Mr Asmussen would bear is also factored in, we have some sympathy with his observation in evidence that the S-bend proposal "is absurd quite frankly".

[30] In these circumstances it is not necessary to traverse Wild J's analysis of the various factors listed in s 129B of the Act. On our assessment the only viable alternative access was not a reasonable option. That meant that if the land was to not remain landlocked, the existing driveway would have to be legalised. That is what happened.

Compensation

(a) Further facts

[31] The parties had been exploring various options over the period of the dispute. One option requiring comment is "Option 1" which involved giving access to 142 by running the driveway from the same existing starting point, but over the road reserve in front of 136 rather than over 136 itself. In circumstances where a neighbour is seeking to make use of the road reserve in front of another property, the owner of that other property must consent. Mr Hajnal refused such consent, as he preferred options that did not involve 142's cars going past his house at all, whether over his section or over road reserve. It was estimated at the 2004 hearing that the then cost of Option 1 would be $25,000–$33,000.[6]

[32] A further factual variable was that the Council itself had plans to widen the street in question. It therefore rejected any of the options that were incompatible with its own plans. Then in 2008 the Council began this widening work. Mr Hajnal and Ms Relich were resident in Sydney but Mr Asmussen was living at 142, and saw an opportunity. He wrote to the appellants on 16 January 2008 noting that the work was happening, and pointing out the opportunity it presented as regards Option 1. The road widening work it was undertaking required the Council to rebuild the entrance to the existing driveway. This in turn required the Council to do retaining wall work above the new entrance. Mr Asmussen noted that the road widening, and consequent road reserve narrowing, made the existing Option 1 no longer feasible, but the existing driveway could be widened, and the access for 142 could come off it onto the remaining road reserve, at a point higher along the driveway. The necessary retaining wall work was already being started by the Council, and Mr Asmussen suggested he could negotiate with the Council for it to extend the retaining wall to the degree necessary. Mr Hajnal replied by saying he was insisting on the S-bend proposal for which he had obtained consent.

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6 We observe that Option 1 is now no longer feasible.

[33] The loss of opportunity to do the original Option 1, or the varied Option 1 that arose during the road widening work, forms the basis of the respondent's approach to compensation, and his cross-appeal.

[34] Conversely, the basis of the approach taken by Mr Hajnal and Ms Relich traces back to when they bought the property. They had plans to extend the existing dwelling at its front, by adding a deck, and create parking underneath. This would mean the existing driveway would no longer be available to 142. If unable to do this work because of the driveway, Mr Hajnal is of the view that the only development options involve pulling down the existing house and starting again with a design that uses what is left of the available section, and which accommodates the existence of the now legalised right of way. Mr Hajnal said in evidence that the extra cost to him would be $150,000 - $200,000, and it is that figure he sought, together with his costs to date.

(b) Wild J's assessment

[35] The Judge noted the respective views of the parties, observing that he considered Mr Asmussen's approach to be thoughtful. It was then noted that the original cost of Option 1 was very similar to the assessed diminution in the value of 136 resulting from the legalisation of the existing property, namely $30,000. The corresponding increase in the value of 142 was noted as being $55,000. Finally the Judge recorded that Mr Asmussen, in 2005, had offered that:

(a) the existing driveway be legalised, and brought up to Council standards, at his expense;

(b) he pay compensation of $50,000;

(c) the costs to date lie where they fall.

[36] Weighing these factors, Wild J assessed compensation of $35,000.

(c) The appeals

(i) Mr Asmussen

[37] Mr Asmussen submits the figure should have been $10,000. He identifies the following factors as relevant:

(a) the diminution in value of 136. He says this should be gauged on the basis that Option 1 was pursued since it was the cheaper, less intrusive option which Mr Hajnal should reasonably have consented to;

(b) the increase in value to 142, which under Option 1 is submitted to be none;

(c) the fact that historically both properties had been valued on the basis that both had legal access;

(d) the appellant's unreasonable refusal to allow Option 1;

(e) Mr Asmussen's 2005 offer; and

(f) the fact that Mr Hajnal bought knowing there was an issue about the right of way.

[38] At this point we comment on one aspect of this submission. Mr Fitchett submits the proper comparison is between the value of the houses if the existing driveway is legalised, and the value if Option 1 had been done. We do not agree and consider that the Judge was correct to assess the diminution figure from the starting point of no access to 142. That legally is the existing situation.

[39] If it is the case that Option 1 was unreasonably rejected by Mr Hajnal, we see that as something to weigh in the mix, if the authorities permit consideration of such issues.

(ii) Mr Hajnal

[40] Mr Upton identified the crux of the compensation appeal as being the proposition that the Judge was too narrow in his approach. The diminution in value to 136 is submitted to be only one factor. Crucial in this case is the opportunity cost to Mr Hajnal and Ms Relich. They consistently had plans to extend over the driveway, and drawings to that effect had been completed. The opportunity to use their land as they wished has been lost, and alternatives will be much more expensive. These realities need to be factored into compensation.

[41] Mr Upton submitted that had this been done properly, and the significant cost of compensation appreciated, then the Court would have seen that the S-bend option was in fact reasonable because the difference in cost between it and proper compensation was so small. Once cost was neutralised in this way, then the analysis of relief would have also changed. If the respective positions of the willing seller/willing buyer were assessed in this manner, the reality would be that the driveway was always worth much more to Mr Hajnal than Mr Asmussen would pay. But, nevertheless, what it is worth to Mr Hajnal should still be the amount of compensation fixed. Then if Mr Asmussen understandably did not wish to pay that much money, he would be left where he should be, namely with obtaining access to his property by a proposal that did not impact Mr Hajnal's use of 136, or going without. That was the reality of the market place.

(d) The applicable law

[42] We consider the applicable law to be identified in the cases of *Jacobsen Holdings Ltd v Drexel*[7] and *Lowe v Brankin*.[8] In *Jacobsen Holdings* the Court reaffirmed that the applicable test was that of a willing buyer/willing seller. Cooke P observed:[9]

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7 *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324 (CA).
8 *Lowe v Brankin* (2005) 6 NZCPR 607 (CA).
9 At 329.

> Under the section the Court is not bound to award compensation, but usually it will be equitable between the parties to do so and to assess it on the footing of what a willing grantor and grantee of an easement or vendor and purchaser of the fee simple would agree in friendly negotiation. If the order under the section gives legal access to a commercial property or a farm, that can properly be treated as a material factor, for it may be reasonable to suppose that a grantee or purchaser who is able to put the right-of-way or land to profitable use is likely to be willing to pay something more for it on that account.
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> In assessing compensation purely sentimental matters have to be put aside: see the *Vizagapatam* case at p 312. So too of course any question of personal impecuniosity or affluence: compare the *New Zealand and Australian Land Company* case at p 716. But the present case does not raise such issues. Subject to those qualifications, all factors of benefit or detriment on either side are material under the section, including for instance any inconvenience or disturbance that the owner of the servient or transferred land may suffer and any advantage that he may gain. These are all considerations which would legitimately influence the parties in the hypothetical friendly negotiation. They all go to what sum is reasonable as the value or price or consideration or compensation – terms which seem to me to be interchangeable and identical in effect when a fair figure has to be arrived at as between the parties and there are no special limiting statutory provisions.
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> An impression left by exposure to such questions over the years, at the Bar and on the Bench, is that the hallowed willing seller–willing buyer test, if faithfully applied, solves any problems of principle. Added complications of theory are to be viewed with suspicion. The real difficulties arise in applying the basic test to the facts and are unlikely to be alleviated by any more refined formula.

[43] *Lowe v Brankin* is really just an application of these principles. We note it for two reasons. First, relevant to many of the factors counsel have sought to rely on in the present case, the Court observed of the willing buyer/willing seller test in the context of s 129B:[10]

> In connection with a s 129B case, it is convenient to record here the qualifier that it has to be taken in an exercise under this section that *there are no other options available to the parties: the option to be negotiated is as set by the Court*.
>
> (Emphasis added.)

[44] Second, that decision regarded the consequent increase in value to the recipient land as a factor the willing buyer would take into account.

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[10] At [40].

Decision

[45] It is unnecessary to dwell further on the competing submissions earlier identified. It is in our view important to adhere to the approved test, which has a degree of simplicity which is to be favoured in any area where, by the time these matters get to court, there is usually a long history, and a breakdown in relations.

[46] Our conclusion from these cases is that one should first identify the value of the land being taken, here a figure obtained by identifying the diminution in value to the property being forced to accept an easement. That is then the starting point against which to measure other factors that would affect the willing buyer and willing seller. In this case, as in *Brankin*, we consider that the buyer (142) would be willing to pay more than the bare value of the land because 142 is the sole beneficiary of the easement, and it results in a significant increase to the value of 142. The hypothetical parties would be aware of this and be willing to factor in a transfer of some or much of 142's increased value to 136.

[47] Other factors also arise. Mr Asmussen as owner of 142 will be incurring expenditure in both legalising the access, and in bringing it up to Council standards. A willing buyer would factor this in. Further, the underlying value of the properties is also relevant, since both parties would be aware of the dangers of over-capitalisation.

[48] In this case, the diminution figure to 136 is found in the uncontested evidence of the only valuer called. He assesses the Court option as devaluing 136 by $30,000. Wild J's compensation figure adds only $5,000 to this starting point, and we consider that is insufficient to capture the benefit to Mr Asmussen, and how much of that benefit a willing buyer would transfer to Mr Hajnal as owner of 136.

[49] We see some merit in the proposition that in the circumstances of this case the figure might well be the loss to 136 and the increase in value to 142, less the cost of legalising the drive and bring it up to Council standards. However, we do not have these figures and we are unwilling to extend this litigation by referring the matter back.

[50] As it happens, we can avoid that exercise because there is very good evidence of what a willing buyer would pay. That evidence comes in the form of Mr Asmussen's 2005 offer which was $50,000 in addition to the expense of undertaking any additional work to the driveway. We note that the offer also suggested costs lie where they fall, but we consider that gloss need not affect our reliance on $50,000 as the appropriate compensation figure.

[51] Although partially successful, Mr Hajnal is still obtaining compensation well below that for which he contends. We explain that by observing we consider that the appellants' compensation submissions did not start from the position of a willing seller as the authorities use that term. Rather, they were premised on a reluctant seller determined to extract all that he or she could, if they were to sell at all. That is not the test.

[52] Also we observe that the concept of loss of opportunity on which Mr Upton placed reliance is very difficult to quantify here. It is not a case where the land that Mr Hajnal wanted to use, in this case the driveway, was unencumbered. Legally it was, but practically it had been a joint driveway for many years. Mr Hajnal took advice before buying, and must be taken to have purchased in the knowledge that s 129B of the Act afforded an opportunity to Mr Asmussen to legalise a driveway that had provided access to his property for more than 50 years. A loss of opportunity analysis would also have to factor in the wasted opportunity involved in Mr Hajnal not accepting Option 1, an option which would have had no cars traversing his property, and which would not have involved any new right of way or encumbrance on 136. It would also have allowed Mr Hajnal to undertake the development of his property exactly as he wished. 142 is landlocked only because of what appears to be an unreasonable withholding of consent to allowing 142 to use the road reserve in front of 136. Finally we observe that no attempt was made at the hearing to lead evidence quantifying this loss of opportunity.

Conclusion

[53] The appeal by Mr Hajnal and Ms Relich concerning the quantum of compensation is allowed. The High Court award of $35,000 is increased to $50,000. In all other respects the appeal and cross-appeal are dismissed.

[54] Both parties have had success. The costs of this hearing are to lie where they fall.

Solicitors:
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Rout Milner Fitchett, Nelson for First Respondent