

Forest access rights a harvest issue

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The time has come for you to harvest your valuable stand of well-tended trees and you suddenly find that you can't even get to your forest. This nightmare situation can develop when a dispute arises as to whether you are entitled to use the road providing access to the stand or upgrade the existing road to make it suitable for harvesting the stand. After waiting 25 or more years for your investment to mature, you do not need this last hour altercation.

How does this unfortunate situation arise?

It is rare for this situation to occur because, in the vast majority of cases, the forest owners generally have access from their stand or forest directly onto a public road.

However, where forest owners do not have direct access but rather rely on access to their forest through adjoining land owned by others, this unwelcome scenario can arise.

In particular, where there is no formal agreement between the forest owner and the neighbouring land owner setting out the access arrangement, the adjoining property owner may later decide that the traffic, noise and associated pitfalls of harvesting the forest may be too much to bear and decide to deny the forest owner access to the forest over the road crossing their land.

Alternatively, the neighbour may continue to allow access to the forest over their land but refuse to allow the forest owner to use the road for harvesting purposes. In practical terms, this limitation would effectively deny the forest owner from harvesting their forest. The commercial implications are obvious!

What about the informal agreement?

The neighbour may simply argue that there was never a binding agreement where the forest owner was entitled to use the road over their property.

A more common way in which this problem arises is where the forest owner has an informal understanding

with a neighbouring owner to use such a road but then the neighbour sells their property to a party who refuses to allow the forest owner access over the road. The new owner will argue that they never knew of the understanding and/or they were not a party to the understanding and therefore are not obliged to adhere to it.

Relief to the forest owner where there is no access to the forest

If access to the forest is taken away or never existed, then the forested land may be what is termed 'landlocked'. In circumstances where a forest owner contends that their land is landlocked, the owner can make an application under the Property Law Act 1952 for an order to be granted giving access over adjoining land.

The first question that the court must determine is whether the land is actually landlocked. Land is landlocked if there is no "reasonable" access to it. The question of reasonable access is subjectively determined by the court on the facts of the particular case.

If the court decides that the land is landlocked, the court then has a discretion to grant the land owner access to their property over adjoining land. In exercising this discretion the Court must have regard to particular factors. These factors include:

1. The nature and quality of the access (if any) to the landlocked land that existed when the applicant purchased or otherwise acquired the land.
2. The circumstances in which the landlocked land became landlocked.
3. The conduct of the applicant and other parties including any attempts to negotiate reasonable access to the landlocked land.
4. The hardship created on the applicant by refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order.
5. Such other matters as the Court considers relevant.

Two cases have recently come before the Courts and although they are not specifically forestry related, both cases provide useful insights as to how such applications will be viewed by the Courts. It is important to remember however that the Court is required to subjectively decide whether the land in question has reasonable access. As discussed above, this depends on the particular facts of the case.

In *Benham v Cameron* the applicant was seeking vehicular access to her property. For the previous 13 years she had used what everyone (including the local authority) regarded as a public road. Part of the "road" was built on private land and had never been formally created as a road (i.e. the road was not noted on the certificates of title relating to the parties land). The new owner of the adjoining land refused to allow continued vehicular access and instead offered pedestrian access. The Court granted vehicular access to the applicant and stated that:

The land was definitely landlocked. Access at the discretion of landowner, limited to pedestrian access, was not "reasonable" access. "Reasonable" access in this case should be vehicular. The area of land in question was already used as a right of way by another party and "this is the age of the motor car. Most people want ... drive on access to their properties".

In the second case, *Kingfish Lodge v Archer*, the application was again for vehicular access. The applicant ran a tourist lodge on the foreshore of the Whangaroa Harbour. The tourist lodge, which had been in existence since 1946, was accessible only by the sea. The applicant sought access by land through neighbouring farms as the applicant intended to develop the tourist lodge land. Consent from the local authority for the first stage of the development did not require road access and access by sea was utilised instead. However, road access was required for the second stage of the development. As neighbouring land owners would not

permit the applicant to develop an access road over their properties, the applicant sought relief from the Court on the grounds that the tourist lodge land was landlocked. The Court did not grant an easement for road access. The Court decided on the facts of the case that although inconvenience was caused in relation to the intended development by not granting access, there was reasonable access to the land by sea as it had been served in this way for 46 years and this mode of transport was acceptable for the use of the tourist lodge. The court believed that it was up to the local authority to provide the roading, not the Court.

The first case is a good example of the application of the Court's discretion and also of the fact that, in general, reasonable access is likely to be vehicular. However, the case also highlights the need to carefully check access to properties when purchasing. Had Benham searched the certificate of title thoroughly before purchasing the property it is possible that the problem may have come to light and been resolved removing the need to pay \$20,000 to her neighbour for the Court ordered easement.

This case also illustrates that where a forest owner does not have access to their forest, a neighbour may offer access over their property in a limited form. For instance, the neighbour may say to the forest owner that they may continue to have vehicular access but deny vehicular access for purposes associated with harvesting the forest. This would generally not be acceptable to the forest owner. If the Court granted a form of access to the forest owner that for some reason did not contemplate harvesting, this would not be commercially viable from the forest owner's perspective.

The second case perhaps is more illustrative of the fact that the Court's discretion is subjective and that the Court may exercise its discretion widely. It is also a warning to people to carefully plan purchases of properties so that they may utilise the land in the manner that they anticipate!

Relief to the forest owner where there is access to the forest but in a limited form

The above discussion on relief relates to the situation where there is no access to the forest owner's land. However, as discussed above, the adjoining landowner may have granted access to the forest over their land but later refuse to allow access for the purposes of harvesting the forest.

In these circumstances it would be far harder to prove to the Court that the land is landlocked as there is vehicular access to the forest albeit in a limited form. The forest owner could argue that the access is not "reasonable" as in the case of *Benham*. In determining whether access is reasonable the Court can have regard to the nature of access provided to properties generally in the particular locality and the Court must have regard to the access reasonably necessary to enable the occupier for the time being to use and enjoy the land. However, a forest owner would not want to rely on this argument to succeed.

A more viable solution would be to continue to negotiate with the neighbour, which would no doubt include offering incentives for the right to use the road for harvesting purposes. The forest owner could offer to restrict the hours of harvesting activities. If this fails then the forest owner may be compelled to try and enforce the 'understanding' in court.

Forest owners take note

Forest owners should be wary of informal understandings with their neighbour concerning access to their forest to avoid unforeseen problems at harvesting or indeed at any time during their tenure as owner of the forest land.

Firstly, forest owners should ensure that any understanding with their neighbour concerning access to their forest is properly documented. At the very least any agreement should be documented in writing and signed by the parties to it. However, if the neighbour then sells their property, the new owner may dispute that they

are obliged to adhere to the agreement. To protect their agreement with the neighbouring owner, the forest owner should request that an easement in favour of the forest land be registered against the adjoining land owners title and the title to the forest land. The forest owner could undertake to pay for an easement to be drafted in a form acceptable to the neighbour and also the costs of registering this document on the titles and obtaining the necessary local authority consent. These costs may be minuscule compared to the costs (financial and non-financial) associated with access to the forest later being denied.

Secondly, the terms of any such understanding or easement should be flexible enough to allow the forest owner to conduct the necessary activities associated with the forest. This would obviously include harvesting. However, other considerations should not be forgotten such as fairly apportioning the costs associated with upgrading and maintaining the road, especially in contemplation of harvesting. If the understanding or easement was entered into by a number of forest owners, then apportioning the costs associated with upgrading and maintaining the road should be carefully considered. For instance, if the road is not yet formed, should the forest owner who intends to harvest first be obliged to pay for the construction of the road because the next forest owner in line for harvesting is 15 years down the track – probably not! Consideration should also be given to when the various forest owners intend to harvest their crops so that transport inefficiencies along the road are eliminated.

In summary, forest owners should ensure that suitable access rights to their forest are protected. If this is not the case, the forest owner should start negotiating so that access for harvest day is not in doubt!

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