

Humble Right of Way gets all the way to the Supreme Court

Posted on: August 28, 2026

The Supreme Court of New Zealand is preparing to issue its judgment in the case of *Wimax New Zealand Limited (Wimax) v Fuge*, a long running neighbour dispute concerning the alleged substantial interference over a right of way easement. While disagreements over shared driveways and access rights are commonplace, relatively few reach the country's highest court, largely due to the significant cost and time involved in civil litigation.

- Burdened Land = The legal owner of the land.

- Benefited Land = The land being granted a right to use a portion of the burdened land.

The generally accepted position for rights of way is that the owner of the benefited land is entitled to pass and repass over the area subject to the easement, though the easement does not confer a right to always use every square inch of the easement area. Rather, the easement permits only such use as is reasonably required for the enjoyment of the right of way. The owner of the burdened land may not do anything that substantially interferes with the rights of the benefited land.

The seemingly settled area of law now being challenged to the Supreme Court in *Wimax v Fuge* has the potential to significantly affect both the drafting of future easements, and advice provided in respect of existing easement rights.

This case involves a dispute between neighbouring landowners who share a long private right of way serving several residential properties with access to the main road. The easement area is approximately 6.2 metres wide, but the paved driveway only occupies part of that area and varies in width. Between 2014 and 2016, Wimax carried out landscaping and construction works on its property, including improving existing retaining and stone walls along the easement area. It is accepted that a number of those structures encroached into the easement area and were in some cases larger and more permanent than previously. However, they did not extend onto the existing paved driveway.

After becoming aware of the works and more robust intrusion onto the easement area, the trustees of the Aberdeen Four Trust (“Fuge”), requested that the structures be removed. They argued that the encroachments unlawfully interfered with the right of way. Wimax refused, maintaining that the structures caused no practical interference with use of the driveway. The dispute was initially determined in arbitration before proceeding through the High Court then the Court of Appeal. It now awaits determination by the Supreme Court.

The arbitrator held that although Wimax’s structures encroached into the easement area, they did not obstruct the formed driveway or substantially interfere with the use of the right of way. The arbitrator concluded that an encroachment would only be actionable where it affected the ability to use and enjoy the existing driveway and dismissed Fuge’s claim.

The High Court differed in its decision. Its analysis was driven primarily by its interpretation of the easement instrument and the statutory rights implied by Schedule 4 of the Land Transfer Regulations 2002 and Schedule 5 of the Property Law Act 2007. Although the Court considered common law authorities, this was as supporting evidence for the Court's interpretation of the statutory framework rather than providing the primary basis for its decision.

The High Court held that the right of way was not confined to the existing formed driveway but extended across the entire defined / legally surveyed easement area. In reaching that conclusion, the Court relied on the statutory rights and ancillary powers associated with the easement, including the ability to construct, reconstruct and maintain a driveway where reasonably required for the enjoyment of the right of way. Because Wimax's structures permanently occupied a portion of the easement area, thereby restricting Fuge's ability to exercise those rights in the future, the Court concluded that the encroachments amounted to a substantial interference with the easement. Wimax appealed the decision to the Court of Appeal ("COA").

The COA's approach differed from that taken by the High Court. The COA reasoned that the statutory framework must be interpreted in accordance with the common law principles from which they were derived.

"The "substantial interference" test derives from the law of nuisance and has been said to reflect the nature of the benefited owner's right. They do not "own" the right of way, nor the land on which the right of way runs but only enjoy the reasonable use of that property for its granted purpose. The benefited owner may only sustain a claim predicated on substantial interference with that reasonable use. The distinction is thus between a right of ownership and the right of use for an identifiable purpose."

As the COA worked through leading authorities in setting out its judgment, it found that no cases appeared to support Fuge's position that the benefited owner is entitled to have the entirety of the easement area free from obstructions.

While the COA accepted that future circumstances may arise in which the structures interfere with the reasonable exercise of the easement rights, that issue did not arise on the facts before the Court. In the COA's view, Fuge's reliance on future

development potential appeared to have been something of a convenient afterthought in arbitration.

Further to this, the COA expressed concern with the way in which the High Court considered case law to justify its position. Namely, the High Court's use of *Harvey v Hurley* which provided that:

"*Once that land is impressed with the grant of a right of way, any use inimical to the right to "go pass and repass" over the land cannot be considered a "reasonable [use] of the land."*

The COA found this problematic because it is inconsistent with the common law principle that a right of way easement is not a grant to go over every square inch of the facility and is rather only a right of access that is reasonably necessary to exercise your rights. While there were similarities in the facts, the COA found these to be superficial and contain important differences.

On current facts, the COA found that the structures themselves could not amount to a substantial interference and found in favour of Wimax. The structures could be retained without action required. Fuge was given leave to appeal to the Supreme Court… and did.

What we are seeing is a fundamental difference in approach between the Courts to the interpretation of easement rights. The High Court placed particular emphasis on the wording of the easement instrument and the associated statutory rights. The COA rather favoured the approach that statutory rights must be interpreted consistently with the established common law principles from which they were derived.

It remains uncertain which approach the Supreme Court will adopt in its final judgment, which is expected before the end of 2026. There has been some suggestion that, during the hearing, the Supreme Court justices appeared to favour the arguments presented by Fuge's legal team. In the writer's view, this would be the preferable approach and would result in a positive outcome if ultimately adopted by the Supreme Court. Given the sheer number of easements across New Zealand, it is crucial that the terms of an easement are clear, accessible, and capable of being relied upon. To achieve this, practitioners and landowners must be

able to rely on the terms of the easement as they appear, rather than having to rely on dated and often fact-specific case law.

Despite the current ambiguity, what is clear is the Supreme Court's outcome will have a significant influence on the way in which property lawyers approach easement disputes, drafting, and advice on behalf of clients. Accordingly, the Supreme Court's decision is eagerly awaited to assess in what ways and by how much it changes the legal approach to the humble New Zealand right of way, existing and future, all shapes and sizes, right across the country.