IN THE MAORI LAND COURT
OF NEW ZEALAND
TAITOKERAU DISTRICT

7 TAITOKERAU MB 234
(7 TTK 234)
A20100001163
A20090004974
A20100002419
A20100002412
A20100002420
A20100001092
A20090019669
A20090019663

UNDER	Section 131, Te Ture Whenua Maori Act 1993
IN THE MATTER OF	Oharotu 4 Taraire 2G3 Tarahape and Te Kuhu Road Lines Tangitangi Road Line Pahuhu Roadway Whakatere Roadway Whakatere Mountain Roadway Wharau Road Line Wharo Road Line Ngararatunua 2B2 Roadline
	DEPUTY REGISTRAR Applicant

Hearing: 9 March 2010
(Heard at Kaikohe)
25 March 2010
(Heard at Whangarei

Judgment: 30 July 2010

RESERVED JUDGMENT OF JUDGE D J AMBLER

Introduction

[1] This judgment concerns several applications under s 131 of Te Ture Whenua Maori Act 1993 ("the 1993 Act") to determine certain roadways to be Maori freehold land. The applications are part of the Maori Freehold Land Registration Project.

[2] The Case Managers have researched the titles and have determined that the roadways have not been proclaimed public roads and that they are therefore Maori freehold land.

[3] Before I can determine that the roadways are Maori freehold land I must first be satisfied that they comprise "freehold land". This may be axiomatic but, as I explain below, as a roadway order can give rise to either a separate freehold title or an interest in the nature of a right of way easement, a roadway order is not always a separate parcel of Maori freehold land.

Statutory provisions in relation to roadway orders

[4] In *Deputy Registrar - Utakura 7* (2010) 7 Taitokerau MB 71 (7 TTK 71) I discussed the five different methods by which roadways or roads could be created over Maori land. In *Deputy Registar - Kapowai A1A* (2010) 7 Taitokerau MB 125 (7 TTK 125) I addressed roadways in the context of consolidation schemes. Here, we are only concerned with roadways made by order of the Court.

[5] I use the term "roadway" to include a road or road-line or roadway made by the Court as intended by s 414 of the Maori Affairs Act 1953 ("1953 Act").

[6] The Court has had the power to make roadway orders since the Native Land Court Act 1886 ("1886 Act"). As the roadway orders before me were all made under the Native Land Act 1931 ("1931 Act") or later legislation, I provide only a brief summary of the earlier legislation.

Legislation pre Native Land Act 1931

[7] Section 91 of the 1886 Act empowered the Court on an investigation of title or partition to order that land was "subject to such rights of private road for the purpose of access". Such an order could be made at any time within five years of the partition. Section 92 empowered the Court to make similar orders in relation to land previously divided by the Court provided that an application was made within two years. Section 93 provided for the Governor to take and lay off roads for public purposes. Orders made by the Court were termed "rights of private road" whereas land taken by the Governor was termed "line or lines of road" as per the earlier legislation.

[8] Section 69 of the Native Land Court Act 1894 ("1894 Act") more or less repeated the powers of the Court under the 1886 Act.

[9] The Native Land Act 1909 ("1909 Act") represented a complete re-write of the Native Land legislation. Section 117 provided for the Court to lay out "road-lines" on the partition of land. Section 117(2) provided that the Governor could proclaim any road-line to be a public road. Section 117(3) provided:

> Unless and until such a Proclamation is made, the land so set apart as road-line shall remain Native land held in common ownership as if no partition order had been made.

[10] The 1909 Act removed the Governor-General's power to take land for roads. It now required a two stage process to create a public road whereby the Court first laid out the road-line (s 117(1)) and the Governor-General then proclaimed it public road (s 117(2)). The proclamation resulted in the land being vested in the Crown in which case the freehold area of the road-line was taken from the underlying title. However, pending such a proclamation the ownership remained as if the partition had not been made, that is, the roadway remained in "common ownership".

[11] Section 117(4) introduced the alternative of "private rights of way".

[12] Section 117 of the 1909 Act was repealed by the Native Land Amendment Act 1913 ("1913 Act") and replaced by ss 48 to 53 of that Act. Although these sections expanded the roading provisions in s 117, the particular sections need not concern us for present purposes except for s 48(4) which was in similar terms to s 117(3) of the 1909 Act:

> Unless and until such a Proclamation is made, the lands so set apart as road-lines shall remain Native land held in common ownership as if no partition order had been made, but subject to such rights of way (if any) as shall be stated in the orders made on partition and specified in the manner provided by sub-section two hereof.

Native Land Act 1931 and following

[13] Sections 476 to 490 of the 1931 Act introduced a more comprehensive roading regime.

[14] The Court could make roadway orders in relation to "Native freehold land" in several circumstances. Under s 477 the Court could "lay out" road-lines at the time of partition. Under s 478 the Court could "lay out" road-lines over land previously partitioned where it was without reasonably practical access to any public road. Under s 479 the Court

could "lay off" road-lines in order to give access or better access to any Native freehold land. In addition, under s 480 the Court could make orders creating private rights of way.

[15] It is difficult to discern any substantive difference in the use of the terms "lay out" in ss 477 and 478 and "lay off" used in s 479. It is likely to be the result of inconsistent drafting as throughout ss 476 to 490 the terms "road", "lines of road" and "road-lines" are interchanged, as are the words "private rights of way", "private way" and "right-of-way". Nevertheless, as I explain later, how a roadway order is expressed may determine whether or not a separate freehold title arises.

[16] The Court had additional powers to create roadways in relation to other freehold land (s 483) and to declare public roads (ss 482 and 484). Under s 486 the Court could recommend that a road or road-line be declared a public road, in which case the Governor-General could then proclaim it to be a public road (s 487). Section 487(3) provided:

> Unless and until such a Proclamation is made, the land so set apart as road-lines shall remain Native land held in common ownership as if no order had been made, but subject to full rights of way thereover (if any) as shall be stated in the orders.

[17] In other words, unless and until the roadway was declared a public road, it remained Native land in its former ownership but the roadway order and any partition or title orders made in reliance on the roadway remained effective. Where the roadway was created as a separate freehold title, it remained as such. As the roadway orders I am concerned with demonstrate, it was not uncommon for there to be an intention to proclaim a roadway to be a public road but for that proclamation to never occur.

[18] Finally, ss 488 to 490 provided for the cancellation of roadways and the consequences of cancellation.

[19] Sections 414 to 432 (Part XXVII) of the 1953 Act governed roads. Interestingly, s 414 acknowledged the range of terms previously used by deeming "roadway" in Part XXVII to include "a road or roadway, or road-line, or right of way, or by any other name or description". Section 415 provided for the general power of the Court to lay out roadways in accordance with Part XXVII. Section 418 related to access to Maori land, s 419 to access to General land and s 420 to access to Crown land. The Court's power to grant rights of way was not contained in Part XXVII but in s 30(j) of the Act.

[20] Section 416 provided for the effect of roadways:

416 Effect of laying out roadway

(1) Subject to the provisions of subsection two hereof, the laying out of a roadway over any land shall confer on all persons the same rights of user as if it were a public road.

(2) In any order laying out a roadway or in any subsequent order the Court may define or limit the persons or classes of persons entitled to use the same and may define or restrict their rights of user in such manner and to such extent as it thinks fit.

(3) In any order laying out a roadway or in any variation of that order the Court may impose conditions as to the formation or fencing of the roadway or as to any other matter that it thinks fit, and may suspend or limit the right to use the roadway until those conditions have been complied with.

(4) The laying out of a roadway over any land shall not affect the ownership of the land comprised therein, or its description as Maori land, or Crown land, or **[**General land**]** (as the case may be).

(5) Where any land … is laid out as a roadway pursuant to this Part of this Act it shall be deemed to be a private way if the rights of user, as defined by the Court, are in any way restricted, and, if the rights of user are not so restricted, it shall be deemed to be a private **[**road**]**.

(6) Notwithstanding anything in this Part of this Act, no private road or private way shall be laid out within the district of a territorial authority otherwise than in accordance with sections 347 and 348 of the Local Government Act 1974 (as enacted by section 2 of the Local Government Amendment Act 1978).

[21] Much of Part XXVII repeated the provisions of the 1931 Act. However, it introduced ss 424 and 427 which, as I explain later, expressly recognised that roadway orders may give rise to separate freehold titles:

424 Powers of Court on cancellation of roadway

(1) Where, pursuant to section 423 hereof, the Court cancels an order for the laying out of any roadway for which a separate instrument of title exists, the Court may cancel that instrument of title and may amend any other instrument of title so as to include therein the whole or any part of the land comprised in the roadway, and the land so included in any instrument of title shall thereupon vest in the owner or owners as if it had been originally included therein, and shall become subject to any reservations, trusts, rights, titles, interests, or encumbrances to which the land comprised in that instrument of title is then subject.

(2) Where the land comprised in any roadway as aforesaid is not included in a separate instrument of title, the owners shall thereafter hold the same freed from its reservation as a roadway.

(3) The foregoing provisions of this section as to the cancellation of orders shall, as far as applicable and with any necessary modifications, apply to the variation pursuant to section 423 hereof of an order of the Court as to roadways.

(4) Any order made by the Court under this section shall, upon production, be registered by the District Land Registrar or the Registrar of Deeds, as the case may be, and the District Land Registrar is hereby authorised to make such amendments in any instrument of title as may be necessary to give effect to any order under this section.

427 Alienation of land to include alienation of interest in roadway giving access to that land

(1) Where any roadway which is comprised in a separate instrument of title has, whether before or after the commencement of this Act, been laid out by the Court over any Maori freehold land, the transfer by sale or otherwise of any land to which the

roadway gives access shall, unless the instrument of alienation expressly provides to the contrary, be and be deemed to have been a transfer by the alienor to the alienee of his interests (if any) in the roadway. If any such instrument of title is registered under the Land Transfer Act 1952, the alienee may apply for registration under that Act of any interest to which he has become entitled under this section, and the District Land Registrar may register the same accordingly.

(2) In any case to which subsection one hereof does not apply, the alienee of any land to which any roadway gives access (whether or not a separate title exists in respect of the roadway) shall have the same rights of access and be subject to the same obligations as were enjoyed by or imposed on the alienor in respect of the roadway prior to the transfer.

[22] Section 315 to 326D of the 1993 Act provide for roadways and easements. Like the 1931 and the 1953 Acts, the 1993 Act provides for the Court to "lay out" roadways but does not expressly stipulate when such orders give rise to separate freehold titles. Sections 323 and 326 of the 1993 Act more or less repeat ss 424 and 427 of the 1953 Act:

323 Powers of Court on cancellation of roadway

(1) Where, pursuant to section 322 of this Act, the Court cancels an order for the laying out of any roadway for which a separate instrument of title exists, the Court may cancel that instrument of title and may amend any other instrument of title so as to include in it the whole or any part of the land comprised in the roadway; and the land so included in any instrument of title shall thereupon vest in the owner or owners as if it had been originally included in it, and shall become subject to any reservations, trusts, rights, titles, interests, or encumbrances to which the land comprised in that instrument of title is then subject.

(2) Where the land comprised in any roadway is not included in a separate instrument of title, the owners shall thereafter hold the land freed from its reservation as a roadway.

(3) The foregoing provisions of this section as to the cancellation of orders shall, as far as they are applicable and with any necessary modifications, apply to the variation pursuant to section 322 of this Act of an order of the Court as to roadways.

(4) Any order made by the Court under this section shall, upon production, be registered by the District Land Registrar or the Registrar of Deeds, as the case may be; and the District Land Registrar is hereby authorised to make such amendments in any instrument of title as may be necessary to give effect to any order under this section.

326 Alienation of land to include alienation of interest in roadway giving access to that land

(1) Where any roadway that is comprised in a separate instrument of title has, whether before or after the commencement of this Act, been laid out by the Court over any Maori freehold land, the transfer by sale or otherwise of any land to which the roadway gives access shall, unless the instrument of alienation expressly provides to the contrary, be and be deemed to have been a transfer by the alienor to the alienee of the alienor's interest (if any) in the roadway.

(2) If any such instrument of title is registered under the Land Transfer Act 1952, the alienee may apply for registration under that Act of any interest to which the alienee has become entitled under this section, and the District Land Registrar may register the same accordingly.

(3) In any case to which subsection (1) of this section does not apply, the alienee of any land to which any roadway gives access (whether or not a separate title exists in respect of the roadway) shall have the same rights of access and be subject to the same obligations as were enjoyed by or imposed on the alienor in respect of the roadway before the transfer.

Summary

[23] Several points arise from this brief review of the historical legislation.

[24] First, the legislation never spelt out when a roadway order gave rise to a separate freehold title and when it was in the nature of an easement only. The same sections were used for both types of order. It was a matter of judicial discretion and judgment and depended on what the Judge making the order considered to be appropriate in the circumstances.

[25] Second, whether or not the Court granted a right of way in addition to or instead of a roadway was also a matter of judicial discretion. As only a roadway could be proclaimed a public road, the Court could be expected to order a roadway whenever such a proclamation was anticipated.

[26] Third, unless and until a roadway was declared a public road, its underlying ownership and status remained unchanged.

[27] Fourth, ss 323 and 326 of the 1993 Act (and ss 424 and 427 of the 1953 Act before them) recognised that a roadway order may give rise to a separate freehold title or an interest in the nature of an easement only. Depending on which, there are different consequences in relation to the cancellation of the roadway order and the transfer of interests in land to which the roadway gave access. I discuss below these sections in the context of the Maori Appellate Court's decision in *Matchitt - Parekura Hei Road (Part Te Kaha Block)* (2004) 10 Waiariki Appellate MB 253 (10 AP 253).

Parekura Hei Road

[28] In *Parekura Hei Road* the Maori Appellate Court considered the meaning of "separate instrument of title" in s 427(1) of the 1953 Act and s 326(1) of the 1993 Act.

[29] The background was that in 1915 the Court made a roadway order pursuant to s 48 of the 1913 Act. The order was recorded in the Court's minute book but was not drawn up, signed and sealed until 1997. The order recorded the roadway as being "hereby set apart as a road line" with reference to two survey plans which showed the roadway as a separate freehold parcel. The order was registered in the Land Transfer Office and a provisional title, GSPR 6C/122, issued on 9 September 1997.

[30] The appellant accepted that the Court had laid off the roadway but argued on appeal that it was not comprised in a "separate instrument of title" in terms of s 427(1) and that subsequent purchasers of land to which the roadway gave access therefore did not receive any interests in the roadway and were not entitled to use it.

[31] The Maori Appellate Court rejected the appellant's arguments and concluded that the roadway was comprised in a separate instrument of title and that ss 427(1) and 326(1) applied. The Court disposed of the appellant's main argument that the roadway did not comprise a separate instrument of title as follows (pages 258 to 260):

> In our view the Appellant has read too much into the phrase "instrument of title". Borrowing the Appellant's use of the definition of "instrument of title" from *Butterworths Land Law in New Zealand* the instrument need only be "documentary evidence" of title. It does not need to constitute the full description of legal ownership rights and obligations that is encompassed by the certificate of title under the Land Transfer system. For example, the *Butterworths* definition includes as an "instrument of title" a registered memorandum of mortgage. The registered memorandum is not the certificate of title to the land, but is still an "instrument of title", because it is legally recognised documentary evidence that the mortgagee has rights in relation to the land.
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> In the case of the Parekura Hei roadway the minute of the order of the Court must be documentary evidence of rights of access over the land, and in fact there can be no better evidence. The minute must therefore be an "instrument of title". Moreover, even though the minute does not include a list of owners, ownership could be traced from the minute by reference to the original block and all the other records of the Court associated with the block. However, the wording of ss 326/93 and 427/53 refers to a "separate instrument of title", and meaning must be given to the word "separate" in the phrase. It cannot simply be a reference to the minute of the order.
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> The ordinary meaning of the word "separate" when used as an adjective as given in *The Concise Oxford Dictionary* (9th edn) is: "forming a unit that is or may be regarded as apart or by itself; physically disconnected, distinct, or individual." In our view the act of signing and sealing the roadway order creates a "separate instrument of title", because the formalised order is a physically separate and distinct document from the minute of the order.
>
> Even if it could be argued that the formalised order simply follows on as an administrative step from the minute, and is therefore not sufficiently distinct from the minute to be "separate", the registration of the order in the provisional register in the Land Transfer system must be seen in a different light. The provisional registration creates a separate and distinct document and through a process that is separate and distinct from the Maori Land Court process. The provisional register is therefore a "separate instrument of title."
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> The Appellant argued that registration of the roadway on the provisional register was simply a practice of the Land Registry and that it was not imbued with the status of a separate title. We consider that such an argument relies too much on the distinction between the provisional registration and a full certificate of title. Where a full certificate of title is issued the registered proprietor has the best evidence and best description of title provided by the Land Transfer System. The provisional register may be something less than that, but it is still an instrument of title, and it certainly serves the function of notifying others of the existence of rights and obligations, in this case the rights and obligations appurtenant to the roadway order creating the Parekura Hei road.
>
> We are supported in this view by consideration of the different treatment accorded partition orders which, along with the provisions dealing with roadway orders, comes under Part 14 of Te Ture Whenua Maori Act. Section 289/93 provides that partition orders constitute the title to the land upon registration under the Land Transfer Act 1952 in accordance with the provisions of s 299/93. No such provision for registration is set in place in respect of roadway orders, with the implication that registration under the Land Transfer Act is not necessary to

> create the title for a roadway. This enhances the argument that provisional registration creates a "separate instrument of title."

[32] The Parekura Hei Road was clearly a separate instrument of title for the purposes of s 427. Nevertheless, I am not convinced by the Court's approach to interpretation of the phrase "separate instrument of title". It is problematic. No doubt, the task of interpretation was difficult as the drafters of the legislation had, in my view, used a phrase that in normal legal usage has a broad meaning, "[separate] instrument of title", to define a form of title that is much narrower, namely, a "separate freehold title".

[33] The Court reasoned that a roadway order, being an instrument of title, only becomes a "separate" instrument of title for the purposes of s 427 upon the signing and sealing of the order or upon its registration (whether provisional or full) in the land transfer system. In other words, whether or not a roadway order amounts to a separate instrument of title is said to depend on whether or not it is promulgated by the administrative step of a "separate" order being signed and sealed or registered.

[34] The problem with this approach is illustrated by the orders that are before me. The Tangitangi Road Line and Wharo Road Line are contained in draft orders only. They have not been signed and sealed. However, all other roadway orders have been signed and sealed yet, in substance, they are no different from the Tangitangi Road Line and Wharo Road Line. Applying *Parekura Hei Road*, the Tangitangi Road Line and Wharo Road Line would not amount to separate instruments of title for the purposes of s 427 but all others would. Furthermore, if registration in the land transfer system is considered to be the trigger for a roadway order becoming a separate instrument of title, then none of the roadway orders would qualify as none have been registered.

[35] The converse problem is that a roadway order that is only intended to be in the nature of an easement but which is contained in a signed and sealed order or is registered against a title in the land transfer system would, following the Court's approach, give rise to a separate instrument of title for the purposes of s 427 (and s 424).

[36] Thus, no matter what the substantive terms of a roadway order, the ultimate determinant of whether it amounts to a separate instrument of title is said to be the form in which it is promulgated. I do not believe that outcome was intended by the Court or the legislation.

[37] The central issue for the Court was the meaning of the phrase "separate instrument of title" in s 427. The Court approached this issue by analysing the component parts of the phrase. An "instrument of title" is simply "documentary evidence" of title and therefore can be anything from a certificate of freehold title under the land transfer system to a memorandum of mortgage to, more relevantly, an easement. The Court then looked to give meaning to the word "separate" and did so by focussing on whether or not the order was contained in a physically separate document from the minute of the order, namely, by way of a signed and sealed order or by registration in the land transfer system.

[38] The difficulty with this approach is that it attempts to ascertain the meaning of the phrase "separate instrument of title" from its component parts without regard to its whole, that is, without regard to the purpose of and context in which the phrase is used in the legislation. This is where s 5(1) of the Interpretation Act 1999 is instrumental: "The meaning of an enactment must be ascertained from its text and in light of its purpose".

[39] I turn to examine the purpose (and context) of the phrase "separate instrument of title" as it is used in both ss 424 and 427.

[40] Section 424 is concerned with the powers of the Court on cancellation of a roadway order. Under s 424(1), if a separate instrument of title exists for the roadway order then, on cancellation, the Court may amend any "other instrument of title" to include the whole or any part of the land comprised in the roadway order. Under s 424(4), the District Land Registrar or the Registrar of Deeds may then amend any "instrument of title". Conversely, under s 424(2), if there is no separate instrument of title then, on cancellation, the underlying land is simply "freed from its reservation as a roadway."

[41] Section 424 is simply concerned with the different consequences of cancellation of a roadway order depending on whether or not the roadway order gives rise to a separate freehold title. If there is a separate freehold title then, on cancellation, the Court must decide what to do with the freehold title of the roadway – does it remain as a separate freehold title or does it get added to another title? If there is no separate freehold title, that is, the roadway order is in the nature of an easement, then, on cancellation, there is no need for the Court to deal with the underlying freehold title as s 424(2) simply operates to release that land from the encumbrance of the roadway order.

[42] Similarly, s 427, which is concerned with the consequences of alienation of land to which a roadway gives access, draws the same distinction between a roadway order that

gives rise to a separate freehold title and one that does not. Under s 427(1), if there is a separate instrument of title any alienee of land to which the roadway gives access may receive the alienor's "interest" (if any) in the roadway. That "interest" is the ownership in the freehold title that the earlier legislation stipulated remained unchanged: s 117(3) of the 1909 Act, s 487(3) of the 1931 Act and s 416(4) of the 1953 Act. Under s 326(2) of the 1993 Act the alienee may now apply to have any such interest in the separate instrument of title registered with LINZ. Section 427 does not otherwise provide for the transfer of an ownership interest where there is no separate instrument of title as, if there is no separate freehold title, there is quite simply no ownership interest to transfer.

[43] Under s 427(2), whether or not there is a separate instrument of title, the alienee has the same rights and obligations of access of the alienor. Hence, the appellant's argument in *Parekura Hei Road* that purchasers of land to which the roadway gave access did not own the roadway and therefore did not have a right of access was always going to fail as the right of access was protected regardless whether or not the roadway amounted to a separate instrument of title.

[44] Is there any possible reason for the phrase "separate instrument of title" to include a roadway order in the nature of an easement for the purposes of ss 424 and 427? Clearly, there is not. In terms of s 424, the cancellation of a roadway in the nature of an easement is covered by s 424(2). In terms of s 427, the Legislature was not giving to neighbouring landowners with a right of access over a roadway in the nature of an easement an ownership interest in the underlying freehold land.

[45] Accordingly, the phrase "separate instrument of title" in ss 424 and 427 of the 1953 Act and ss 323 and 326 of the 1993 Act is, for all intents and purposes, synonymous with "separate freehold title". (I note that the phrase could, in theory, include "separate leasehold title" as roadway orders could conceivably be made in respect of a leasehold interest in Maori freehold land, though I have never encountered such an order).

[46] Therefore, in my view, where the Court is faced with the question of whether or not a roadway order amounts to a separate instrument of title for the purposes of ss 323 or 326, the Court is not required to examine whether or not the order has been signed and sealed or registered. Rather, the Court is required to examine whether in substance the order gives rise to a separate freehold title.

Indicia of a separate freehold title

[47] Given that the legislation is silent on when a roadway order gives rise to a separate freehold title and that both types of roadway order are made under the same sections, what then are the indicia of whether or not there is in substance a separate freehold title?

[48] Ultimately, the question can only be answered on an order by order basis having regard to the relevant statutory provisions, the wording in the minute and the order, any supporting diagrams and the overall context in which the order was made. Nevertheless, I suggest the following indicia.

[49] First, if the roadway order was made at the time of investigation of title or partition (as per s 91 of the 1886 Act, s 69 of the 1894 Act, s 117 of the 1909 Act, s 48 of the 1913 Act or s 477 of the 1931 Act) then normally the roadway order was intended to be a separate freehold title. At a practical level that was because, if the roadway was first deducted from the parent title as a separate freehold parcel, then all owners in the land being partitioned shared equally in the burden of the loss of land to the roadway. However, if it was created as per a right of way easement over the partitioned titles then the burden of the encumbrance was not necessarily shared equally by the owners.

[50] Second, if it was intended that the roadway later be proclaimed a public road then the roadway order would normally give rise to a separate freehold title.

[51] Third, the wording of the order is a key factor, though inconsistency in statutory language and the wording used in minutes and orders means that a cautious approach is required. For example, if a roadway order says that an area is "set aside" or "set apart" then that suggests a separate freehold title. Conversely, if the roadway order is expressed to be "laid out" or "over" or "laid over" or "traversing" existing titles or it refers to an existing title as the servient tenement, then it is in the nature of an easement. In this regard, if a roadway order is endorsed against the freehold title order of another block (as was the practice at one time) or registered against a land transfer title, then it is in the nature of an easement.

[52] Fourth, where a roadway order is allocated a distinct title name or appellation, such as "Parekura Hei Road" or "Oharotu 4", that suggests a separate freehold title.

[53] Fifth, if the roadway is shown as a separate title on a sketch plan or survey plan and is excluded from surrounding titles, that indicates a separate freehold title. For example, the

survey plan may show the roadway as having primary title boundaries or it may show a disjoined vinculum over titles on either side of the roadway. Conversely, if it is shown as running over existing titles as per a right of way or has a joined vinculum running through it, then it is not a separate freehold title. Care should be taken in relying on sketch plans as they do not always follow the Court's minute and are not necessarily approved by a Judge. Care should also be taken in relying on survey plans that have not been approved by the Court.

[54] These suggestions are not definitive or exhaustive.

The Roadway Orders

[55] I now turn to consider the specific roadway orders.

Oharotu 4

[56] Oharotu 4 was created by roadway order on 5 August 1988 under s 418 and s 416(2) of the 1953 Act. The order is recorded in the minute book and in a signed and sealed order. No land transfer title has issued. It was created as part of a partition. The order refers to the roadway as being "hereby laid out" and is depicted as a separate parcel "Oharotu 4" in survey plan ML15715. The Court has not maintained any ownership record for the roadway.

[57] I conclude that Oharotu 4 is a separate freehold title and make an order under s 131 under the 1993 Act determining the land to be Maori freehold land.

Tangitangi Road Line

[58] Tangitangi Road Line was created by roadway order on 17 January 1944 under s 477 of the 1931 Act. The order is recorded in the minute book and a draft order has been prepared but has not been signed or sealed. No land transfer title has issued. It was created as part of a partition. The order records the roadway as being "set apart" and declared to be road line and until such land be proclaimed to be public road it shall be known as "Tangitangi Road Line". There is no evidence that the land has been proclaimed public road. The order is supported by a sketch plan which depicts it as a separate title. The Court has not maintained any ownership record for the roadway.

[59] **I conclude that Tangitangi Road Line is a separate freehold title and make an order under s 131 of the 1993 Act determining it to be Maori freehold land.**

Tarahape and Te Kuhu Road Lines

[60] Tarahape and Te Kuhu Road Lines was created by roadway order on 2 November 1942 under ss 162, 477 and 478 of the 1931 Act. The order is recorded in the minute book and in a signed and sealed order. No land transfer title has issued. It was created in the context of a consolidation scheme. The order refers to the roadway as being "laid out and set apart as road line", and that until such area be proclaimed a public road the land so set apart shall be known as "Tarahape and Te Kuhu Road Lines". The order refers to survey plan 13333 which depicts the Tarahape and Te Kuhu Road Lines as separate titles. There is no record that the land has been declared public road. The Court has not maintained any ownership record for the roadway.

[61] **I conclude that Tarahape and Te Kuhu Road Lines is a separate freehold title and make an order under s 131 of the 1993 Act determining it to be Maori freehold land.**

Taraire 2G3 (Residue)

[62] Taraire 2G3 was created by partition order on 9 December 1910. On 7 August 1940 the Court made a roadway order under s 479 of the 1931 Act over part of Taraire 2G3 to provide access to Taraire 2G1 and Taraire 2G2 blocks owned by Alexander Edward-Milne. Although the roadway order was made as a result of a separate application it was within the context of a consolidation scheme. Mr Milne was to pay £10 compensation to the Tokerau Maori Land Board. It would seem that the compensation was paid as a signed and sealed order exists. No land transfer title has issued. The order records that it "doth hereby lay off a road line over the following route...". When Taraire 2G3 was subsequently partitioned on 16 February 1950 survey plan 13483 which was prepared to depict the partition showed Taraire 2G3 Road Line as a separate title. The Court has not maintained any ownership record for the roadway.

[63] **I conclude that Taraire 2G3 (Residue) should in fact be known as Taraire 2G3 Road Line and that it is a separate freehold title and make orders under s 131 of the 1993 Act determining it to be Maori freehold land.**

Whakatere Mountain Roadway

[64] Whakatere Mountain Roadway was created by roadway orders on 8 May 1942 under ss 477 and 478 of the 1931 Act. The order is recorded in the minute book and in a signed and sealed order. No land transfer title has issued. It was created in the context of a consolidation scheme. The order records the owners and occupiers of five blocks of land as having "a right of road over that area containing 3 acres 1 rood 1 perches more or less and known as the Whakatere Mountain Roadway as the same is more particularly shown in the plan annexed hereto." The plan is ML14095 which depicts the Whakatere Mountain Roadway as a separate title. The Court has not maintained any ownership record for the roadway.

[65] **I conclude that Whakatere Mountain Roadway is a separate freehold title and make an order under s 131 of the 1993 Act determining it to be Maori freehold land.**

Whakatere Roadway

[66] Whakatere Roadway was created by roadway order on 8 May 1942 under ss 162, 477, 478 and 479 of the 1931 Act. The order is recorded in the minute book and in a signed and sealed order. No land transfer title has issued. The order records that "the land described in the Schedule hereto, be and the same is hereby set apart as a road line... and that the same be known as the Whakatere Roadway." The Schedule refers to the area of land as shown on ML14097. Survey plan ML14097 depicts the Whakatere Roadway as a separate title. The Court has not maintained any ownership record for the roadway.

[67] **I conclude that Whakatere Roadway is a separate freehold title and make an order under s 131 of the 1993 Act determining it to be Maori freehold land.**

Wharau Road Line

[68] Wharau Road Line was created by roadway order on 3 April 1950 under s 162(9) of the 1931 Act. This reference to s 162(9) is likely to be an error as that section relates to the closing and vesting of roads whereas s 162(8) relates to the making of road lines. Nevertheless, the substance of the order is recorded in the minute book and in a signed and sealed order. No land transfer title has issued. It was created in the context of a consolidation

scheme. The order refers to the road line being "laid off over the land known as Wharau block." The Wharau Road Line is depicted in ML13621 as a separate title. The Court has not maintained an ownership record for the roadway.

[69] **I conclude that Wharau Road Line is a separate freehold title and make an order under s 131 of the 1993 Act determining it to be Maori freehold land.**

Wharo Road Line

[70] Wharo Road Line was created by roadway order dated 17 January 1944 under s 477 of the 1931 Act. The order is recorded in the minute book and in a draft order that has not been signed or sealed. No land transfer title has issued. It was created in the context of a partition. The order refers to the roadway as being "hereby set apart and declared to be road line and until such land be proclaimed to be Public Road it shall be known as 'Wharo Road Line'." There is no record that the land has ever been proclaimed public road. The road line is depicted in a sketch plan as a separate title. The Court has not maintained any ownership record for the roadway.

[71] **I conclude that Wharo Road Line is a separate freehold title and make an order under s 131 of the 1993 Act determining it to be Maori freehold land.**

[72] Ngararatunua 2B2 road line was created by roadway order on 15 May 1925 under ss 49 and 50 of the 1913 Act. The order is recorded in the minute book and a signed and sealed order. No land transfer title has issued. The order records that "...there shall be laid out and set apart as a road line so much of the said Ngararatunua 2B2 block as is delineated upon the minutes of the Court...". The roadway is depicted in survey plan ML12525 which shows it as a separate title. The Court has not maintained any ownership record for the roadway.

[73] **I conclude that Ngararatunua 2B2 Road Line is a separate freehold title and make an order under s 131 of the 1993 Act determining it to be Maori freehold land.**

[74] **All orders issued above are to issue immediately pursuant to rule 66(3) of the Maori Land Court Rules 1994.**

Ownership of Road Lines

[75] I have concluded that all of the roadways comprise separate freehold titles and are Maori freehold land. The Court has not maintained records of ownership for any of the land. The Case Manager advises that in discussions with staff of LINZ it is proposed that, as the Court did not define ownership at the time of making the roadway orders, it is proposed that the roadways be registered as "the owners of the Wharo Road Line" and so forth.

[76] Section 318(4) of the 1993 Act states that the laying out of a roadway "shall not affect the ownership of the land comprised in the roadway." Section 416(4) of the 1953 Act was in similar terms, so too s 487(3) of the 1931 Act and s 48(6) of the 1913 Act. The effect of these sections is that there remain underlying owners of the roadways. Furthermore, under s 326(1) of the 1993 Act and its predecessor, interests in the roadway may be automatically transferred on the alienation of any land to which the roadway gives access.

[77] Arguably the Court should be maintaining ownership lists for all such roadways. I understand there is no universal practice in the Court registries. Consequently, I have considered whether in conjunction with the s 131 applications I should amend them to include s 128 applications to determine the current ownership of the roadways. I have decided that I should not, for three reasons.

[78] First, no owners have asked the Court to determine their ownership interests.

[79] Second, at present the underlying ownership remains undefined but is able to be defined at any point in time if that becomes necessary. For example, were a roadway to be cancelled and revested then the Court would need to undertake an investigation into ownership for the purposes of s 323(1).

[80] Third, amending the applications to include a determination of ownership would mean that a considerable amount of research would need to be undertaken, hearings convened, potential owners notified and determinations made. The issues are not straightforward. For example, as per s 326(1) the Court would need to trace the transfers of any land to which the roadways give access to determine whether or not the interests in the roadway were excluded from the transfers. All of this work and effort would be required for little or no practical benefit as, if the land is dedicated as a roadway, the ownership is nominal only.

[81] Accordingly, I concur with LINZ's proposed approach to the issue of titles for roadways.

Pronounced in open Court in Whangarei at 5.39 pm on Friday this 30th day of July 2010.

D J Ambler
JUDGE