IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20020002933

UNDER	Section 328, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Ahipara A8B
BETWEEN	CATHERINE DAVIS Applicant

Hearing: 10 July 2002
16 September 2002
4 November 2002
11 March 2003
3 May 2004
16 January 2006
11 July 2006
12 June 2007
10 March 2008
27 March 2009
3 December 2013
(Heard at Kaitaia)

Judgment: 03 October 2014

RESERVED JUDGMENT OF JUDGE D J AMBLER

Introduction

[1] In 2002 Catherine Davis applied for an occupation order of a quarter acre over Ahipara A8B ("A8B"). The application did not progress as quickly as it should have due to that block's access problems through neighbouring land, Ahipara A8A1 ("A8A1") and Ahipara A8A2 ("A8A2"). Those access issues can now be resolved as part of this decision. As far as the occupation order is concerned, the only issue requiring my attention is the size of the occupation site.

Background

[2] A8B is 21.57 hectares in area and presently has approximately 30 owners holding 548.157 shares. At the time the application was filed Catherine held 5.55 shares. As a result of further successions and her sister gifting her further shares she now holds 17.723 shares.[1] A8B is situated on Roma Road, Ahipara. It has some areas of pasture but has largely reverted to scrub and there are no buildings on the land. Indeed, Catherine will be the first owner to live on the land in recent generations. The owners who participated in the application process fully support her obtaining an occupation order. The proposal was discussed at a meeting on 21 October 2008 where Catherine obtained consents from or on behalf of:[2]

Stephen Muru	05.2980
Alfred Muru	05.2980
Phillip Muru	05.2980
Edward Davis	05.2980
Janina Blackbourn	05.2980
Yvonne Hadfield	17.7230
Emily Trevor Davis Whānau Trust	64.6460
Stefan Hadfield	00.2000
Paul Murupaenga	04.0364
Matthew and Betty Muru Whānau Trust	56.0910
Jolie-Ann Hobson	08.8620
Total	**178.0484**

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1 12 Auckland Succession MB 76 (12 AT(S) 76) and 76 Taitokerau MB 48-51 (76 TTK 48-51)

2 Jolie-Ann Hobson has now gifted her shares to Catherine Davis (the applicant). The shares held by Betty Davis were vested in the Emily Trevor Davis whanau trust on 22 November 2010 14 Taitokerau MB 63 (14 TTK 63)

[3] The owners have attended various hearings and site inspections since 2002. I only took responsibility for the application at the hearing on 3 December 2013 but am unaware of any earlier objections to the occupation order. More recently, on 10 November 2013 Catherine organised a further meeting of owners to update the access and occupation order issues. At that meeting she obtained the owners' agreement to a different site of an increased size of 1.5 acres to reflect Catherine's increased shareholding. The site is less ideal for Catherine but the other owners will benefit from the driveway she needs to construct to gain access to her site.

Issues

Access

[4] The access problem that has held up the granting of the occupation order arises from the partitioning of the parent title, Ahipara A8 ("A8"), and the subsequent Ahipara A8A ("A8A") title into A8A1 and A8A2. The history is explained in Mr Bob Adam's comprehensive report to the Court of 25 October 2012. I attach as Appendix A Mr Adam's Diagram 6 which illustrates the access issues and his suggested remedy to extend the existing roadway over areas "D" and "E" and to provide a service easement over areas "F" and "G".

[5] A8 was partitioned on 23 July 1980 to create A8A and A8B.[3] The surveyed title for A8B provided for it to have access to Roma Road via a "panhandle" that varied in width from 3.96 metres to 5.27 metres. Importantly, an access width of 3.96 metres is not sufficient to allow full development of A8B for residential purposes. In that sense, the 1980 title for A8B has proved to be deficient.

[6] On 18 November 2002 the Court partitioned A8A to create A8A1 and A8A2.[4] At the time, the Court was made aware that A8A1 and A8A2 did not have a right of access over the A8B panhandle. Consequently, the Court made a roadway order over areas "A", "B" and "C". The roadway order solved the access issue for A8A1 and A8A2 however, as Appendix A illustrates, area "C" did not extend the length of the panhandle and therefore did not resolve the access issue for A8B.

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[3] 11 Kaitaia MB 342 (11 KT 342).
[4] 22 Kaitaia MB 265 (22 KT 265).

[7] As a result of the present application, surveyors were engaged to resolve the access issue. The surveyors have produced survey plan ML 426522 which reflects the discussion and agreement between Catherine and John Paitai, the owner of A8A1. ML 426522 provides for an extended roadway over areas "D" and "E" and a service easement over areas "F" and "G".

[8] As I say, the extensions to the roadway and the easement reflect the understanding between Mr Paitai and Catherine. At the hearing on 3 December 2013 the three owners of A8A2, being Mr Paitai's sisters, all took time to read Mr Adam's report and fully agreed with the proposed orders to resolve the access issues. The owners of A8B who have participated in the Court process support resolving the access issue in this way.

[9] As far as the statutory requirements of the creation of the roadways and easements are concerned, I am satisfied for the purposes of ss 315 and 317 of Te Ture Whenua Māori Act 1993 ("the Act") that the owners have had sufficient notice of the proposed extended roadway and easement and sufficient opportunity to discuss and consider them, and there is a sufficient degree of support for those orders among the owners. The orders will of course address an anomaly arising from the 1980 partition orders.

[10] I therefore propose to invoke s 37(3) of the Act and make roadway and easement orders as part of this application. For two reasons I consider it preferable to cancel the roadway order of 18 November 2002 and replace it with a new order rather than simply amend the existing order. First, it will be simpler for the parties to be able to refer to a single order to understand the various access rights and obligations in the future. Second, the 18 November 2002 roadway order does not spell out the obligations of the parties in relation to maintenance and so forth of the existing roadway.

The occupation order

[11] As noted earlier, the occupation order has the support of the owners of A8B who participated in the Court process. For the purposes ss 328 and 329 of the Act, an occupation order is appropriate. As with the roadway and easement orders, I am satisfied that the owners have had sufficient notice of the application, sufficient opportunity to discuss and consider it, and that there is a sufficient degree of support for the application.

Catherine holds sufficient shares in the land to justify an occupation order. The only issue is the size of the occupation site.

[12] Catherine originally applied for a site of a quarter of an acre. However, after taking advice from her surveyor she increased the area to 2000m^2 based on the Far North District Council's requirements. In fact, the Council's District Plan normally requires a 3000m^2 area in a rural zone but according to Catherine she can get a dispensation which will allow for a 2000m^2 section. By the time of the final hearing Catherine was seeking a 1.5 acre section, being an area of approximately 6000m^2, to reflect her increased shareholding.

[13] I asked Catherine why she now sought a 6000m^2 site. She explained that this reflected her increased shareholding and that her fellow owners were supportive of this increase. She did not feel she should be limited by the Council's minimum site requirements. She also felt that her fellow owners saw her as the ahi kaa, pushing for the development and use of the land, and that the area granted to her should reflect her role. Her fiancé added that the area they seek is not just for a home but also for related buildings and areas of garden they wish to establish. They do not want the area of exclusive use to be limited to the house but to extend to those buildings and gardens. In essence, Catherine and her fiancé ask for an occupation order that will reflect the total area of A8B they intend to use.

[14] I appreciate the points that Catherine and her fiancé advanced. I certainly think that owners such as Catherine with energy and passion to utilise their whenua tupuna should be encouraged to do so. Her fellow owners certainly want her to succeed. But there are two reasons why granting a 6000m^2 occupation site is not appropriate.

[15] First, the Court's power to grant an occupation order is for the purpose of a "site for a house". The Court cannot grant occupation orders for other purposes. I certainly accept that a homeowner might be expected to have a substantial garden or orchard in association with his or her home. But to the extent that such a garden or orchard extends beyond the area surrounding a house, the Court cannot grant exclusive rights to that area under s 328 of the Act.

[16] Second, granting a 6000m^2 occupation site to Catherine will set a precedent and have potentially adverse implications for her fellow owners. An occupation order is of indefinite duration when it is not limited to a lifetime or a specific term. Therefore Catherine's descendants will be able to succeed to the occupation order in the future. Because an occupation order is semi-permanent in nature, the Court must exercise careful judgment in determining the size of the occupation order as it will impact on the ability of other owners to use the land in the future.

[17] Following the Council's guideline of 3000m^2 residential sites in rural zones, granting Catherine a 6000m^2 area will effectively take up two house sites. Furthermore, if an occupation site of 6000m^2 is granted to Catherine, then the next owner who applies to the Court for an occupation order will likely ask for a similar area. This will further reduce the total number of house sites available to the owners. Such an approach will result in inefficient and short-sighted allocation of areas of the land. Normally the Court will only grant the minimum area required to be able to build unless there are exceptional circumstances. I do not find any exceptional circumstances to exist.

[18] I therefore do not consider that a 6000m^2 occupation order site is appropriate. In my view it is better to fix the area at 3000m^2, being the minimum site area the Council requires. That will then set an appropriate precedent for other owners who apply for an occupation order. Catherine will need to file a suitable sketch plan showing the boundaries and location of the site.

[19] Importantly, the fact that the Court will only grant Catherine an occupation site of 3000m^2 does not mean that she is limited to using that area of A8B. That is the exclusive area she is entitled to use and occupy for the purpose of her home. However, there is nothing to prevent her from using other parts of A8B for garden and orchard purposes as long as it does not interfere with the rights of her fellow owners. If she wishes to achieve some certainty about the use of a greater area, she can always get the written agreement of her fellow landowners or enter into some sort of lease or licence. That is up to her to pursue.

Orders

[20] Accordingly, I invoke s 37(3) of the Act and make the following orders:

(a) section 322 of the Act cancelling the roadway order over A8A1, A8A2 and A8B dated 18 November 2002;

(b) section 316 of the Act granting a roadway order in replacement of the above roadway order over the following areas of A8A1, A8A2 and A8B:

(i) Area "A" on ML 316582 in favour of A8A1 and A8A2;

(ii) Area "B" and "C" on ML 316582 in favour of A8A2 and A8B;

(iii) Area "D" on ML 426522 in favour of A8B; and

(iv) Area "E" on ML 426522 in favour of A8A2.

Pursuant to s 318(2) of the Act the roadway shall be restricted to the owners of A8A1, A8A2 and A8B and their invitees.

The roadway is subject to the rights and powers implied by clauses 1, 6 and 10 to 13 of Schedule 4 of the Land Transfer Regulations 2002 and the implied covenants detailed in Schedule 5 of the Property Law Act 2007 regarding grants of vehicular rights of way provided that the right in clause 2 (d) of Schedule 5 of the Property Law Act 2007 shall prevail over clause 11 of Schedule 4 of the Land Transfer Regulations 2002. The Court retains jurisdiction in relation to any disputes;

(c) section 315 of the Act granting water, drainage, electricity, and telecommunication and computer media easements over the following areas of A8A1 and A8A2:

(i) Area "F" on ML 426522 in favour of A8A2 and A8B;

(ii) Area "G" of ML 426522 in favour of A8B.

The easements are subject to the rights and powers implied by clauses 1 to 5 and 7 to 13 of Schedule 4 of the Land Transfer Regulations 2002. The Court retains jurisdiction in relation to any disputes;

(d) section 328 of the Act granting exclusive use and occupation of an area of 3000m^2 within A8B (to be defined by sketch plan filed with the Court) in favour of Catherine Davis with effect from 3 October 2014 on terms that:

(i) The occupier or her invitees, agents and workers shall have a right of access over the balance of the land for the purpose of access to and from the said area;

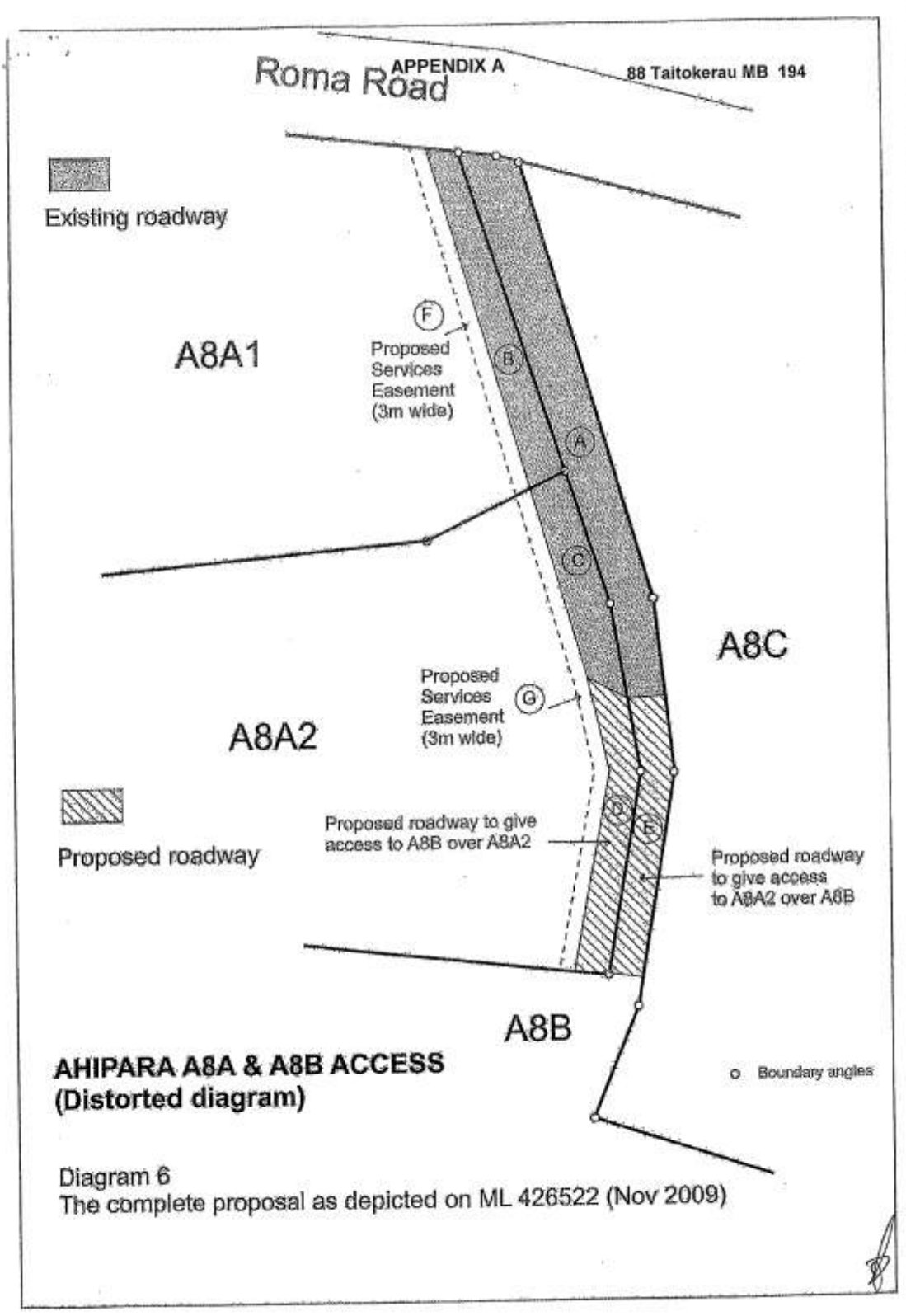
(ii) The occupier shall meet any rates and other charges levied in respect of the area; and

(iii) The order shall end and be cancelled by the Court in the event that the occupier alienates any of the beneficial interests she holds in the land as at the date of this order.

[21] Pursuant to s 73 of the Act the occupation order set out in paragraph (d) above is conditional upon Catherine filing with the Court by 30 November 2014 a suitable sketch plan setting out the boundaries and location of the occupation area of 3000m^2 within A8B.

Pronounced in open Court at 4.01 pm in Whangarei this 3rd day of October 2014.

D J Ambler
JUDGE


APPENDIX A
88 Taitokerau MB 194
Roma Road
Existing roadway
A8A1
F
Proposed Services Easement (3m wide)
B
A
C
A8C
Proposed Services Easement (3m wide)
G
A8A2
Proposed roadway
Proposed roadway to give access to A8B over A8A2
D
E
Proposed roadway to give access to A8A2 over A8B
A8B
AHIPARA A8A & A8B ACCESS
(Distorted diagram)
o Boundary angles
Diagram 6
The complete proposal as depicted on ML 426522 (Nov 2009)