**IN THE MAORI LAND COURT OF NEW ZEALAND**
**WAIARIKI DISTRICT**

**33 Waiariki MB 48**
**(33 WAR 48)**
**A2008003988**

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| UNDER | Section 19, Te Ture Whenua Maori Act 1993 |
| IN THE MATTER OF | Tahora 2AD2 and Omuriwaka |
| BETWEEN | TE RAKE TE PAIRI<br>Applicant |
| AND | WHAKATANE DISTRICT COUNCIL<br>Respondent |

Hearing: 2 April 2008 (101 OPO 119)
8 April 2008 (101 OPO 207)
5 May 2008 (102 OPO 130-143)
31 July 2008 (9 CONF 140-148)
2 June 2009 (109 OPO 233-236)
2 October 2009 (111 OPO 179-192)
8 July 2010 (14 WAR 136-154)
(Heard at Opotiki)

Counsel: Mr Koning (Counsel for the Respondent)

Judgment: 13 June 2011

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**PRELIMINARY DETERMINATION OF**
**DEPUTY CHIEF JUDGE CL FOX**

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## Introduction

[1] This case concerns the maintenance and proposed formation of a road known as "Matahi Valley Road" located approximately 40 kilometres south of Whakatane. For many years the carriageway of Matahi Valley Road had been located outside of an area Gazetted as a road reserve on 14 July 1930.[1] The location of the carriageway outside the

[1] NZ Gazette No 52, 2194

road reserve has been the subject of dispute, with the applicant and his supporters taking action to blockade the road. As a consequence the Council has moved to reconstruct the carriageway wholly within its road reserve. The applicant contests the position of the road reserve boundary.

**Background**

[2] The dispute concerns two blocks of land. The Omuriwaka block and the Tahora 2AD Section 2 blocks. Tahora 2AD Section 2 is contiguous with Omuriwaka.

[3] Omuriwaka was first constituted under the Urewera Lands Act 1921-1922 and on 10 April 1922 it was vested in 14 owners. A consolidation order was made in 1963 concerning this block and the land was subsequently gazetted as a Maori reservation in 1986, and a part excluded in 1989.

[4] Omuriwaka is now comprised of a Maori Reservation and an ahu whenua trust. There are 81 owners of Omuriwaka and the same seven people were named as trustees for both areas. Three of these trustees are deceased leaving only four trustees in office.

[5] These trustees are Meri Wiki, Meri Tuhoro, Te Rake Te Pairi and Boy Amoroa. The reservation has been constituted over 71.1994 hectares and the ahu whenua trust, known as Part Omuriwaka Lands Trust, covers the remaining 2.0234 hectares. The reservation has been set aside for the benefit of the Ngai Tama Tuhirae Hapu.

[6] I also note that in August 2008, the Crown purchased cutting rights to Matahi Forest in Waimana Valley from a consortium of forestry investors known as "Matariki Forests." The Matahi trees are now owned by the Crown subject to a forestry right which is registered on the relevant land titles as LINZ Dealing No AG 7963008. Ownership of the land remains with Matariki and is in seven freehold titles including GS5B/1495. A condition of the forestry right was an option for the Crown to also purchase the land. This option is assignable to Te Kotahi a Tuhoe (TKAT) or its successor Tuhoe entity, thus making the forest (both land and trees) potentially available for inclusion in any claims settlement offer to Tuhoe.

[7] The Crown purchased the forestry right in 2008 because, for more than twelve months previously, Matariki had been prevented from exercising its freehold property rights by the blockade of the applicant and his supporters. They, dispute Matariki's freehold title, based on reasons going back to the original "Tahora No 2" purchase by the Crown many decades ago. I note that the interim injunction granted by the Maori Land Court below has never applied to Crown Forestry, the body charged with the duty to manage the forest.

**Application**

[8] On 1 April 2008, the Maori Land Court in Rotorua received an application from Te Rake Te Pairi for an injunction under section 19 of Te Ture Whenua Maori Act 1993 prohibiting the Whakatane District Council and "their Associates from continuing any kind of work on the land Tahora 2AD Section 2 until such time as the correct boundaries have been stipulated." The grounds relied upon where that:

- The applicant disputed the boundaries of Omuriwaka and Tahora 2AD Section 2; and he complained

- The Whakatane District Council is widening their boundary for a roadway without proper consultation with the people of the land.

[9] The affidavit filed by Mr Te Pairi in support of the application alleged that:

1. The boundaries of the Maori Reservation land to be used for access for the road formation are in dispute. The surveys that the Council have previously upheld as accurate between 1982 and 2000 are now found by Council to be substantially different in Council's 2007 survey due to now finding "original survey pegs".

2. There has been no consultation or information provided as to the location and authenticity of the "original survey pegs" suddenly now found. These "original survey pegs" now found are on land,

previously acknowledged by Council to be Maori Reservation land, to be Council road reserve.

3. The movement of the boundaries is substantially more than the estimated accuracy of 1 metre. In fact [they] have moved apparently at least 50 metres.

4. The Council's intention to use Section 330 of the Resource Management Act 1991 Emergency Powers is without grounds; as there is no critical need for a new road formation, nor are there likely to be any adverse effects on the environment which requires immediately preventative or remedial measures, nor the likelihood of a sudden event likely to cause loss of life, injury or serious damage to property.

5. In fact the formation of the new road is more likely to cause injury, loss of life or property damage and environmental adverse effects due [to] the road being prone to washing out in floods.

6. The existing road is in good condition, and open to Public access as well as maintenance and emergency services.

7. The Applicant relies on the High Court Rules 236 and commentary to those rules in McGechan on Procedure, and relevant case Law.

[10] By minute dated 2 April 2008, the Court advised the applicant that as Tahora 2AD Section 2 was General land, the Maori Land Court had no jurisdiction over it.[2] The Registrar was directed to contact the applicant to ascertain whether a formal resolution had been passed by the seven trustees of Omuriwaka in support of the application for an injunction.[3]

[2] 101 Opotiki Minute Book 119 (101 OPO 119)
[3] 101 Opotiki Minute Book 119 (101 OPO 119)

[11] The Whakatane District Council, through their counsel, submitted that the road is a legal road and that there was some urgency for works which were to commence on 1 April 2008. It was claimed that the current road had been rendered impassable as a consequence of the actions of the applicant. According to the Council, this had made public access to land beyond the disputed area, including other privately owned land and public reserves impossible.

[12] Documentation supporting the application from the surviving trustees was subsequently filed and as a result the Court on 8 April 2008 found that it was

> ... not satisfied that the Whakatane District Council has yet been able to clearly establish what the appropriate alignment for the new roadway should be. The Court will need to receive evidence from the three (3) surveyors that have been commissioned by the Whakatane District Council, demonstrating how they have ascertained the boundaries of the two blocks known as Tahora 2AD [Section] 2 and Omuriwaka.
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> Pursuant to section 19(1)(a) of Te Ture Whenua Maori Act 1993, the Court makes an order granting an interim injunction prohibiting the Whakatane District Council and/or their Associates from trespass and/or doing injury to the Maori freehold land known as Omuriwaka. The order is granted with interim effect only until such time as a substantial hearing can be held.[4]

[13] On 5 May 2008, the matter came before the Court and submissions and evidence were presented by Mr Te Pairi, Maui Te Pou, Tania Mihinui, Kato Wharepapa, Te Araaka Te Pairi, Arwin Maari, Graham Weavers, Denny Helmbright and Mrs Hira Hohepa in support of the application for an injunction.

[14] Mr Te Pari claimed that in approximately 1964, following the destruction of the previous road caused by a flood, there were discussions held between the Whakatane District Council and the people of Omuriwaka Marae.

[15] The people were asked to allow the Council to form a roadway over Omuriwaka for a short period of time and then once they had improved the old roadway, the new

[4] 101 Opotiki Minute Book 207 (101 OPO 207)

formed road would be discontinued and the land returned. Two years and then more years passed. After 20 years there was some discussion regarding compensation but nearly 50 years on, the road is still there and no compensation has been paid. Mr Te Pou raised the issue of boundaries being properly ascertained through tradition, particularly by reference to what the old people knew to be boundaries and the special land marks within.

[16] Mr Helmbright raised concerns regarding the state of the rest of the road. But Mr Te Pou assured that Court that there was alternative access.[5]

[17] Mr Koning appeared for the Whakatane District Council. In attendance were the CEO of the Council, Ms Diane Turner and one of the surveyors commissioned by the Council. Interestingly, it was Mr Koning's suggestion that an independent surveyor be commissioned to undertake a survey and that the cost be met from the Maori Land Court Special Aid Fund.

[18] A consensus was reached and the Court ordered that a survey be commissioned and a report back to the Court be provided pursuant to section 69(2) and section 98 of Te Ture Whenua Maori Act 1993.[6] That order was confirmed during a judicial conference with His Honour Judge Clarke held on 31 July 2008.[7]

[19] The survey that was commissioned took just under a year to complete and the matter was not back before the Court until 2 June 2009 when the case had to be adjourned due to the passing of the applicant's wife.

[20] The Court directed that the Registrar through the case manager should meet with the surveyor and the parties, particularly the applicant to discuss the survey report. The meeting envisaged never eventuated, primarily because the case manager was not able to pursue the issue of meeting until some months later.

[5] 102 Opotiki Minute Book 142 (102 OPO 142)
[6] 102 Opotiki Minute Book 139 (102 OPO 139)
[7] 9 Conference Minute Book 146 (9 CONF 146)

[21] There was another Court hearing in October 2009 and this direction was repeated for the benefit of the case manager. The Registrar was directed to produce a report on the information used by the surveyor.[8]

[22] When the case came back for hearing again on 8 July 2010, the Court was told that the meeting between the surveyor, the Council and the applicant had not taken place and no report was produced for Court. The Court at that point invited all those in support of the application to meet with the surveyor, Mr Nick Davis. The case was adjourned for an hour to allow this meeting to occur.[9]

[23] Deputy Registrar Dodd then reported on the discussion at the meeting. He advised that there was no agreement reached regarding the boundaries. He advised that:

> The dispute regarding the Omuriwaka Block and the survey is not a small boundary issue, it is a wider issue. It goes back prior to the 1922 plan, so no matter how many survey plans are drawn up going back to the 1922 block where the order, inferring title was made, there will never be agreement on that, on the survey. I have been asked to refer you Judge to the 1876 survey plan, which is the block that our owners are here more confident that the block should be.
>
> There is also contention between the Omuriwaka block and the boundary line to the right of the Omuriwaka block with the Tahora 2 block and our owners are clear in their minds that much of Omuriwaka block that has not been defined on the plan is within the Tahora 2 plan, would that be correct? I show that by way of this plan here.
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> The Omuriwaka block that we know is over here, this part in blue is approximately an area that the owners feel should also be called Omuriwaka, that is the major contention, there will never be agreement to the current plans as set down. I cannot go much further than that there was no agreement.

[24] Following his summary of the discussion the Court heard from those who supported the application. Their position was based on historical understandings that

[8] 111 Opotiki Minute Book 191 (111 OPO 191)
[9] 14 Waiariki Minute Book 136-154 (14 WAR 136-154)

stem back to a time before the Urewera Lands Act 1921-1922. Forceful submissions were also made regarding the autonomy of the hapu associated with Omuriwaka and pre-existing rights recognised in the Declaration of Independence 1835. Unfortunately, the Maori Land Court is not the forum to raise such issues, which rather belong in the Waitangi Tribunal. It will be through the future Urewera Settlement that some relief for those still affected by previous actions of the Crown and its agents in breach of the Treaty of Waitangi may be found.

**The Survey Evidence**

[25] The applicant relies on a map produced before the Native Land Court in 1888 by a representative chief at the time.[10] It is his case that the marks and pegs used at that time were definitive of the boundaries of Omuriwaka. He challenged the survey work completed for ML 3642 in 1923. In this respect it was stated:

> "The Applicant's claim, for the previous 43 years, is that those original boundaries are still in place and the boundaries the Council are using are assumed. In regards to paragraph 9 surveying, the survey mark pegs are not "original" in this area unless they conform to the Totara pegs placed in 1888. Pegs outside of those cannot be accepted unless proof of legal change to those boundaries is shown, and the Applicants reserve the right to maintain the Council is incorrect. (Refer appendix 3(g)(vi), the Council acknowledges ownership by the Hapu from "the Governors pool to just past the Marae entrance road." The new boundary changes, as per paragraph 9, has removed the situation. It is noted that a survey in 1982 for the boundary of Tahora 2AD and Omuriwaka, under the seal of the Council, found the boundaries to be as the existing maps supplied, in relation to the 1923 map. It was also found in surveys by Carter-Holt Harvey in January 2000 to be the same as the existing maps supplied, in relation to the 1923 map. The accuracy of the 2007 survey is found to be the 'accurate' one. It is far more than .38m 'out'. ..." [11]

[26] I note the survey report completed by GeoMatic Survey dated 13 January 2000 of the Tahora 2AD Section 2 block noted that the difference existing between the 1923 survey boundaries and that undertaken in 1982 of 0.32 metres "... is an acceptable error considering the age of the older survey and terrain." This suggests there has been some movement of boundary.

[10] Memorandum in Support of Application (9 Jan 2008) para 13-14
[11] Memorandum in Support of Application (9 Jan 2008) para 14

[27] Thus I agreed that Canmap Hawley should be commissioned by the Maori Land Court to review the existing survey information regarding this block and to provide a plan and report back to the Court. In October 2008 they reported that the area surveyed to that date comprised the road frontage of the Omuriwaka Block extending some 200m to the north along the Matahi Valley Road and also the boundaries around the smaller parcel known as Pt Omuriwaka adjacent to the bend in the river. Only one old mark was found which did not provide any security of definition to replace other positions as required. Thus, a calculation of almost every known position had to be completed, which necessitated a great deal of field work.

[28] The final report was filed with the Court on 10 June 2009 with the SO 415819 plan approved as to survey. Boundaries for the plan were adopted from ML 3642. The Waimana River boundaries and stream positions were also digitized from ML 3642. The river was plotted from a previous survey, but the river bank was not surveyed.

[29] Mr Koning submitted that the SO 415819 plan independently demonstrates that the boundary between the road reserve and the Omuriwaka Maori reservation is exactly the same as previously determined by Opus Consultants Limited RPC Limited. Thus, he submitted there was no ground for the continuation of the interim injunction.

**Further Directions**

[30] I realise that this review has taken some time to be released and that in large measure has been due to the state of this file and the fact that the Court's previous directions have not been complied with. The end result has been that there is insufficient information available as to the accuracy or otherwise of the applicant's claims. Because no meeting prior to Court occurred between the surveyor and the applicant the opportunity to discuss the matter fully could have taken place in a much more informal fashion, rather than the fraught circumstances of the Court hearing where I doubt the 1888 plan relied upon was adequately assessed.

[31] I note the original order constituting the Omuriwaka block was made under the Urewera Lands Act 1921-1922. That order was followed by a survey of the block, and

then ML 3642 was produced in 1923. In addition all the survey evidence produced since, has only considered the ML 3642 plan.

[32] But there may have been a plan that pre-dates the orders made by the Commissioners in 1922. I do not know. I do know that the applicant claims there was the previous 1888 plan and he has relied upon it for these proceedings. If what the applicant states is correct, there may be a copy of that plan on the Block file with reference to it in the original title investigation minutes. If it does exist, I should know that and then assess its accuracy. But I am not in a position to assess the accuracy of that plan or what it may mean without expert advice from a surveyor.

[33] As there may be further information in the Maori Land Court archives, a final decision cannot be made. Thus to complete my judgment I direct:

- The Registrar complete a full search of the Omuriwaka Block file and identify any plans produced during the first investigation of title hearings that predate 1923. A report under section 40 is to be produced to the Court indicating whether or not such plans exist and whether they were referred to in the original title investigation minutes. That report is to be filed with the Court within four weeks of this decision. A copy of that report is to go to all parties;

- If any further plans are found, the plans and the section 40 report are to be sent to Canmap Hawley Surveyors;

- Canmap Hawley Surveyors are to be commissioned to complete and file a report on the difference, if any, between boundaries suggested by such plans, ML 3642 and SO 415819. That report is to be filed with the Court within 2 months of receipt of those plans and the section 40 report;

- The parties are to be sent a copy of Canmap Hawley Surveyors' report immediately upon receipt by the Registrar;

[34] The Registrar is to produce a copy of such report to the Court as soon as it is received for directions as to whether the matter is to be set down for a final hearing.

Pronounced in open Court at 4.00pm in Gisborne on the 13th day of June 2011.

C L Fox
**DEPUTY CHIEF JUDGE**