

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

A20150003914

UNDER Sections 322,323 Te Ture Whenua Māori Act
1993

IN THE MATTER OF Pt Taumata 3A2B Block

WESTERN BAY OF PLENTY DISTRICT
COUNCIL AND TAURANGA CITY
COUNCIL
Applicants

Hearing: 128 Waiariki MB 9-18 dated 4 September 2015

Appearances: Mr C Bidois for the applicants

Judgment: 22 September 2015

RESERVED JUDGMENT OF JUDGE L R HARVEY

Solicitors: Mr C Bidois, East Brewster, PO Box 1742 Rotorua

Introduction

[1] Western Bay of Plenty District Council (WBPDC) and Tauranga City Council (TCC) seek an order per s 322 of Te Ture Whenua Māori Act 1993 cancelling a road line laid out over Taumata 3A2B block. They also seek an order per s 323 of the Act re-vesting the land in WBPDC and TCC as the owners.¹

[2] According to the applicants, the road line was originally intended to be set aside as a public road but was never subsequently taken by proclamation. They say that the road line is unused and now seek a cancellation so that they can grant easements over the land to benefit three iwi, who as a result of their Treaty settlements, now own forests on adjoining lands. It is argued that the easements cannot be registered while the road line remains as a separate parcel of land without ownership or title.

[3] A hearing was held on 4 September 2015. Mr Bidois confirmed that cancellation of the road line as depicted in the partition order (as amended) for Taumata 3A2B is sought. At the conclusion of the hearing, and following a request from counsel for urgency, I confirmed that a decision would issue within one month.

Issues

[4] The issues for determination are whether the Court should cancel the road line. In addition, I must consider:

- (a) Is the road line still required?
- (b) Will cancellation be detrimental to any title that relies on the road line?
- (c) Who should the road line be re-vested in?

Background

[5] In 1895 an application per s 7 of the Native Land Court Act 1886 Amendment Act 1888 was filed to have the interests acquired by the Crown in Taumata 3A2, partitioned and vested in the Crown. Orders were issued for a partition of Taumata 3A No 2 in favour of Her Majesty to be

¹ Taumata 3A2B Block is legally described as Part Lot 1-4 Deposited Plan 345266 and Lot 9 Deposited Plan 345266 and Section 6 Survey Office Plan 354471 being all the land comprised in Computer Freehold Register 392651

called Taumata 3A2A and to contain 806 acres. Taumata 3A2B was to comprise the residue of the land and contain 2,258 acres.²

[6] The order drawn up in accordance with the minutes of the hearing included a diagram of the land based on Māori Land Plan 5013. The diagram did not depict the road line the subject of this application and the total area of the block was noted as 2,258 acres. The partition order was sent for registration and a provisional title for the block issued – SAPR27/16.

[7] According to Court records, in 1915, Taumata 3A2CB was sold to Percy Laycock. Thereafter in 1928 it appears that following correspondence between the Court and the District Land Registrar the diagram contained in the partition order was amended to depict the subject road lines and the area of the block deducted accordingly. The order was sent back to the District Land Registrar and SAPR27/16 was cancelled and CT469/264 issued showing the amended area of the land and the road lines.

[8] The road line (shown as a separate instrument of title) runs through Taumata 3A2B which is now General land and owned by the applicants. On 1 May 2015 Judge Savage issued an order determining the road line to be General land.³

[9] Attempts have been made to have the status order registered against CFR 392651 however this has not been completed as CFR 392651 is General land and comprises the land now formerly known as Taumata 3A2B. Accordingly, the road line is not included in CFR 392651. It does not have a CFR title and the ownership of the road line is undefined.

The case for the applicants

Submissions

[10] Mr Bidois submits that there is no separate Court order for the road line. He says that the road line was created by amendment to the original partition order for Taumata 3A2B for which the Court had jurisdiction to do so per s 27 of the Native Land Act 1909. Counsel contends that the appropriate order to be cancelled is the partition order that created the block. Mr Bidois further submits that per s 322(1) of the Act the Court has the jurisdiction to cancel the partition order “in so far as it relates to the roadway”.

² 34 Rotorua MB 164 (34 ROT 164)

³ 96 Waiariki MB 249 (96 WAR 249)

[11] In addition, counsel submits that the road line is a separate instrument of title. He relies on the decision of *Deputy Registrar – Oharotu 4* where Judge Ambler considered the question of when a roadway order amounts to separate instrument of title for purposes of s 323 of the Act. Mr Bidois says that the amended block diagram, contained in the partition order, is the separate instrument of title as upon registration with the District Land Registrar the order gave rise to a separate freehold title in the sense referred to by Judge Ambler in *Oharotu 4*.

[12] Mr Bidois further states that additional evidence that the road line is a separate instrument of title is shown by the fact that the road line land was deducted from the total area of the block. If it had been included in the area of block it would have demonstrated an intention not to create a separate freehold title.

[13] Added to that, Mr Bidois points out that the Court had the jurisdiction to amend the partition order per s 117(1) of the Native Land Act 1909. Section 117 empowered the Court to lay out such road lines as necessary or expedient as part of any partition. In conclusion, Mr Bidois submits that it is appropriate that orders per s 323(1) of the Act are made to re-vest the land comprised in the road line, in Taumata 3A2B.

Affidavit of Mr Flaherty

[14] Michael Flaherty, a licensed cadastral surveyor and Principal of Flaherty Survey and Mapping Limited, provided an affidavit in support of the application. According to Mr Flaherty the road line has never been formalised and is now part of a private forestry road known as Galaxy Road.

[15] He says that the historical record suggests that the road line was made and Survey Office Plan 1856 was produced in anticipation of a proclamation which would have made the road line a public road. However, that proclamation never eventuated and the road line has remained a separate parcel within the applicants' land but without any separate title or ownership.

[16] Mr Flaherty goes on to say that in October 1918 Māori Land Plan 11191 issued depicting the road line as a “non legal road” and shows the net area of Taumata 3A2B after deduction of the land comprised in road line as 2,264 acres. He considers that the Court amended the partition order diagram for the land based on these plans.

[17] In addition, Mr Flaherty adds that in August 1928 the District Land Registrar wrote to the Court noting that some of the roads depicted on Māori Land Plan 11191 were not public roads and that the matter be investigated by the Survey Office and the diagrams amended accordingly. Mr Flaherty says that the diagram for the block was never amended and the road line continues to exist as a separate parcel within Taumata 3A2B as shown on CFR 392651.

[18] Mr Flaherty says that the applicants' have agreed to grant registered easements over the road line for the benefit of three iwi who, as a result of their Treaty Settlements, now own the forests on the adjoining lands. He also says that those easements cannot be registered while the road line remains on the register.

The Law

[19] Sections 322 and 323 of the Act provide:

322 Court may cancel roadways

- (1) Where any roadway that has been laid off by an order of the court, whether before or after the commencement of this Act, has not been declared to be a road, the court may, on application, **vary or cancel that order in so far as it relates to the roadway.**
- (2) Where application for the variation or cancellation of an order under this section is made by any person other than the Chief Surveyor of the district in which is situated the land over which the roadway has been laid off, notice of the variation or cancellation of the order shall be given to the Chief Surveyor by the Registrar.
- (3) The court may vary or cancel any order under this section notwithstanding that, after the order was made, the land over which the roadway was laid out ceased to be land to which this Part applies.

(Emphasis added)

323 Powers of court on cancellation of roadway

- (1) Where, pursuant to [section 322](#), 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 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.

[20] The Court in *Parker – Pt Waipahihi 2B2B Roadline* in considering s 322 stated:⁴

[15] Although the section does not provide any express guidance as to when the Court should cancel a roadway, it is self evident that the Court will only do so when a roadway is no longer needed and provided that the cancellation will not be detrimental to any title that relies on the roadway.

[21] I adopt the reasoning set out in this decision.

Discussion

Is the road line still required?

[22] Based on the evidence I am satisfied that the Court did not create a separate order for the road line. It was included as part of the amended partition order diagram approved by Judge Holland on 14 February 1928. I accept Mr Bidois' submission that the Court had the power to do so per s 27 of the Native Land Act 1909 which provides:

27. (1.) The Court or any Judge thereof may at any time make or authorise to be made in any order, warrant, record, or other document made, issued, or kept by the Court all such amendments as are considered necessary to give effect to the intended decision or determination of the Court or to record the actual course and nature of any proceeding in the Court.

(2.) Any such amendment shall take effect as of the date of the order, warrant, record, or other document so amended; but no such amendment shall take away or affect any right or interest acquired in good faith and for value before the making of the amendment.

(3.) If any order or other document so amended has theretofore been registered by a District Land Registrar, a copy of the amendment under the seal of the Court shall be transmitted to him, and he shall make all necessary consequential amendments in the registration of the title to any land affected thereby.

(4.) This section shall extend and apply to all such orders, records, warrants, and other documents as aforesaid, whether made before or after the commencement of this Act.

⁴ *Parker – Pt Waipahihi 2B2B Roadline* (2015) 52 Waiariki MB 295 (52 WAR 295).

[23] I therefore find that if the road line is to be cancelled the appropriate order to vary is the original title order *in so far as it relates to the road line*. I also agree with Mr Flaherty that the road line has not been proclaimed a public road, there is no evidence of proclamation and I consider that sufficient enquiries have been made to satisfy the Court that the road is not a public road.

[24] In addition I find that the road is not currently being used and has been superseded by the use of Galaxy Road. I also take into account the fact that the applicants are seeking to grant easements over their land to provide access to adjoining forestry lands and neighboring blocks.

Will cancellation be detrimental to any title that relies on the road line?

[25] At the hearing I discussed with Mr Bidois the terms of the proposed easement:⁵

Mr Bidois: So the current situation out on the land today Sir is that the applicant's land has within it this orphaned area that comprises the intent of road-line, for which there is no certificate of title and this is leading to some real practical difficulties Sir.

The application comes before the Court because the two coun[ci]l who are the applicants' have agreed that they will grant an access easement over the land within the road-line to Ngāti Rangiwewehi and other iwi who have received back forests in this area.

The Crown is anxious to ensure that they get permanent access but of course no easement can be granted because there is currently no title over which to register it.

The Court: Are there any terms associated with that easement – in the future between the Councils and these groups?

Mr Bidois: I haven't looked at that detail Sir. However, it is not solely the iwi who would be receiving the right of access it is also the adjoining private landowners and I would say some dairy farmers who use the land and I apologise for not looking at this, but if there are maintenance obligations for instance -

[26] No objections have been received in relation to the applications. As to the issue of whether the road line is a separate instrument of title, I note that in *Deputy Registrar – Oharotu 4* this Court reviewed the historical legislation on roads. Judge Ambler noted several points from the review:⁶

[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.

⁵ 128 Waiariki MB 9 (128 WAR 9) at MB 14

⁶ *Deputy Registrar – Oharotu 4* (2010) 7 Taitokerau MB 234 (7 TTK 234)

[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.

...

[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.

[27] Judge Ambler then went on to consider the indicia of a separate freehold order:⁷

[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.

[28] Taking into account the factors set out by Judge Ambler I find that the road line is a separate instrument of title. It was not set out by a separate order. Rather it was contained in the amended diagram for the title order. That order was amended on the basis that a survey plan had

⁷ Ibid at [49] to [54]

been produced with a view to setting out the road line to be proclaimed as a public road. The area of Taumata 3A2B was adjusted to exclude the area of the road line.

[29] Despite the fact that the proclamation never eventuated, there are no records of the Court to show that the partition order was ever amended to remove the road line. Nor was the area of Taumata 3A2B adjusted to include the land contained in the road line. Further, CFR 392651 continues to exclude the road line which is recorded as a separate parcel with Land Information New Zealand. In conclusion, I am satisfied that the road line should be cancelled. The remaining issue is ownership.

Who should the road line be re-vested in?

[30] Section 326 of the Act helpfully provides:

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) 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.

[31] The effect of s 326(1) is that, upon the transfer of "land to which the roadway gives access", the ownership interests in the roadway automatically transfer to the new owners unless that is expressly excluded in the transfer documents.⁸ The evidence before me is that the transfers did not purport to exclude an ownership interest in the roadway. Therefore, the current owners of the roadway are WBPDC and TCC.

[32] It is appropriate that the road line be cancelled and re-vested in the applicants. Both blocks are General land since there is no issue with their status.

⁸ *Parker – Pt Waipahihi 2B2B Roadline* (2015) 52 Waiariki MB 295 (52 WAR 295)

Decision

[33] The application of the Western Bay of Plenty District Council and the Tauranga City Council seeking an order, per s 322 of Te Ture Whenua Māori Act 1993, cancelling a road line laid out over Taumata 3A2B, is granted.

[34] The application, per s 323 of the Act, re-vesting Taumata 3A2B in the Western Bay of Plenty District Council and the Tauranga City Council as the owners, is granted.

Pronounced at 4.00 pm in Rotorua on Tuesday this 22nd day of September 2015

L R Harvey
JUDGE