

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

A20130001016

UNDER Section 326B, Te Ture Whenua Māori Act 1993
IN THE MATTER OF Te Touwai B19A1
BETWEEN LAVINIA LISA ROBERTS
Applicant

Judgment: 30 October 2017

JUDGMENT (No 2) OF JUDGE M P ARMSTRONG

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Introduction

[1] On 15 October 2015, Judge Ambler and I granted an easement providing access to Te Touwai B19A1 across Te Touwai B16 and Te Touwai B19A2. Those orders were conditional on:¹

- (a) Approving a survey plan depicting the route of the easement and
- (b) Determining the level of compensation payable and to whom it is to be paid.

[2] This decision determines those remaining issues. I also consider whether I should cancel the interim injunction, granted by Judge Spencer on 3 December 2010, as the easement is now in place.²

Further information received

[3] On 17 December 2015, Fintan McGlinchey of Northland Valuers was engaged pursuant to ss 69(2) and 98 of the Te Ture Whenua Māori Act 1993 to prepare a valuation on compensation payable for the easement. That valuation was received and distributed to the parties. Submissions on the valuation, and compensation payable, were received from Mr Hockly and Mr Simich on 25 May 2016. On 1 March 2017, Mr Hockly filed a draft plan depicting the easement.

[4] I apologise to the parties for the delay in determining these final issues.

Should the plan be approved?

[5] The draft title plan ML505167 indicates the easement is to be recorded as a non-primary parcel per the ‘Interim guideline to aspects of survey requirements applicable to Maori land surveys.’ The plan correctly identifies the path of the easement granted in our earlier decision, and once approved, will be capable of registration as an encumbrance against the servient titles with appurtenant rights to B19A1.

¹ *Roberts – Te Touwai B19A1* (2015) 114 Taitokerau MB 131 (114 TTK 131).

² 14 Taitokerau MB 1-2 (14 TTK 1-2).

[6] The plan has not yet been approved as to survey by LINZ.³ This has to occur before it can receive final approval by the Court. The applicant will need to file the plan with LINZ, and once approved there, refer it back to the Court.

What compensation should be paid and how should it be paid?

[7] The valuation from Mr McGlinchey assesses compensation at market value for the easement crossing B16 at \$10,250.00, and for B19A2 at \$1,350.00.⁴ Mr Simich accepts these figures. Mr Hockly accepts Mr McGlinchey has correctly assessed compensation at market value, but argues that this should be reduced due to payments already made to owners in B16 and their whānau.

[8] I find that Mr McGlinchey has correctly assessed compensation at market value. I now consider what compensation should be paid for the easement across each block, and how it should be paid.

What compensation should be paid for the easement across B16?

[9] Mr Hockly argues the compensation assessed by Mr McGlinchey should be reduced taking into account:

- (a) The payments by the Roberts whānau to the Urlich whānau in the form of livestock between 1968 to 1969; and
- (b) The payments to Isabella Urlich in 2004.

[10] In our earlier decision, Judge Ambler and I found that Clem Urlich allowed a road to be built across B16, to access B19A1, as repayment for his rescue at sea. We also accepted Ms Dawson's evidence that her grandmother paid Clem for this access by providing a bull, a cow and 12 sheep.⁵ Mr Hockly argues the compensation for the easement should be reduced by the current value of this livestock.

³ The current status of the plan according to Landonline is 'pre-allocate'.

⁴ The valuation summary incorrectly states that the valuation for B19A2 is \$1,350. The compensation assessment in the body of the report correctly identifies the figure as \$1,350.00.

⁵ 114 Taitokerau MB 131-165 (114 TTK 131-165) at 147 – 148.

[11] I accept that this livestock is relevant in determining the compensation now payable for the easement. I do not accept that the overall compensation assessed by Mr McGlinchey should be reduced by the current value of the livestock.

[12] Clem Urlich and Mautini Roberts agreed on access across B16 in return for the sea-rescue. Clem also received compensation for this access in the form of livestock. However, he was not the sole owner of the block. He owned 2.75 out of a total 12 shares. The stock given to Clem cannot be treated as compensation for the other owners.

[13] I find that the livestock provided full and final compensation to Clem Urlich. No further compensation is payable to his successors. This does not affect compensation payable to the other owners. I address below how the applicant is to give effect to this. The current owners in B16, who received their interests through succession to Clem Urlich, are William Urlich, Marjorie Urlich, Elizabeth Smith, Clem Bowman, Clyde Bowman, Peter Bowman and Theresa Herewini.⁶

[14] Mautini Dawson gave evidence that, in 2004, Haumia Roberts paid \$1,200.00 to Isabella Urlich for using B16 to access B19A1. Mr Hockly argues the compensation assessed by Mr McGlinchey should be reduced by the amount of these funds already paid. Ms Dawson's evidence is as follows:⁷

And then this is what happened to nan, when nan passed away in 1996 December 24th. "After she had passed away Bella told Haumia that they would have to pay for the road, trusting her to be acting on behalf of the owners of the block. Haumia paid four payments of \$300 to Bella in 2004. However, this money never went to the owners and we know now that Bella is not and never had an interest in B16.

[15] Ms Urlich is not an owner in B16. There is no evidence that Ms Urlich had authority to act for the owners in B16 when demanding or receiving payment in 2004. Ms Dawson confirms that the money did not go to the owners. It is difficult to accept that this should be treated as compensation part paid to the owners.

[16] Mr Hockly contends that the obligation is on the owners in B16 to take proceedings to recover those funds from Ms Urlich. I do not agree. If Mr Roberts paid money to Ms

⁶ 8 Registrars Taitokerau MB 9 (8 RGTO 9), 3 Whangarei Succession MB 240 (3 WH(S) 240), 4 Kaikohe Succession MB 45 (4 KH(S) 45).

⁷ 86 Taitokerau MB 189-281 (86 TTK 189-281) at 211.

Urlich in the mistaken belief that she was entitled to receive it, the obligation is on Mr Roberts, not the owners in B16, to recover those funds.

What compensation should be paid for the easement across B19A2?

[17] Although not addressed by Mr Hockly or Mr Simich, I address whether compensation should be paid for the easement across B19A2.

[18] There are 49 owners in B19A2 who hold shares as tenants in common. The Whare and Mautini Roberts Whānau Trust is one of those owners. There is no administration structure administering this block. The other owners in B19A2 have not participated in this proceeding.

[19] As an owner as a tenant in common, the Roberts whānau, through their whānau trust, are entitled to equal possession and ordinary use of B19A2 along with all other owners. This includes the right to pass and repass over the block. Although the easement granted crosses B19A2 in favour of B19A1, this simply confirms an existing right held by their whānau trust.

[20] As there is an existing right to use B19A2, I consider that compensation should not be paid for the easement crossing that block. If the Whare and Mautini Roberts Whānau Trust alienate their shares in B19A2, or B19A1, the remaining owners in B19A2 will be entitled to bring a claim for compensation for the easement.

How should the compensation be paid to the owners in B16?

[21] Mr Hockly does not address how payment should be effected. Mr Simich argues that 27.08 per cent of the compensation should be paid to him for the Simich whānau. However, Mr Simich is not an owner in the block. His deceased mother, Mere Urlich, is an owner. Mr Simich and his siblings have not succeeded her interests. Similar difficulties arise for other owners who are deceased or whose contact details are not known. At least one owner, Marjorie Te Rehu, advised she is not seeking compensation for the access across B16.

[22] To address these issues, I consider that compensation should be payable on demand from the individual owners in B16. This compensation should be calculated at \$10,250.00 (being the market value for the easement across B16) apportioned according to the shares held by that owner. The demand for payment should be made in writing to the trustees of the Whare and Mautini Roberts Whānau Trust and should include the following information:

- (a) The contact details for the owner (or his or her legal representative); and
- (b) The bank account to which the funds should be paid.

[23] If payment is not made within 20 days of the trustees receiving a lawful demand the owner will need to take steps to enforce payment.

[24] Where the owner has passed away, a valid demand can only be made by the administrator of his or her estate. This means that for deceased owners, their successors must obtain an order granting probate, letters of administration, or succession, before they can demand payment of their share of the compensation.⁸ Where a demand for payment is made by an administrator of a deceased owner's estate, the administrator should attach with the demand a copy of the order appointing him or her as the administrator of the estate.

Should the interim injunction be cancelled?

[25] On 3 December 2010, Judge Spencer granted an interim injunction preventing the owners of B16 from obstructing access to B19A1.⁹ As access has now been granted by easement, the interim injunction is no longer required. It is appropriate to cancel that order.

Decision

[26] I direct the applicant to submit the plan with LINZ for approval as to survey. Once obtained, the applicant is to refer the plan back for final approval by the Court.

⁸ Probate and letters of administration are granted by the High Court. Succession orders are granted by the Māori Land Court.

⁹ 14 Taitokerau MB 1-2 (14 TTK 1-2).

[27] No compensation is payable to the owners in Te Touwai B19A2 for the easement crossing that block.

[28] Compensation is payable to the individual owners in Te Touwai B16 as follows:

- (a) Each owner in B16 is entitled to compensation calculated at \$10,250.00 (as market value for the easement across B16) apportioned according to the shares held by that owner;
- (b) The trustees of the Whare and Mautini Roberts Whānau Trust must pay the relevant portion of compensation to an owner, or his or her legal representative, within 20 days of receiving a valid demand for payment;
- (c) A demand for payment must be signed by the owner, or his or her legal representative, and contain contact details for the owner, and the bank account to which payment is to be made. Where the demand is signed by a legal representative of the owner, the demand must attach sufficient evidence demonstrating that the representative has legal authority to act on behalf of the owner or his or her estate;
- (d) William Urlich, Marjorie Urlich, Elizabeth Smith, Clem Bowman, Clyde Bowman, Peter Bowman and Theresa Herewini (and their successors) are not entitled to compensation.

[29] The easement granted on 15 October 2015 is varied to include the above terms.

[30] The interim injunction granted by Judge Spencer dated 3 December 2010 is cancelled.

Pronounced in open Court in Whangarei at 9:20 am on Monday this 30th day of October 2017.

M P Armstrong
JUDGE