IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20140007528

UNDER	Section 320, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Part Whakapoungakau 1B3G Roadway
BETWEEN	NEIL SIMON QUAIFE AND ANGELA DAWN BETTERTON-QUAIFE Applicants

Hearing: 102 Waiariki MB 38 dated 5 August 2014
119 Waiariki MB 25 dated 29 April 2015
(Heard at Rotorua)

Appearances: K Sewell for N Quaife and A Betterton-Quaife
J Koning for C Faulkner

Judgment: 10 September 2015

RESERVED JUDGMENT OF JUDGE C T COXHEAD

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Introduction

[1] This decision concerns an application to take and declare a portion of Māori land to be a public road so the owners of neighbouring general land may facilitate a subdivision.

[2] The applicants ask the Court to declare a portion of Part Whakapoungakau 1B3G Roadway to be a public road, for the purpose of providing legal frontage to Glenroy Place in favour of Lot 2 Deposited Plan South Auckland 9908 ("Lot 2 DPS 9908"). The applicants own Lot 2 DPS 9908, which is general land and which is separated from Glenroy Place by Part Whakapoungakau 1B3G Roadway. They wish to subdivide their land. The applicants seek to have a section of the roadway block declared public road and vested in the Rotorua District Council to facilitate such subdivision.

Background

[3] Part Whakapoungakau 1B3G Roadway ("the roadway block") was laid out as a roadway by order of the Court on 21 November 1912, to provide access to subdivisions of Whakapoungakau 1B No 3 on partition.[1] The roadway block originally joined State Highway 33 and had an initial area of 7588 square metres.

[4] On 30 June 2004, orders were made to cancel a portion of the roadway block where it joined State Highway 33 and vest that portion in the owners of Whakapoungakau 1B 3G1 block, the only remaining Māori freehold land adjoining the roadway block.[2] At the same time, an order was also made recommending that a further portion of the roadway block be proclaimed as a public road, to provide permanent legal and physical access to subdivided lots of General land adjoining the roadway block. That portion of the roadway block subsequently became part of Glenroy Place.

[5] Following the 2004 orders, a survey plan was prepared to record the changes to the roadway block. This was approved by the Court and deposited with Land Information New Zealand. The survey plan required slight amendments to the original orders and the final areas were subsequently confirmed on 24 August 2005.[3] That plan, ML 332881, shows the remaining area of the roadway block as being 5066 square metres and identifies

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1 58 Rotorua MB 104 (58 ROT 104).
2 282 Rotorua MB 43 (282 ROT 43).
3 292 Rotorua MB 6 (292 ROT 6).

that a small portion of the roadway block stretches along the boundary between Lot 2 DPS 9908 and Glenroy Place.

Procedural History

[6] The application was filed by Neil Quaife and Angela Betterton-Quaife on 17 June 2014, pursuant to s 320 of Te Ture Whenua Māori Act 1993 ("the Act"). The matter was initially heard by Judge Harvey on 5 August 2014 where the proposal in relation to the roadway block was discussed and where Judge Harvey indicated that, on the face of it, the application did not appear unreasonable.[4]

[7] At the initial hearing, Catherine Faulkner, an owner in Whakapoungakau 1B 3G1 block, raised the issue of compensation for the owners. Judge Harvey considered the matter of compensation, along with an issue regarding informal use and access by a neighbouring landowner, warranted further examination and he indicated that a lawyer would be appointed to assist. Judge Harvey subsequently appointed Mr Koning as counsel to represent Ms Faulkner and directed that submissions be filed by 7 January 2015.[5]

[8] Submissions were eventually filed by Mr Koning on 9 March 2015, indicating that Ms Faulkner reserved her position regarding the application, but the matter could be brought on for a hearing. A final hearing was then held before me on 29 April 2015, where I reserved my decision.[6]

Applicants' submissions

[9] Kevin Sewell, a surveyor for Geomatic Surveys, acted for the applicants Mr Quaife and Mrs Betterton-Quaife. He set out the following grounds for the application:

(a) The Court records indicate that the roadway block is not noted as a current Māori land title and has no registered ownership;

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4 102 Waiariki MB 38 (102 WAR 38).
5 109 Waiariki MB 268 (109 WAR 268).
6 119 Waiariki MB 25 (119 WAR 25).

(b) The applicants own land in general title, being Lot 2 DPS 9908 (SA9D/351), which adjoins the roadway block and has existing legal frontage following a previous subdivision;

(c) The applicants wish to have legal frontage to Glenroy Place, to permit future subdivision of one new house site on their land; and

(d) In order to facilitate a subdivision, both the owners and the Rotorua District Council require a small section of the existing roadway block to become a public road.

[10] Mr Sewell advised that only a small sliver of the roadway block separates the applicant's general land from the public road, Glenroy Place, effectively restricting legal frontage. Lot 2 DPS 9908 has its legal access via State Highway 33 but also has a gate providing physical access to Glenroy Place, although such access does traverse the roadway block.

[11] Mr Sewell submitted that when part of the roadway block was previously proclaimed as a public road, the intention was that the legal boundary of the public road would intersect the applicants' boundary of Lot 2 DPS 9908 and would therefore provide Lot 2 DPS 9908 with legal frontage to Glenroy Place. Mr Sewell asserted that this is evidenced by the original scheme plan of the subdivision submitted as part of the resource consent and approved by the Rotorua District Council. He also referred to plan DP 361992 which legalised the subdivision. Mr Sewell argued that the Māori land plan ML 332881 defined a boundary that was different to the proposed scheme plan and created the small sliver of roadway between Lot 2 DPS 9908 and Glenroy Place.

[12] The applicants therefore propose that this small area of the roadway block, comprising 162 square metres, be cancelled as a roadway and the land be legalised as a public road, to provide legal frontage and access to Lot 2 DPS 9908, rather than just physical access. The residue area of 4904 square metres will remain as an unrestricted Māori roadway.

[13] Mr Sewell submitted that the applicants have no interest in obtaining ownership of the land and the proposal will not affect access to any Māori land or create any landlocked land. Mr Sewell advised that, although there are currently no registered owners of the roadway block, the owners of Whakapoungakau 1B 3G1 block have an interest in the land and have indicated that they may make an application for ownership of the roadway block. Mr Sewell submitted that preliminary verbal consultation with a resident owner of Whakapoungakau 1B 3G1 block indicated there would likely be little objection to the proposal due to the minimal area concerned. Further, the Rotorua District Council does not have any objection to the application, but made it clear that they do not wish for the remainder of the roadway block to become a public road.

[14] Mr Sewell further submitted that over recent years, the New Zealand Transport Agency ("NZTA") has discouraged or refused to allow additional traffic access onto State Highway 33. He argued that it is therefore desirable that any subdivided northern portion of Lot 2 DPS 9088 has a safe legal frontage to Glenroy Place, rather than dependence on approval from NZTA for access to State Highway 33, which may not be forthcoming. Mr Sewell noted that consent from NZTA for the current proposal is not required as the legalised road does not front the State Highway.

Ms Faulkner's submissions

[15] John Koning acted for Ms Faulkner and identified issues relating to the roadway block, in terms of current trespass and injury occurring to the roadway block by another adjoining landowner, and the intention of the owners of Whakapoungakau 1B 3G1 block to cancel the remainder of the roadway and have it vested in the underlying owners. Mr Koning submitted that those issues were not relevant to the current application and could be dealt with at a later date by further application to the Court.

[16] In terms of the current application, Mr Koning questioned whether s 320 of the Act could be used in the present circumstances. Mr Koning submitted that s 320 could only apply in the situation where there was a roadway that had been formed properly and was being used as a roadway, which was then sought to be declared a public road. He argued that you cannot simply "cherry pick" small pieces of Māori land to declare as public roads.

Mr Koning submitted that the roadway block is not currently being used as a roadway and the original purpose of the roadway, to give access to subdivisions of Whakapoungakau 1B No 3, is no longer necessary. He argued that these factors should be taken into account by the Court in determining whether a recommendation should be made.

[17] Mr Koning submitted that if a recommendation under s 320 was contemplated, there would need to be some benefit to the underlying owners, or those for whom the roadway was created. He argued that there does not appear to be any such benefit in the current proposal, the underlying owners are simply being asked to agree to a portion of the land being taken and vested in the Rotorua District Council. Further, the applicants have not suggested or offered any compensation and there does not appear to be any ability for the Court to make a recommendation conditional on payment of compensation. Mr Koning noted that the matter of compensation would have been addressed when the roadway was initially laid out.

[18] Finally, Mr Koning submitted that legalisation of part of the roadway block as a public road was not necessary for continued access to the applicants' land, given that they have existing legal access to State Highway 33. Mr Koning pointed out that the application was made to simply allow additional benefit by way of subdivision to Lot 2 DPS 9908.

The Law

[19] Section 320 provides as follows:

> **320 Roadways may be declared roads or streets**
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> (1) The Governor-General may, by Proclamation made in accordance with this section, declare that the land comprised in any roadway laid out by the court under this Part or under any corresponding former enactment shall be a road or street.
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> (2) No roadway shall be declared a road or street pursuant to this section except in accordance with a recommendation made by the court to the Minister of Transport.
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> (3) In making a recommendation for the purposes of this section, the court shall describe the roadway with sufficient particularity to enable its boundaries to be accurately determined.

(4) No roadway shall be declared a road or street pursuant to this section without the consent in writing of—

(a) the New Zealand Transport Agency and the territorial authority for the district in which the land is situated, in the case of a State highway or a proposed State highway; or

(b) the territorial authority for the district in which the road or proposed road is situated.

(5) On the date of the publication in the *Gazette* of a Proclamation issued under subsection (1), or on such later date as may be specified in that Proclamation as the date when it shall have effect, all land to which the Proclamation relates shall vest as a road in the territorial authority within whose district the land is situated, but otherwise free from all reservations, restrictions, trusts, rights, titles, estates, or interests of any kind.

(6) The provisions of section 57 of the Public Works Act 1981 shall, as far as they are applicable and with any necessary modifications, apply to any Proclamation issued under this section.

[20] Section 320 is contained within Part 14 of the Act. In that respect, ss 286 and 287 of the Act are also relevant. Those provisions read as follows:

286 Purpose of this Part

(1) The principal purpose of this Part is to facilitate the use and occupation by the owners of land owned by Maori by rationalising particular landholdings and providing access or additional or improved access to the land.

(2) Where it is satisfied that to do so would achieve the principal purpose of this Part, the court may make partition orders, amalgamation orders, and aggregation orders, grant easements, and lay out roadways in accordance with the provisions of this Part.

287 Jurisdiction of Courts

(1) Subject to subsection (3), the Maori Land Court shall have exclusive jurisdiction to make partition orders, amalgamation orders, aggregation orders, and exchange orders in respect of Maori land, and to grant easements and lay out roadways over Maori land.

(2) The jurisdiction conferred on the Maori Land Court by this Part shall be discretionary, and, without limiting that discretion, the court may refuse to exercise that discretion in any case if it is not satisfied that to do so in the manner sought would achieve the principal purpose of this Part.

(3) Nothing in this section shall apply in respect of any Maori reserve.

> (4) Except as provided in subsection (1), nothing in this Part shall limit or affect the jurisdiction of the High Court.

[21] In *Ngunguru Coastal Investments Limited – Horahora 1B4A2D1 and Other Blocks*, the Māori Appellate Court considered an application under s 320 and noted that the Māori Land Court's role in such an application is to make a recommendation or not to the Minister of Transport that a roadway be declared a road or street.[7] The Appellate Court highlighted the relevance of ss 286 and 287 and noted that Part 14 of the Act is not a self-contained code and must be construed and applied in the context of the Act as a whole, including the principles outlined in the Preamble and ss 2 and 17. There is therefore emphasis on the retention, effective use, occupation, management and development of Māori land and in providing access or improved access to the land.

[22] The Appellate Court in *Ngunguru Coastal Investments Limited* also considered that, while there is no mandatory obligation on the part of the Court under s 320 to seek the views of the owners, the Court *may* take into account the level of support or otherwise for the application, given that the effect of any recommendation made will result in the land being alienated from the owners and vested in a territorial authority. To make such an order without any input from the owners would offend the spirit and letter of the Act:[8]

> [71] Given the clear legislative directions outlined in the Preamble, ss 2, 17, 286 and 287 any recommendation made by the Māori Land Court pursuant to s 320 requires an exercise of discretion. The Court obviously has to take into account those matters outlined in s 320(4). The Court must also notify the relevant owners of a s 320 application and in exercising its discretion may also take into account the views of the owners. To do otherwise would be tantamount to permitting an alienation of Māori land without the owners' knowledge or possible input. That offends against the spirit, intention and principles of the Act.

[23] An earlier decision of this Court in *Tauhara Middle 4A1J11A*, referred to by the Māori Appellate Court in *Ngunguru Coastal Investments Limited*, also emphasised the importance of notice being given to owners and the consideration of their views.[9] The

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7 *Ngunguru Coastal Investments Limited – Horahora 1B4A2D1 and Other Blocks* [2012] Māori Appellate Court MB 80 (2012 APPEAL 80).

8 At [71].

9 *Tauhara Middle 4A1J11A* (2002) 75 Taupo MB 151 (75 TPO 151).

Court noted in that decision that the proposal to declare the Māori roadway a public road and vest it in the local council provided little advantage to the owners. Rather, the advantages were entirely to the adjoining lands, some of which were General land and some Māori freehold land, and to other users of the roadway. The Court considered that in circumstances where the road exists and is operative, where there was no advantage or compensation to the owners, and where the owners were opposed, an order should not be made.

[24] In *Walters – Horahora 1B4A2D1* the Court also refused to grant an order per s 320 where there was no support from the owners.[10] In doing so the Court noted that the effect of such an order in that case would be to remove the owners' rights to apply to vary or cancel the roadway and would remove any underlying rights of the owners in law and equity that attached to their interests in the land.

Discussion

[25] Before addressing whether a recommendation to declare a portion of the roadway block a public road should be made, a primary consideration is Mr Koning's argument regarding whether s 320 of the Act applies in this case.

[26] I find it difficult to concur with Mr Koning's interpretation that s 320 can only be used where the roadway is formed properly and is already being used as a roadway in the nature of a public road. Essentially that s 320 could only be invoked to formalise the existing situation. I do not consider that the authorities make this specific distinction in considering a recommendation under s 320. The wording of s 320 simply refers to "…the land comprised in any roadway laid out by the Court…" and does not further qualify the nature or use of that roadway.

[27] In a previous decision relating to this block, Judge Harvey did in fact make a recommendation under s 320 where the existing roadway was not being used as a public road at that time, although as Mr Koning argued, it was contemplated to be used as such as part of the subdivision of the area, albeit at the risk that the Māori Land Court would not grant such orders. The difficulty I have with Mr Koning's proposition is that arguably it

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10 *Walters – Horahora 1B4A2D1* (2011) 22 Taitokerau MB 209 (22 TTK 209).

encourages the public to use Māori roadways as public roads prior to any application being made to the Court, in order to establish the applicability of s 320. I do not consider that would have been the intention of the legislature or that such an interpretation is supported by an ordinary reading of the section. The roadway block is a roadway laid out by the Court and I am satisfied that s 320 applies in this case.

[28] Moving to the substantive issue, prior to making any recommendation that a roadway be declared a public road under s 320 of the Act, the Court is required to consider the matters contained in s 320(4), but must also ensure that notice has been given to the owners. In exercising its discretion the Court should have regard to the principle purpose of Part 14, which is to facilitate the use and occupation by the owners of land owned by Māori, being Māori land and general land owned by Māori, which can be achieved by providing access or additional or improved access to the land. The kaupapa of the Act in terms of the Preamble and ss 2 and 17 is also relevant and the Court may also take into account the views of the owners.

[29] In the present case, the portion of roadway proposed as public road is not a state highway and accordingly only the consent of the relevant territorial authority is required. There is no issue in that regard as the Rotorua District Council has indicated it has no objections to the proposal. I also note that while there are currently no recorded owners of the roadway block, Whakapoungakau 1B 3G1 block is the only remaining Māori freehold land adjoining the roadway block and a portion of the roadway block was previously cancelled and vested in those owners. Although ultimately an application to determine the owners of the roadway block is needed, I am satisfied that the owners of Whakapoungakau 1B 3G1 have an interest in the roadway block and have had sufficient notice of the application and sufficient opportunity to express their views.

[30] The remaining issues for consideration are therefore whether a recommendation per s 320 will achieve the principal purposes of the Act and of Part 14, and what level of support or otherwise exist for such a recommendation.

[31] In support of their application, the applicants pointed to the intention regarding the boundary of the public road when part of the roadway block was originally incorporated into Glenroy Place. Mr Sewell argued that the public road was to intersect the boundary of

Lot 2 DPS 9908 and thereby provide legal frontage, which he says is evidenced by the original subdivision scheme plan. I note that there was broad support for the original application from the owners of Whakapoungakau 1B 3G1 block at that time, and there were no objections. On examining both the original subdivision scheme plan and the scheme plan relied on in the earlier decision of Judge Harvey, I agree that on the face of those plans it does appear that the public road was to intersect the applicants' boundary at some point.

[32] However, I make two observations. First, both of those plans were scheme plans and not the final survey plans deposited with Land Information New Zealand. The final survey plan of the subdivision is DP 361992, which does show the existence of a sliver of the roadway block between the applicants' boundary and the public road. Similarly, when the final survey was completed in relation to the Māori Land Court orders and ML 332881 deposited with Land Information New Zealand, it also shows the existence of the small sliver of roadway block.

[33] Secondly, the areas on the scheme plan from which the earlier Māori Land Court orders were made, and the final ML 332881 plan, generally equate. There was a small adjustment made on final survey, where the area of the public road portion increased from 1400 square metres to 1401 square metres. However, if, as Mr Sewell contends, the original intention was that Glenroy Place would intersect the applicants' boundary, then I would expect at least a portion of the sliver in question (162 square metres) to be reflected in the areas on the plan. There is no such discrepancy and the ML plan reflects the original scheme plan in terms of area. Mr Sewell may be correct regarding the original intention of the boundary of Glenroy Place, however that is not borne out by the plans. Any support of the owners of Whakapoungakau 1B 3G1 for the original application cannot therefore extend to the present proposal.

[34] The application seeks a recommendation to declare a portion of the roadway block a public road and vest it in the Rotorua District Council, for the purpose of allowing additional access to the applicant's general land and to facilitate future subdivision of their land. The recommendation is not necessary for continuing access to the applicant's land, it does not appear to provide additional or improved access to the roadway block, as Māori land, and the applicants have not attempted to show that it will in any form. The applicants

have also failed to show any other benefit to the Māori land and, although the issue of compensation was raised, it appears that an offer of compensation has not been entertained by the applicants. In other words, the applicants simply seek additional access to their lands to secure an added benefit by way of subdivision in the future. While I agree that the area sought to be declared a public road is relatively small, I consider that the benefit of the proposal appears to be entirely in favour of the applicant's general land.

[35] In addition, the applicants suggested that initial discussions indicated that there would likely be little objection from the owners of Whakapoungakau 1B 3G1, however, beyond notification of the Court hearings, there is no evidence that any attempts have been made to ascertain the views of those owners, or to secure any formal indication of support. This is especially surprising given that there are only a small number of current owners. Ms Faulkner appears to be the only owner who has expressed an opinion with regard to the application and, through her counsel, she has indicated her objection to the proposal as it stands. Without any further indication of support or otherwise from additional owners of Whakapoungakau 1B 3G1 block, Ms Faulkner's views take on primary importance in that regard and the Court cannot conclude that it is the owners' wish to give effect to the application.

Decision

[36] Given the factors set out above, the proposal contained in the application does not achieve the principal purpose of Part 14 of the Act, to facilitate the use and occupation by the owners of land owned by Māori. I decline to exercise my discretion to make a declaration per s 320 of the Act declaring part of the roadway block as a public road. The application is therefore dismissed.

[37] While this matter is now concluded, there may be other options available to the applicants, such as an easement arrangement, which would need to be pursued on its merits through a further application, once the owners of the roadway block have been determined.

Pronounced at 9.00 am in Rotorua this 10th day of September 2015.

C T Coxhead
JUDGE