IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20120010362
A20140008262

UNDER	Sections 24, 316 and 326B, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Waiomu 3B 2B 2B 3B 2 Block and Waiomu 3B2B2B3B1B Block
	PETER CHARLES SMITH ON BEHALF OF THE TRUSTEES OF WAIOMU 3B 2B 2B 3B 2 BLOCK Applicant

A20130010596

UNDER	Section 24, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Waiomu 3B2B2B3B1B Block
	JULIE PHYLLIS BEYNON-GAINFORT AND RONA DIANNE BEYNON Applicants

Hearing: 24 July 2015 (104 Waikato Maniapoto MB 77-93)
(Heard at Thames)

Appearances: Mr C Bidois for Peter Charles Smith

Judgment: 28 August 2015

REASONS FOR JUDGMENT OF JUDGE S TE A MILROY

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Introduction

[1] The trustees of Waiomu 3B 2B 2B 3B 2 Block ("B2") have applied for access to their block from Pohue Creek Road over the Waiomu 3B2B2B3B1B Block ("1B"). By the time of the final hearing of this matter on 24 July 2015, it was clear that an overwhelming majority of the 1B owners who participated in a vote on the matter consented to access being granted to the B2 owners. The only question was what compensation would be required of the B2 owners.

[2] At the end of the hearing on 24 July 2015 I gave my decision, indicating that an access order would be made in favour of the B2 block over the 1B block on certain terms and conditions. The orders would be subject to survey. I gave some reasons for the decision at the hearing, but also said that I would issue a judgment giving my full reasons later on.

[3] This judgment sets out my reasons for the decision.

Background

[4] The B2 block is Māori freehold land situated north of Thames on the Coromandel Coast. It contains an area of 7.5246 hectares. The block is vested in six trustees, including Peter Charles Smith, who filed these applications on their behalf.[1]

[5] The 1B block sits adjacent to the B2 block, contains 0.7575 hectares, and currently has 67 owners. There is no governance structure in place, so decisions in relation to the block must be made by consulting the owners in hui, and obtaining a resolution from them.

[6] B2 has road frontage on Waiomu Valley Road but this has never been used as access, and all dwellings built on B2 have been accessed by way of informal access from Pohue Creek Road over 1B. This informal access was agreed upon between the then trustees of B2 and a representative of the owners of 1B, Henry Beynon, at least as early as the 1980's. The issue facing the B2 trustees is how to obtain legal access over 1B so as to improve the B2 owners' ability to develop and utilise their own block.

[1] 93 Waikato Maniapoto MB 187 (93 WMN 187).

[7] In 1988 the B2 trustees sought to obtain legal access over 1B by applying to the Māori Land Court. At that time the local authority's requirements for creating the formal access required the access to be about 6 metres in width. The current informal access varies in width but at its widest is no more than 3.8 metres. The 1988 application was not granted by the Māori Land Court for the following reasons:[2]

a) Evidence as to the cost, difficulty and satisfactoriness of developing access from Waiomu Valley Road was not clear;

b) Lack of evidence as to the effect on the existing houses of granting access in terms of the local authority's requirements;

c) The significant loss of frontage to the dwellings on 1B, being the Beynon house and the Dehar bach; and

d) Lack of consultation with the affected parties.

[8] From that time until these applications were filed the B2 owners continued to use the informal access over 1B.

[9] One other matter arises as between the B2 trustees and 1B. The Beynon family are owners in the 1B block and Mr Beynon built a substantial dwelling on the 1B block about 40 or 50 years ago. Unfortunately, part of the dwelling encroached upon the B2 block. Until now no steps have been taken to rectify the encroachment.

[10] The active respondents in these proceedings from the beginning have been Julie Beynon-Gainfort and Rona Beynon, daughters of the man who built the dwelling on 1B. As matters progressed Greg Dehar, another owner in 1B, became involved. The informal access, which is also proposed as the legal access, runs between the area of 1B occupied by Mr Dehar and his whānau and the Beynon dwelling.

[2] 91 Hauraki MB 24-25 (91 H 24-25).

Procedural history

[11] In August 2012 the B2 trustees filed applications for relief from encroachment pursuant to s 24, and for a roadway under ss 316 to 319 of Te Ture Whenua Māori Act 1993 ("the Act"). A further application was filed dated 17 July 2014 seeking reasonable access over 1B pursuant to s 326B. The s 326B application was filed in case consent was not forthcoming from the 1B owners to the B2 trustees' access proposal.

[12] The first substantive hearing of this matter took place on 17 October 2012.[3] The evidence put before the Court at that time was:

a) Minutes of an AGM of B2 shareholders agreeing to the proposal to exchange the area of encroachment by the Beynon house for legal access over 1B block, to be located over the current informal access way;

b) Notices, mailing addresses, minutes and an attendance list for a joint meeting on 3 March 2007 between the B2 trustees and the 1B owners; and

c) A report prepared for a further meeting on 10 November 2007, with copies of the notice and attendance list for that meeting.

[13] At the time of filing of the application, the proposal from the B2 trustees involved transferring some land to the 1B block from B2 by way of boundary adjustment to deal with the encroachment. The proposal also included granting access over B2 to the back of the 1B block, with B2 to bear the costs of construction of the access. Such access was offered because at present the siting of the Beynon house blocks access to the rest of the 1B block.

[14] Given the delay between the meetings with the 1B owners and the filing of the applications, together with submissions from Mr Dehar and others at the hearing, I directed that a further meeting of 1B owners was to take place so as to obtain evidence of the current views of the 1B owners.[4]

[3] 49 Waikato Maniapoto MB 43 (49 WMN 43).
[4] 49 Waikato Maniapoto MB 50-51 (49 WMN 50-51)

[15] The matter was adjourned a number of times as discussions either progressed or faltered between the B2 trustees and the 1B owners.[5]

[16] On 2 December 2012, Julie Beynon-Gainfort and Rona Beynon lodged an application for relief from encroachment and seeking a boundary adjustment.[6]

[17] On 7 May 2013, counsel for the applicant advised by way of memorandum that they had received a letter, signed by the acting chairperson and acting secretary of 1B that the owners of 1B would consent to orders upon either payment of monetary compensation or the granting of an exclusive right to use and occupy part of the B2 land.

[18] I held a judicial conference on 23 July 2014 because, by that time, the possibility of getting a clear agreement from the 1B owners was doubtful.[7] Counsel for the B2 trustees indicated the kind of evidence the trustees intended to call, but was uncertain whether they would be able to provide evidence of minutes of meetings held by the 1B owners. The only evidence regarding consultation with the 1B owners was in correspondence from one or two individual owners who were acting as secretary or chair for the 1B owners, without formal authority. A further adjournment was granted to allow evidence to be filed by all parties.

[19] The applications were set down for a site visit and hearing on 18 February 2015.[8] By the end of the hearing it appeared that the parties might be able to resolve the issues by negotiation, but that any proposals would need to have the consent of the owners of 1B. The applications were adjourned to finalise proposals between the parties and to obtain further evidence as to the views of the 1B owners.

[20] The final hearing of this matter took place at Thames on 24 July 2015.[9]

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[5] 52 Waikato Maniapoto MB 105 (52 WMN 105); 58 Waikato Maniapoto MB 167 (58 WMN 167); 69 Waikato Maniapoto MB 152 (69 WMN 152); 75 Waikato Maniapoto MB 249 (75 WMN 249); 77 Waikato Maniapoto MB 241 (77 WMN 241).
[6] A20130010596.
[7] 83 Waikato Maniapoto MB 266 (83 WMN 266).
[8] 94 Waikato Maniapoto MB 296 (94 WMN 296).
[9] 104 Waikato Maniapoto MB 77 (104 WMN 77).

Site Visit

[21] The Court conducted a site visit on 18 February 2015. I was accompanied on the site visit by some of the B2 trustees; their counsel; Julie Beynon-Gainfort; Greg Dehar; Phillip Green, Surveyor; Niel Smith, Civil Engineer; and Michael Jordan, Registered Valuer. The Surveyor, Valuer and Engineer were the expert witnesses being called by the B2 trustees.

[22] During discussions at the site visit it became apparent that much of the objection to granting legal access from the involved 1B owners was based on an incorrect view as to the width that the legal access would need to be in order to comply with council requirements. At the site visit and during the subsequent hearing it was made clear to the 1B owners present that B2 had approval from the Thames-Coromandel District Council to carry out further development on B2, provided legal access was obtained. The Council also granted a special exemption to the minimum carriage way width for the access so that it could be as little as 2.7 metres. In other words, the proposed legal access would be exactly the same in dimensions as the current informal access, and there would be no loss of frontage to either the Dehar area or the Beynon area.

[23] At the site visit it became clear that the issues remaining to be resolved were the following:

a) Noise pollution concerns from increased traffic as development proceeds on B2;

b) Privacy concerns;

c) Reducing speed of drivers as they enter the access way;

d) Maintenance of the access way;

e) Improving storm water drainage issues from water run-off from the existing developments on B2;

f) Mr Dehar's wish to improve his sewage disposal facility by putting in a septic tank, which would require a suitable area for waste water disposal. The construction of a sealed access way might prevent him from using the area of access for soakage; and

g) The Beynon concerns regarding utilisation of the area of 1B which was to be exchanged, including concerns that development of that area of 4,700m^2 on very steep land might cause erosion issues and/or interfere with the Beynon septic tank disposal lines.

[24] After the site visit all parties returned to Thames for the hearing.

Evidence for the B2 trustees

[25] Mr Smith's evidence on behalf of the B2 trustees was that the trustees had investigated the possibility of gaining access from the road frontage on Waiomu Valley Road. However, the land rises from 20 metres to 80 metres within a short distance and the engineering work required to form the access was costed at $978,000. This evidence was supported by the evidence from Mr Green. I questioned Mr Green as to the reason for the expense required to put in access from Waiomu Valley Road. He advised that in the 1980's the cost would have been much less because the access would simply have been put in by bulldozer. However, since that time resource management requirements are now such that the engineering of access must take account of preservation of bush, prevention of erosion and landslides, and safety concerns requiring either double carriageway or passing bays, due to the length of the access that would be required from Waiomu Valley Road to the usable part of B2. By contrast, the length of the access sought from Pohue Creek Road over 1B is approximately 44 metres on relatively flat ground providing no serious engineering difficulties.

[26] Mr Peter Smith also gave evidence regarding how B2 came to have no practical access. He provided a copy of a survey plan dated 1914 and a Lands & Survey plan dated 30 November 1925, which showed that Pohue Creek Road previously traversed the land comprised in B2. However, the trust's solicitors were unable to find out what happened to

that road. To the best of their knowledge it appears that the Pohue Creek Road shown on the survey plan was not a legal road line.

[27] In a decision of the Māori Land Court on 21 August 1962, an application for access to 1B, B2 and European land to the east of B2 was declined.[10] Another application was brought by Taimoana Turoa, one of the then trustees of B2, in 1986. This was the decision that was declined by the Māori Land Court in 1989.[11] An appeal to the Māori Appellate Court was also dismissed in December 1989.

[28] The Māori Land Court's reasons for dismissing the application were referred to earlier in this judgment. As set out in Mr Smith's evidence, the circumstances, including local body requirements and the B2 proposal, have changed considerably from that time.

[29] Mr Smith went on to discuss the trust's management of B2. At present there are 11 tenants holding leases on the B2 land, and there are plans to create another 11 lots over a period of time in a staged development, as and when the trust is able to support the creation of new lots. Some of the tenants' houses are not compliant with council bylaws and the trustees have worked closely with council to prepare a management plan which would enable the trust to regularise the existing development on B2. However, that is dependent upon B2 obtaining legal access over 1B, rather than the informal access presently in place.

[30] Mr Smith also set out the numerous attempts B2 trustees had made to negotiate legal access with the 1B owners, beginning when B2 was created by partition order on 19 October 1945.[12] During Mr Smith's own term as trustee the B2 trustees have arranged and met the cost of two meetings of 1B owners to consider B2's requests for access. A further Court directed meeting was held on 16 March 2013. The acting chair and acting secretary of 1B for that meeting wrote to the B2 trustees setting out proposals for compensation in return for access. One of the compensation proposals would have required the B2 trustees to pay a lump sum of $60,000 plus an annual access fee of $5,000, and also to set aside an area within B2 for the exclusive use and enjoyment of 1B owners indefinitely.

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[10] 78 Hauraki MB 47 (78 H 47).
[11] 91 Hauraki MB 24 (91 H 24).
[12] 72 Hauraki MB 149 (72 H 149).

[31] The B2 trustees rejected the compensation proposal because there was no provision for resolving the encroachment issue, and the proposal for payment of a $5,000 fee per annum appeared arbitrary and intended to disincentivise future development of B2. The trustees considered that the fee was not an objective, fair fee.

[32] Instead the B2 trustees offered compensation by way of an area in B2 (called Lot 2) to the 1B owners in exchange for unused land on 1B. The exchange would also involve a payment by the 1B owners of $40,000 to equalize the exchange of values between the blocks.

[33] Having visited the site, and heard the evidence, it is clear that the area of B2 land proposed to be exchanged for the 1B land would be immediately usable for camping, and would provide at least one house site. The land proposed for exchange behind the Beynon house on the 1B block was on steep land covered in bush, although there is an area at the top of the rise which looked capable of use as a house site or camping area. From the evidence it also appears that that area would have excellent views.

[34] In concluding, Mr Smith emphasised that without formal access from Pohue Creek Road the B2 trustees would not be able to put in place the management plan agreed with the Thames-Coromandel District Council and would have to try and construct access from Waiomu Valley Road at very large expense, which the trust was unlikely ever to be able to afford.

[35] The evidence from Mr Green and Mr Niel Smith provided support for the trustees' position and outlined technical evidence regarding the requirements for providing access from Waiomu Valley Road.

[36] Mr Green and Mr Niel Smith also provided evidence as to what could be done to minimise the effect on 1B owners if legal access was granted over their land. Mr Green gave evidence that a sealed access way, rather than the gravel access way currently in place, would minimise noise. The construction of the access way could also assist to minimise the storm water drainage issue which currently exists. Mr Green also advised that speed in the access way could be minimised by the use of chicanes at either end of the

access way, and that these were preferable to speed bumps because of the noise associated with speed bumps.

[37] Mr Green's estimate of costs for construction of the access way over 1B was $56,000, as compared to the construction costs of $978,000 if access were to be constructed from Waiomu Valley Road.

[38] Mr Niel Smith gave evidence that the granting of access would not prevent Mr Dehar from putting in a septic tank system as he had at least two options for constructing the septic tank soakage lines, including placing a duct under the access way.

[39] Mr Jordan, the valuer, gave evidence that the area the B2 trustees proposed to exchange was worth $40,000 more than the area from 1B it was to be exchanged with. Although the B2 trustees initially sought payment of $40,000 from the 1B owners that changed as a result of further discussions during the hearing.

Evidence for the respondents

[40] Julie Beynon-Gainfort provided evidence to the Court at the February 2015 hearing of objections she received from the owners of 1B to the proposal. However, during cross-examination Mrs Beynon-Gainfort accepted that the information on which the objections were based was inaccurate and that anyone receiving the information would not have been able to make a fully informed decision. Now that Mrs Beynon-Gainfort understood that the access was to be of the same dimensions as the current informal access, she agreed that the issues were as set out at paragraph [23] above.

[41] The respondents provided no contradictory expert evidence in relation to the practicality of providing access from Waiomu Valley Road, but Benjamin Gainfort, Julie Beynon-Gainfort's husband gave evidence that he had been in the earth moving business for 25 years. Mr Gainfort stated that it was not impossible to put in access from Waiomu Valley Road but that it would be expensive due to the terrain. At the site visit the respondents also referred to an owner on a block adjacent to the B2 block who had put in access from Waiomu Valley Road some years ago. As part of the site visit we went further

down Waiomu Valley Road to try to locate the adjacent owner's access. However we found it overgrown and clearly unused for some time.

[42] Mr Dehar was also present for the latter part of the hearing. His concerns were similar to Mrs Beynon-Gainfort's, but he also wished to see 1B owners able to gain some ongoing benefit from granting access to the B2 owners.

[43] I pointed out to Mr Dehar that if the B2 proposal went ahead the 1B owners would receive a flat area next to the Beynon-Gainfort house which the 1B owners could develop and gain an income from. He replied that all these matters were on the table. He wished to discuss the matter further with his whānau and the other 1B owners.

[44] Further discussion took place at the February 2015 hearing, as it appeared that the parties might be able to reach agreement if the B2 trustees' proposal could be amended to take account of the list of issues raised by Mr Dehar and Mrs Beynon-Gainfort. I therefore directed that the B2 trustees prepare a statement setting out the trustees' amended proposal and including the responses to the various issues raised at the hearing. Mrs Beynon-Gainfort and Mr Dehar were to reply with any questions, queries or suggested changes, with a finalised statement to be prepared and sent out to the 1B owners by way of e-mail. The Court would then have evidence upon which to base any decision as to the granting of the applications by the B2 trustees.

[45] The B2 trustees provided a proposal to Mrs Beynon-Gainfort on 4 March 2015. She and Mr Dehar provided a counter proposal to the Court and the B2 trustees. The B2 trustees' final counter proposal, dated 27 March 2015 set out the following terms:

a) The Court would be requested to make an access easement authorising B2 to use the existing access way over 1B;

b) The Court would transfer ownership of Lot 2 on B2 as shown in the plan attached to the proposal to the 1B owners. The Court would then transfer ownership of 1B land, south of the line shown in the plan to B2. The exchange of land would mean that the 1B owners receive $40,000 greater

value in the exchange than B2 receives. B2 would write off the $40,000 difference in value;

c) The following conditions would be imposed on the access easement:

(i) B2 would install a chicane at both ends of the access way and road signage advising that the access way is private property and a limited speed zone;

(ii) B2 would bury sewage pipes beneath the access way at a suitable depth to assist Greg Dehar to use Lot 2 as a soakage field for his septic tank, provided those pipes are supplied by Greg Dehar before the surface of the access way is sealed;

(iii) B2 would provide appropriate storm water controls to divert runoff away from the Dehar property, so as to reduce storm water runoff onto that property;

(iv) A "no building" covenant covering the steep hillside land behind the Beynon house to reduce landslip risk. The B2 proposal noted that Mrs Beynon-Gainfort considered that was not sufficient and wanted the covenant to cover all the land B2 would receive in exchange to protect soakage lines from the Beynon septic tank and to prevent risk of landslip; and

(v) All works and future maintenance of the access way would be completed to a council compliant standard at B2's sole cost.

[46] The B2 trustees' proposal was sent to the 1B owners by Mrs Beynon-Gainfort together with options that the Beynons and Mr Dehar proposed.

Results of consultation with 1B owners

[47] Mrs Beynon-Gainfort helpfully provided a table showing those owners to whom she sent the proposals, and also showing the list of deceased owners. Her list showed the

proposals were sent to 38 owners out of 59 shown on the Māori Land Court List of Owners at that time.

[48] Three owners did not agree to access being granted. All the other owners who responded agreed to grant access. There was general agreement as to four conditions to be placed on the access. However there was a division between two groups of owners as to the compensation required for the access.

[49] With no disrespect intended to any person I describe one group of owners as the "Beynon/Dehar interests", and the other group as the "Hingston interests". As mentioned above the B2 trustees had proposed that an area of B2 (Lot 2) be exchanged for an area of 1B. The Beynon/Dehar interests wished to retain all of 1B, and to be granted Lot 2 for use in perpetuity by the 1B owners. The Beynon/Dehar interests also sought provision for Mr Dehar to be able to use Lot 2 for soakage lines for his septic tank system.

[50] The Hingston interests preferred that the B2 trustees provide and construct legal access over B2 to the area behind the Beynon house on 1B, so that they would be able to use and enjoy their own ancestral land. Veronica Haumaha, who appeared as a member of the Hingston interests at the hearing in July 2015, made it clear that the Beynon/Dehar proposal did not provide an answer to the Hingston whānau's wish to be able to use their taonga tuku iho. Ms Haumaha had previously written to Mrs Beynon-Gainfort commenting that the Beynon/Dehar proposal was a way to solve the Beynon's encroachment problem but provided little benefit that the Hingston interests wanted.

[51] In assessing the level of support for the various proposals, I have taken into account that recent successions to the Hingston interests were not provided for in the list used by Mrs Beynon-Gainfort in sending out the proposals to the 1B owners. Ms Haumaha's evidence was that there were nine further Hingston owners who were not sent proposals. On that basis 17 owners supported the Beynon/Dehar proposal, while 16 supported the Hingston proposal. In terms of shareholding it is not clear as to what shares each voting shareholder held. On rough figures, it appears that owners holding over 11 shares voted in favour of the Beynon/Dehar proposal, while 7 to 8 shares voted in favour of the Hingston proposal. I take the view that although there is a majority in favour of the Beynon/Dehar proposal, it is not a huge majority in the circumstances.

[52] In determining what compensation ought to be given by the B2 owners for access over 1B, the wishes of the 1B owners are but one factor, albeit an important one. The Court must also take into account the statutory provisions and follow the guidelines laid out in the leading case, *Jacobsen Holdings Ltd v Drexel* in determining what compensation is appropriate. [13]

Law

[53] The statutory provisions relevant to granting of access are ss 315, 316 and 317 of the Act.

[54] Section 315 provides:

> **315 Court may create easements**
>
> (1) The court may—
>
> (a) create easements over any land to which this Part applies for the purpose of being annexed to or used or enjoyed with any other land; or
>
> (b) create easements over any General land for the purpose of being annexed to or used or enjoyed with any land to which this Part applies; or
>
> (c) create easements in gross over any land to which this Part applies.
>
> (2) The grant of an easement under this section may be made subject to a condition for the payment of compensation in respect of the grant, or to any other conditions that the court may impose.
>
> (3) Where an easement is granted under this section for the purpose of providing access to any other land, the grant of the easement shall be made in accordance with the succeeding provisions of this Part.

[55] Section 316 provides:

> **316 Court may lay out roadways**
>
> (1) For the purpose of providing access, or additional or improved access, the court may, by order, lay out roadways in accordance with the succeeding provisions of this section and of this Part.
>
> (2) For the purpose of providing access, or additional or improved access, to any land to which this Part applies, the court may lay out roadways over any other land.
>
> (3) For the purpose of providing access, or additional or improved access, to any land other than land to which this Part applies, the court may lay out roadways over any land to which this Part applies.

[13] *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324.

> (4) Any order laying out roadways may be a separate order, or may be incorporated in a partition order or other appropriate order of the court.

[56] Section 317 provides:

> **317 Required consents**
>
> (1) The court shall not lay out roadways over any Maori freehold land unless it is satisfied that the owners have had sufficient notice of the application to the court for an order laying out roadways and sufficient opportunity to discuss and consider it, and that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.
>
> …
>
> (6) The court shall not lay out roadways connecting with any public road without the consent of the territorial authority for the district in which the connection would be effected.
>
> …

[57] The original application filed by the B2 trustees was under s 316, but during the course of proceedings counsel indicated that the access should be by way of private right of way easement over 1B. That would mean that the application should be under s 315. Nevertheless the consents required under s 317 are equally applicable to easements by way of right of way under s 315.

[58] For the avoidance of doubt I will make an order under s 37(3) of the Act at the end of this decision, amending the application to be one under s 315 as well as s 316.

[59] In *Jacobsen Holdings Ltd v Drexel*, Cooke P in the Court of Appeal set out the principles guiding the Court's consideration of compensation issues when granting access. He said: [14]

> The Privy Council judgment emphasises that the hypothesis is a willing seller and a willing buyer. Compulsion on either side is to be disregarded: the seller is not to be treated as one forced by circumstances to sell his potentiality for anything he can get, the buyer is not to be treated as one driven to buy. It is the price that willing parties would arrive at in friendly negotiation that has to be found, on such materials as are available. Beyond rejecting the concept of an imaginary auction their Lordships did not give any express guidance as to how this exercise is to be done if there are no truly comparable market transactions. They recognised that in many cases it might be a matter of considerable difficulty. In the case before them "giving the matter the best consideration they can" they appear to have selected a compromise figure not purporting to be based directly on any specific formula or evidence.
>
> Modern statutes relating to the compulsory acquisition of land for public purposes commonly provide that in assessing compensation the special suitability of the land for any purpose shall not be taken into account if the purpose is one for which there is no market

[14] *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324, at 328-329.

> apart from the needs of a particular purchaser. In New Zealand such a provision is included in the Public Works Act 1981, s.62(1)(d). No corresponding limitation has been enacted in s.129B(8) of the Property Law Act. "Compensation" thereunder bears its ordinary meaning and should be assessed in my opinion on the broad basis already indicated.
>
> Under the section the Court is not bound to award compensation, but usually it will be equitable between the parties to do so and to assess it on the footing of what a willing grantor and grantee of an easement or vendor and purchaser of the fee simple would agree in friendly negotiation. If the order under the section gives legal access to a commercial property or a farm, that can properly be treated as a material factor, for it may be reasonable to suppose that a grantee or purchaser who is able to put the right-of-way or land to profitable use is likely to be willing to pay something more for it on that account.
>
> In assessing compensation purely sentimental matters have to be put aside: see the *Vizagapatam* case at 312. So too of course any question of personal impecuniosity or affluence: compare the *New Zealand and Australian Land Company* case at 716. But the present case does not raise such issues. Subject to those qualifications, all factors of benefit or detriment on either side are material under the section, including for instance any inconvenience or disturbance that the owner of the servient or transferred land may suffer and any advantage that he may gain. These are all considerations which would legitimately influence the parties in the hypothetical friendly negotiation. They all go to what sum is reasonable as the value or price or consideration or compensation - terms which seem to me to be interchangeable and identical in effect when a fair figure has to be arrived at as between the parties and there are no special limiting statutory provisions.

[60] In considering what is appropriate compensation, I must also take into account the Preamble, s 2 and s 17 of the Act. The Preamble and s 2 require the Court to exercise its powers under the Act in such a way as to facilitate and promote the retention and use, occupation and development of land in the hands of the Māori owners, their whānau and hapū. Section 17 requires the Court to seek to achieve the following further objectives:

> **17 General objectives**
>
> …
>
> (2) In applying subsection (1), the court shall seek to achieve the following further objectives:
>
> (a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:
>
> (b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:
>
> (c) to determine or facilitate the settlement of disputes and other matters among the owners of any land:
>
> (d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:
>
> (e) to ensure fairness in dealings with the owners of any land in multiple ownership:

(f) to promote practical solutions to problems arising in the use or management of any land.

Discussion

[61] The main issue for consideration is whether the compensation to be provided by the B2 trustees for obtaining access over 1B should be to grant perpetual use rights over Lot 2 or to grant and construct access over B2 land to the area of 1B behind the Beynon house, and to which access is blocked by the siting of the Beynon house on the block.

[62] The Hingston proposal for compensation would, in many ways, be a straightforward quid pro quo between the 1B and B2 owners. The informal access which the B2 owners already enjoy would become legal access and would allow the B2 owners to further develop their land. The access to be provided by B2 to the unused area of 1B behind the Beynon house would allow other 1B owners to use and enjoy that part of their land which is currently unused.

[63] Ms Haumaha made it clear that the Hingston interests had a very strong bond to the 1B land – that is their taonga tuku iho and that is the land that they wish to use. Thus the Beynon/Dehar proposal would be insufficient because it would not grant them access to their taonga tuku iho. In my view the Hingston interests proposal is a fair solution to the access needs of the various groups. At the same time it would also provide a resolution to the encroachment problem, as the B2 trustees are prepared to agree to a boundary adjustment to the extent that would be necessary to put the Beynon house within the 1B boundaries.

[64] In addition, the B2 trustees are prepared to allow the 1B owners to have use of Lot 2 on the B2 land until the access to the back of 1B is constructed. The proposal strikes me as reasonable and fulfils the definition of "willing buyer, willing seller" referred to in *Jacobsen Holdings Ltd v Drexel*.[15]

[65] Under the Beynon/Dehar proposal the B2 trustees would obtain access but would lose rights to use Lot 2 in perpetuity, without obtaining part of 1B in exchange. The B2 trustees opposed the Beynon/Dehar proposal on the basis that the compensation would not

[15] *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324.

be fair. The trustees' own proposal was, on an objective analysis, weighted in favour of the 1B owners but it was rejected.

[66] The Hingston interests also opposed the Beynon/Dehar proposal because they would not be able to obtain access to the rest of 1B. The area used by the Beynons and Mr Dehar mean that there is no other area on 1B that the Hingston interests can use.

[67] In my view the principles set out in the Preamble and s 2 favour retention of land that is taonga tuku iho and its use and development, in the hands of the Māori owners. Thus the Hingston proposal, which supports use of 1B by the 1B owners seems to me to be more in line with those principles than the Beynon/Dehar proposal. It is also clear that if the Beynon/Dehar proposal was put in place, that a slim majority of owners would have achieved their wishes over a large minority. Section 17(2)(d) requires the Court to protect minority interests against an oppressive majority.

[68] I also consider that the Hingston proposal would ensure fairness and would be a practical solution to the various issues, including the encroachment issue.

[69] As I indicated at the hearing I also take into account the benefit that B2 will gain by the legalisation of access, but note that there would be considerable hardship upon the B2 owners if access was not granted, as they would not then be able to further utilise and develop the rest of their block. The grant of formal access also enables the B2 trustees and the local council to require the existing occupants of B2 to comply with council bylaws and requirements in relation to drainage issues and so forth. That would be a benefit to both 1B and B2 owners because it would require occupants of B2 to comply with requirements relating to storm water drainage and the like.

Decision

[70] For the reasons given above and at hearing the application by the B2 trustees for access by way of private right of way over the 1B land is granted, subject to receiving a suitable plan on which to make the formal orders.

[71] There is an order pursuant to section 37(3) of the Act amending the application to include an application under s 315.

[72] Pursuant to s 73 of the Act the conditions attaching to the orders are as follows:

a) That the easement is by way of right of way over 1B from Pohue Creek Road for the use of owners, trustees, agents, invitees and assigns of the B2 owners, in exchange for an easement by way of private right of way over B2 for the use of the owners, trustees, agents, invitees and assigns of the 1B owners to access the area of 1B that lies behind the Beynon dwelling. The costs of construction of access over 1B and B2 are to be borne by the trustees of the B2 block;

b) That the B2 trustees are to erect at their own cost, signage at the Pohue Creek Road end of the access way stating that the access is private property and that the speed is limited to 10 kilometres per hour;

c) That the B2 trustees are to construct at their own cost a chicane at each end of the access way to force a reduction in vehicle speed;

d) That the B2 trustees are to construct at their own cost a sound-rated fence along each side of the access way over 1B, but costs of maintenance of the fence is to fall on the 1B owners;

e) The costs of maintenance of the access way over 1B are to be paid by the B2 owners;

f) The B2 trustees are also to construct and install improved drainage along the access way over 1B land at their own cost and to a council compliant standard;

g) Mr Dehar is to be permitted to use Lot 2 as a soakage field for his septic tank provided that there is no other suitable area for use for soakage purposes on 1B. There is a direction to Mr Dehar and the B2 trustees to liaise to consider the best solution for the soakage field that Mr Dehar

requires, as if he is able to use another area, then Lot 2 will not be available to him for his septic tank soakage lines; and

h) The boundary of the B2 block is to be adjusted to give relief for the encroachment of the Beynon house pursuant to s 24 of the Act.

[73] At the hearing I also directed counsel for the B2 trustees to provide the Court with a suitable plan so that orders could be made referring to the plan. The orders above are also conditional upon survey being completed.

Pronounced in open Court at am/pm in Hamilton on the day of August 2015.

S Te A Milroy
JUDGE