IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20180002014

UNDER	Sections 318(3) and 322 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Waikawa Pahaoa 1B & 1C 2C 1B (Aggregated)
BETWEEN	OHINEMANGO LANDS TRUST Applicant
AND	WAIKAWA LANDS TRUST First Respondent
AND	OTPP NEW ZEALAND FOREST INVESTMENTS LIMITED Second Respondent

Hearing: 7 December 2018, 202 Waiariki MB 224-228 (Teleconference)
28 March 2019, 209 Waiariki MB 69-86
(Heard at Rotorua)

Appearances: J Koning for Applicant
K Tahana for First Respondent
J Graham for Second Respondent

Judgment: 8 November 2019

JUDGMENT OF JUDGE C T COXHEAD

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Tēnā tātou i ō tātou aituā maha e ngapu nei te whēnua i tō rātou hingahinga. Hēoi anō, e tāea te aha atu i te tangi, i te auē, i te maumahara ki a rātou me tā rātou i mahi ai? Nō reira, waiho rātou ki a rātou, ko tātou ki a tātou, tēnā anō tātou

Hei timatanga kōrero - Introduction

[1] In 1985, the Māori Land Court made an order setting out a roadway that allowed access to the land block known as Waikawa No 3 (the roadway order). The roadway is laid over lands vested in the Ohinemango Lands Trust, known as Waikawa Pahaoa 1B & 1C 2C 1B (aggregated). The lands sit on either side of State Highway 35, in the north-eastern Bay of Plenty.

[2] The applicant, Ohinemango Lands Trust, seeks to vary the terms of the roadway order so that, among other entitlements, compensation (royalty) will be paid to them and they will also have a right to use the roadway.

[3] The roadway order allows Waikawa Lands Trust, the first respondent, to use the roadway. OTPP New Zealand Forest Investment, the second respondent, leases forestry land from the first respondent, and uses the roadway to access the leased land.

[4] Both respondents oppose the variation to the roadway order. They argue that the Court cannot vary the roadway order in the way the applicant is proposing as that would require the Court to invalidate the terms of the original roadway order. The respondents submit the application for the variation of the roadway order is untenable and therefore the application should be struck out.

[5] The issue I have for determination, is whether the application for a variation of the roadway order should be struck out.

Kōrero whānui - Background

[6] On 14 August 1985, the Māori Land Court made an order setting out a roadway over Waikawa Pahaoa 1C 2C 1B and Waikawa Pahaoa 1B (aggregated), to enable access to Waikawa No 3. That order was issued pursuant to ss 34(1), 416, 417 and 418 of the Māori Affairs Act 1953, primarily to enable forestry to occur on the blocks known as Waikawa No 3 and Waikawa No 2B (the Waikawa blocks).

[7] The terms of the order were:[1]

(a) The junction with State Highway 35 being constructed and maintained by Tasman Forest Limited to the satisfaction of the District Commissioner of Works, Napier;

(b) All future fencing and maintenance to be at the expense of Waikawa No 2B and 3 blocks;

(c) Road user to be limited to the owners, occupiers, licencees or lessees of Waikawa No 2B and 3 Blocks and their respective agents, workmen, contractors, invitees or successors in titles; and

(d) That no compensation shall be payable to any person in respect of the said roadway.

[8] Waikawa Pahaoa 1B & 1C 2C 1B (aggregated) (the land), is currently vested in the Ohinemango Lands Trust, an ahu whenua trust. This trust was constituted on 4 April 1984, by way of order by the Court.[2] The current recorded trustees are Catherine Ranapia, Edward Ngatata Howell, Jocelyn Ross Winder, Kevin Peter Manihera Riini and Toni Ngaroma Harvey.

Ko te hātepe ture o te kēhi nei - Procedural History

[9] On 13 March 2018, the Court received an application from the Ohinemango Lands Trust for a variation of the roadway order. The variations, the applicant seeks are:

(a) The junction with State Highway 35 to be constructed and maintained by the lessee under the forestry lease to the satisfaction of the New Zealand Transport Agency or any successor entity;

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1 214 Rotorua Minute Book 198 (241 ROT 198).
2 60 Opotiki MB 242 (60 OPO 242).

(b) A right of user for the trustees, beneficiaries, employees, agents, contractors and invitees of the Ohinemango Lands Trust;

(c) The class of user to otherwise be restricted to forestry operations on Waikawa No 2B and Waikawa 3 (aggregated) in accordance with the forestry lease;

(d) The formation of the roadway in accordance with ss 347 and 348 of the Local Government Act 1974 as required under s 318(5) of Te Ture Whenua Māori Act 1993 and as approved by the Ōpotiki District Council and the Bay of Plenty Regional Council;

(e) The lessee under the forestry lease to pay the Ohinemango Lands Trust a royalty calculated in accordance with the standard industry practice; and

(f) Any other appropriate conditions including health and safety, public liability insurance and environment.

[10] On 19 November 2018, counsel for the first and second respondents, Justin Graham and Kiri Tahana, filed a joint interlocutory application to strike out the applicant's claim.

[11] On 7 December 2018, I held a teleconference with the parties to discuss evidentiary and timetabling matters.[3]

[12] The matter came before me on 28 March 2019, with the applicant and the first respondent in attendance. At this hearing, I heard the parties submissions on the interlocutory issue.[4] The parties raised issues pertaining to s 77 of Te Ture Whenua Māori Act (the Act), and the circumstances and nature surrounding the original roadway order. I adjourned the matter for a reserved decision to be given.

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3 202 Wairaiki MB 224-228 (202 WAR 224-228).
4 209 Waiariki MB 69-86 (209 WAR 69-86).

Ngā kōrero a ngā kaiurupare - Submissions of the respondents

[13] Mr Graham and Ms Tahana, counsel for the first and second respondents, filed joint submissions on this matter and, by my leave, were represented jointly by Ms Tahana at the hearing.

[14] The primary submission for the respondents was that the application to vary the roadway is prohibited under s 77 of the Act and should therefore be struck out. Ms Tahana argued that s 77 prevented the Court from making an order that would annul, quash or otherwise invalidate an order pre-dating it by ten or more years except by the exercise of the Chief Judge's special powers under s 44 of the Act.

[15] Counsel submitted that, although s 322 of the Act allowed for variation of a roadway order when circumstances have changed, this does not apply in the present situation as the circumstances relied on by the applicant for the variation of the order existed at the time the order was granted. Therefore, Ms Tahana contended, that while s 322 allowed for variation of roadway orders, the current application would effectively invalidate the 1985 roadway order and therefore cannot be allowed under s 77 of the Act.

[16] Ms Tahana provided examples of instances where s 322 could be used without engaging the limits of s 77. These included changing the location of the roadway to reflect actual use and amending the roadway because of land partition.

[17] In the present case, Ms Tahana argued that most of the grounds raised by the applicant for variation relate to circumstances that existed or could have been considered at the time the order was made. These were whether certain trustees and the Ōpotiki City Council gave consent and whether the Māori Land Court Rules of the time were complied with.

[18] Counsel contended the amendments designed by the applicant to reflect changes in legislation, such as health and safety, will be unnecessary as they are already required by law. She argued, in essence, these grounds put forward by the applicant, asks that the Court find the original order invalid, as there would be a need to reconsider the evidence tendered at the time of the original hearing. However, Ms Tahana argued such an action was clearly prohibited by s 77.

[19] Further, counsel submitted that the roadway was established to allow access required to undertake the forestry operation on the Waikawa blocks. The trustees of the Ohinemango Lands Trust consented to the roadway when it was established in 1985 and were aware at that time that no compensation would be paid. These terms were explicitly stated and confirmed in the roadway order. As compensation was a central argument, espoused by the applicant to the variation application, counsel argued, it essentially makes the application incompatible with s 77.

[20] Additionally, counsel argued that the original order has been relied by the Waikawa Lands Trust and by the lessees of the land. Investment in the land has also occurred in reliance on the terms of the order. Counsel referred to the case of *Trustees of Oparau No 1 Block* in support of this contention. In that case Judge Milroy found that, although there was no evidence that compensation was considered at the time of the making of the order for the roadway, many decades had passed since the roadway was surveyed and the order was sealed and registered. These factors militated against the re-opening of the compensation term.[5]

[21] Finally, counsel submitted that at least one of the grounds for amendment was wrong in fact as there was evidence that the trustees of the Ohinemango Lands Trust were aware of the roadway application and consented to the roadway order at the time it was made.

[22] Essentially, Ms Tahana contended that this was a clear case of untenable causes of action worthy of the exercise of the Court's jurisdiction to strike out.

Ngā kōrero a te kaitono - Submissions of the applicant

[23] Counsel for the applicant, Mr Koning, submitted that the respondents have misconstrued their pleadings. Mr Koning contended that the applicant does not seek to invalidate the roadway order, but a variation pursuant to ss 318(3) and 322 of the Act, in accordance with the draft order filed.

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5 *Trustees of Oparau No 1 Block Trust – Oparau No 1 Block and Pirongia West 1 2B3D* (2004) 109 Waikato MB 300 (109 W 300).

[24] Mr Koning submitted that the original application for a roadway was defective as:

(a) The trustees of the Waikawa Pahaoa 1B Trust and the Waikawa Pahaoa 1C 2C Trust did not consent to the application;

(b) The consent of the National Roads Board did not comply with r 108(6) of the Māori Land Court Rules 1958;

(c) The Waikawa Lands Trust filed no consent from the Ōpōtiki County Council as required by 415(3)(a) of the 1953 Act;

(d) The Waikawa Lands Trust filed no planning statement from the Ōpōtiki County Council as required by r 108(4)(b) of the 1958 Rules; and

(e) The Waikawa Lands Trust did not adduce evidence on compliance with ss 179 and 180 of the Municipal Corporations Act 1954 as required by r 108(8) of the 1958 Rules.

[25] Further, counsel argued that the authorities relied on by the respondents do not limit the discretion of the Court to exercise their power to amend the roadway order. In fact, *Ngunguru Coastal Investments Limited v Climo* shows that such discretion should be exercised in accordance with the plain meaning of ss 318 and 322 of the Act, and having regard to the principles of the Act outlined in the Preamble and ss 2 and 17 of the Act.[6]

[26] Counsel also contended that compensation was not the core matter in the roadway order and the order contemplated several other factors which were important to the applicant. In that sense, amendment of one provision does not undermine the entire order and therefore the application to vary the roadway order cannot be considered as barred by s 77.

[27] Mr Koning submitted that it was highly unlikely that the variation sought will result in a completely new and different roadway order but that if it did, such matter should be decided in the substantive hearing. Mr Koning says, the amendments sought by the applicant

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6 *Ngunguru Coastal Investments Limited v Climo – Horahora 1B4A2D1 and others* [2012] Māori Appellate Court MB 80 (2012 APPEAL 80).

were designed to bring the roadway order in line with standard industry practice, which involved having compensation by royalty and modification of the intersection with State Highway 35 to be managed by the relevant statutory authority.

[28] Counsel submitted that the order as it currently stands allows for use of the roadway only by the Waikawa Lands Trust. Therefore, the applicant seeks to also have a right to use the roadway to access their land. Mr Koning also raised concerns about the roadway being used by third parties as access for hunting purposes. However, the intent behind the original order was to enable forestry activities to operate. Counsel submitted that the third parties that are permitted to use the roadway should be restricted to those who require access for forestry purposes only.

[29] Mr Koning says all the proposed amendments to the roadway order meet the statutory criteria, to allow the Court to exercise its jurisdiction. Counsel further submitted that striking out the variation application would not prevent the applicant bringing an application to the Chief Judge under s 45 of the Act. The current application was filed as it allows for the amendments to be made fairly and reasonably by consent.

[30] Finally, counsel submitted that the High Court guidance requires the Court to seek repleading of the substantive matter if the Court believes that there could be a possibility of change of circumstances. In that case, the matter should not be struck out but replead for a substantive hearing. Mr Koning says, the amendments proposed are designed to reflect changes that have occurred since the original order, and not to make them would bind the applicant to the defective order for 75 years.

Te Ture - The Law

[31] Section 77 of the Act is as follows:

> **77 Orders affecting Maori land conclusive after 10 years**
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> (1) No order made by the court with respect to Maori land shall, whether on the ground of want of jurisdiction or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any court in any proceedings instituted more than 10 years after the date of the order.
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> (2) Where there is any repugnancy between 2 orders each of which would otherwise, by reason of the lapse of time, be within the protection of this section, then, to the extent of any such repugnancy, the order that bears the

> earlier date shall prevail, whether those orders were made by the same or different courts.
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> (3) Nothing in this section shall limit or affect the authority of the Chief Judge to cancel or amend any order under section 44.

[32] As stated in *Tuwhangai v Boon*, s 77 prevents any Court from quashing, invalidating or annulling orders after 10 years except by exercise of the Chief Judge's special jurisdiction under s 44 of the Act:[7]

> [27] The clear provisions of s 77, together with relevant authorities, confirm that orders affecting Māori land are conclusive after 10 years. Such orders cannot thereafter be annulled, quashed or held to be invalid on any grounds, unless in accordance with the special jurisdiction of the Chief Judge under s 44 of the Act.
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> [28] The order creating the joint tenancy between Mr Tuwhangai and Mrs Ormsby in the present case was made in 1992, approximately 26 years ago. Accordingly, the order falls within the provisions of s 77 and this Court cannot look to overturn it. As Judge Ambler noted in *Rogers v Hauraki*, in the absence of any appeal or other challenge to the order since it was made, the Court must therefore proceed on the basis that the order is valid.

[33] However, Judge Clark in *Tuwhangai* also noted that there is a distinction to be drawn between claims that seek to overturn conclusive orders and those that seek orders related to the original without invalidating or quashing that order:[8]

> [29] However, I consider that the claim of Ms Boon as currently framed does not seek to overturn the order made in 1992. Ms Boon claims an entitlement for the successors of Mrs Ormsby based in equity. At no point so far has Ms Boon claimed that the 1992 order should be amended or quashed.
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> [30] While that remains the case, I do not consider that an order under s 18(1)(a) declaring any equitable interest that the successors of Mrs Ormsby might have in the joint tenancy, would offend the provisions of s 77 of the Act. The Court must of course be careful that any such determination does not seek to annul, quash, declare or hold that the 1992 order is invalid.

[34] I now consider the law on strike out. This was summarised by this Court in *Taueki v Horowhenua Sailing Club Ltd*:[9]

> [22] There are no provisions within the Act or the Māori Land Court Rules 2011 which specifically address an application to strike out proceedings. The powers of

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7 *Tuwhangai v Boon – Kawhia U 2B Block* (2018) 160 Waikato Maniapoto MB 113 (160 WMN 113) at [27]-[28].

8 *Tuwhangai v Boon – Kawhia U 2B Block* (2018) 160 Waikato Maniapoto MB 113 (160 WMN 113) at [29]-[30].

9 *Taueki v Horowhenua Sailing Club Ltd – Horowhenua 11 (Lake) Maori Reservation* (2015) 337 Aotea MB 68 (337 AOT 68) at [22] – [26].

the High Court in relation to striking out a pleading may therefore provide some guidance.

[23] Rule 15.1 of the High Court Rules provides that the High Court can strike out all or part of a pleading or can dismiss or stay the proceedings:

> **15.1 Dismissing or staying all or part of proceeding**
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> (1) The court may strike out all or part of a pleading if it—
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
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> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
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> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

[24] The established criteria for striking out was summarised by the Court of Appeal in *Attorney-General v Prince*, where the Court noted that it is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed.[3] The jurisdiction is one to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material. The fact that applications to strike out raise difficult questions of law, and require extensive argument, does not exclude jurisdiction.

[25] This approach was followed by the Supreme Court in *Couch v Attorney-General*, where the Court stated:

> [33] It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.

[26] In the recent decision of Commissioner of *Inland Revenue v Chesterfields Preschools Ltd,* the Court of Appeal also considered the requirements for striking out an application:

> [89] The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous"

> pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceedings that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

[35] I note also the comments of Elias CJ in *Sandman v McKay*:[10]

> [113] Summary judgment may be entered or a claim may be struck out on the basis that it is untenable as a matter of law, even if the decisive point of law is one of some difficulty, requiring substantial argument. But where the cause of action is novel or where established principle must be applied to novel circumstances, peremptory determination in the absence of full understanding of context established at a hearing of the facts is often not appropriate. A court may refuse summary judgment if amendment to the statement of claim reasonably in prospect would raise a cause of action upon which the court is not satisfied the plaintiff could not succeed.

Kōrerorero - Discussion

[36] While I am not being asked to decide the variation matter at this point, I must still consider whether the application is tenable. If the application is clearly untenable then there may be reason for the application, in whole or in part, to be struck out.

Will the Court need to reconsider the 1985 decision?

[37] Mr Koning argued that the amendments sought are unlikely to result in the creation of a new order. Rather, the amendments will assist to bring the existing roadway order in line with standard industry practice which is to have compensation by royalty and for modification of the intersection with State Highway 35 to be manged by the relevant statutory authority.

[38] I disagree. The variations that are being requested seek to change the original terms of the roadway order in two fundamental ways. That is in terms of:

(a) Compensation (royalty) being paid to Ohinemango Lands Trust; and

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[10] *Sandman v McKay* [2019] NZSC 41 at [113] per Elias CJ.

(b) Determining who has the right to use the roadway.

[39] These are two of the fundamental issues that were considered and decided upon when the roadway order was granted in 1985. Specific terms with regard to both these issues were noted in the order. The variations that are being sought will significantly vary the original order as made and do more than just bringing the order into line with standard industry practice.

[40] The critical variation that is being sought is that the lessee under the forestry lease pay the Ohinemango Lands Trust a royalty calculated in accordance with standard industry practice. The original order made in 1985 provided that no compensation shall be payable to any person in respect of the roadway. In considering whether to grant the variation, in my view, will require the Court to revisit the Court's original decision made in 1985.

[41] The variation seeking that the Ohinemango Lands Trust be given a right to use the roadway, once again is a fundamental change to the original order. In considering the application the Court will again be required to delve back into the Court's decision in 1985.

[42] The variations also seek that the formation of the roadway be in accordance with ss 347 and 348 of the Local Government Act 1974 and as approved by the Ōpōtiki District Council and the Bay of Plenty Regional Council. I find that, in essence such variation is meaningless and unnecessary. The 1985 order required that the formation of the roadway comply with the law. Subsequently, the formation of the roadway has been completed in accordance with the Bay of Plenty Regional Council plan. It is a given that the roadway must also comply with current law.

[43] The variation that the junction with State Highway 35 be constructed and maintained by the lessee under the forestry lease to the satisfaction of the New Zealand Transport agency or any successor entity is simply an update of the term in the 1985 order that required the junction with State Highway 35 be constructed and maintained by Tasman Forestry Limited to the satisfaction of the District Commission of Works Napier. This variation seems pointless and simply reflects the change in the agency from the District Commission of Works, Napier to the New Zealand Transport Agency.

Is the current order valid?

[44] Variations or cancellation orders cannot be used to overturn a roadway order on the basis of deficiencies that were present when the order was made. I, similar to Judge Ambler's findings in the *Rogers v Hauraki* decision, proceed on the basis that if I was to hear the variation matter I would not be able to revisit the Court's decision in 1985.[11] There has been no appeal or other challenge to the roadway order since granted in 1985. Therefore, the Court would proceed on the basis that the roadway order is valid.

[45] The grounds raised by the applicant focus on the circumstances under which the roadway order was made. These grounds question the validity of the original roadway order and on reading these grounds they would appear to be grounds for an appeal or a s 45 application.

[46] This goes to show that the variations being sought are very much about undoing the original order, even though in this case suggesting that the order was defective. These complaints, the applicant advances, should have been raised at the time the order was made or an appeal should have been filed.

[47] These grounds support further that the variations that are being sought will require the Court to revisit those matters that were considered (or not considered) when the 1985 orders were made. Such an action is clearly prohibited by s 77 of the Act.

What circumstances have changed?

[48] This is not a situation where a creek has caused erosion and therefore the roadway needs to be varied in terms of where it tracks. Or a situation where a partition requires a change in the roadway. This is a case where the changes sought by the applicant will require the reopening of the grounds upon which the order was originally made.

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11 *Rogers v Hauraki – Te Aute A1B* (2015) 117 Taitokerau MB 87 (117 TTK 87).

[49] The variations that are being sought are not due to changes in circumstances that have occurred over time. The changes being proposed are fundamentally associated with a change in the trustees' view. In 1985, the trustees consented (although this seems arguable) that no compensation would be paid. There also seems to be have been agreement as to use of the roadway.

[50] There are different trustees now from those who were administering the lands in 1985. The trustees of today have different views to those trustees of 1985. The current trustees want a royalty (compensation). Unsurprisingly, now that the forest is being harvested and the Waikawa Trust is presumably obtaining income from the harvesting of the forest - the Ohinemango trustees want a piece of the action.

[51] Further, the Ohinemango trustees want the right to use the roadway as trustees and beneficiaries of the lands rather than invitees. There does not seem to be any indication that the Ohinemango trustees and beneficiaries have been stopped from using the roadway, rather it is that they seek to be able to use the roadway in their own right as opposed to as invitees.

Kupu whakatau - Decision

[52] The grounds raised by the applicant for variation relate to the circumstances at the time the order was made. The amendments designed to reflect changes in legislation, such as health and safety, are unnecessary as they are already required by law. The application for variation asks the Court to find the original order defective, and as such will require the Court to reconsider the evidence tendered at the time of the original hearing. Such an action is clearly prohibited by s 77.

[53] I agree with the respondents that the variation application as proposed will require a reopening of evidence and reconsideration of the matters that were before the Court in 1985. This is exactly the type of reconsideration that s 77 of the Act is designed to prevent. The variation application should not be used as a means to reconsider evidence that is now 30 years old. Therefore, the variation application is untenable.

[54] In these circumstances, the application is struck out.

I whakapuaki i te 10.15am i Rotorua te 8 o ngā rā o Whiringa-ā-rangi te tau 2019

C T Coxhead
JUDGE