

**I TE KOOTI WHENUA MĀORI O AOTEAROA  
I TE ROHE O TE TAITOKERAU**

*In the Māori Land Court of New Zealand  
Taitokerau District*

**A20200006099**

WĀHANGA <i>Under</i>	Section 18(1)(a) and 24A, Te Ture Whenua Māori Act 1993
MŌ TE TAKE <i>In the matter of</i>	Okahu 3B2A and Okahu 3B2B2D
I WAENGA I A <i>Between</i>	DESLEY AUSTEN, ALEXANDRA BAKER, PARAIRE FLETCHER, CASSINO HADFIELD, DESMOND MAHONEY, RAIHA MANN, TANIA MAIRE MORUNGA Ngā kaitono <i>Applicants</i>
ME <i>And</i>	FAR NORTH DISTRICT COUNCIL Te kaiurupare <i>Respondent</i>

Nohoanga: 26 February 2021, 229 Taitokerau MB 66-107  
*Hearing* 23 June 2022, 252 Taitokerau MB 81-86 (Telephone Conference)  
(Heard at Kaitaia)

Kanohi kitea: R Mark for the applicants  
*Appearances* G Day for the respondent

Whakataunga: 28 July 2022  
*Judgment date*

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**TE WHAKATAUNGA Ā KAIWHAKAWĀ M P ARMSTRONG**  
*Judgment of Judge M P Armstrong*

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**Hei tīmatanga kōrero***Introduction*

[1] The trustees of the Ngakahu-Ngakohu Whānau Ahu Whenua Trust administer 10 blocks of Māori freehold land. There is an easement across this land in favour of the Far North District Council (“FNDC”) which provides access to the Kauri Dam. The trustees also use the easement to access their land. The easement crosses the Tarawhatoroa stream. FNDC constructed a ford over the stream to traverse it. Widespread flooding in the area damaged the ford requiring extensive repairs.

[2] In 2016, the trustees and FNDC entered into an agreement to repair and maintain the ford (“the ford agreement”). The ford agreement provides:

- (a) The trustees will repair and reconstruct a more durable ford over the stream;
- (b) FNDC will pay \$11,500.00 to the trustees in full and final settlement of all claims arising from the ford;
- (c) The trustees are solely responsible for all future repairs and maintenance to the ford; and
- (d) The trustees indemnify FNDC from any further liability for the ford.

[3] Some time after the agreement was signed, the trustees say:

- (a) They discovered that FNDC was required to construct and maintain the ford crossing through resource consent obligations; and
- (b) This was not disclosed to them prior to signing the ford agreement.

[4] In 2020, the trustees sent notice to FNDC to cancel the ford agreement on the grounds of mistake or misrepresentation. FNDC did not accept the agreement was validly cancelled. The trustees filed this application seeking a determination it was validly cancelled.

[5] As a preliminary issue, FNDC argue this court does not have jurisdiction to determine whether the ford agreement was validly cancelled. This decision resolves the question of jurisdiction.

**Ko te hātepe ture o te tono nei**

*Procedural history*

[6] The application was prepared by Mr Mahoney, the chairperson of the trust. At that time, the trustees were not represented. They seek orders:

- (a) Determining and cancelling the ford agreement; and
- (b) Recovering 50 percent of ongoing maintenance costs to the ford crossing.

[7] The application was heard on 26 February 2021 along with six other applications filed by the trustees against FNDC.<sup>1</sup> The trustees instructed Mr Mark to represent them at the hearing.

[8] Mr Day, for FNDC, argued this court does not have jurisdiction to determine whether the ford agreement was cancelled. After hearing from the parties, I indicated I would decide jurisdiction as a preliminary issue.

[9] In a related application heard the same day, the trustees and FNDC came to an agreement to share repair and maintenance costs on a 50/50 basis for the easement excluding the ford crossing. Mr Mahoney also advised that the trustees are not seeking a contribution from FNDC for past repairs and maintenance to the ford crossing. Given this progress, I invited Mr Day to take instructions on whether agreement could be reached on future maintenance and repair costs to the ford crossing.

[10] Agreement was not reached. In a memorandum to the Court, Mr Mark advised:

The cancellation of the ford crossing agreement remains before the Court for a determination. Counsel's position is that although the Court's determination would be helpful, because it would provide certainty, it is not essential. The Applicant has cancelled the Ford crossing agreement by notice in writing. If the Respondent

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<sup>1</sup> 229 Taitokerau MB 66-107 (229 TTK 66-107).

disputes the validity of that cancellation it is entitled to issue proceedings in the jurisdiction of its choice.

[11] Mr Day responded:

All of that said - what is the status of the current proceedings? As Mr Mark says in his memorandum the trustee's position is that these proceedings are no longer essential – only “helpful”. They say they do not need a ruling from this Court to cancel the contract. And the Council is saying ‘ok – let’s argue the point if it becomes necessary to do so – it might not’. We have a respondent who challenges the jurisdiction and says the proceedings are not necessary at this stage, and an applicant who while accepting jurisdiction, appears to agree that the proceedings are not needed.

As these proceedings serve no useful purpose they should be withdrawn or dismissed.

[12] Mr Mark did not respond to Mr Day’s memorandum. I have since learnt that he no longer acts for the trustees. The above memoranda created some confusion over the status of the proceeding and it stood adrift. The file was referred to me on 26 April 2022 after I asked the Registrar for an update.

[13] I convened a teleconference with the parties on 23 June 2022. Mr Day appeared for FNDC. Mr Mahoney appeared on behalf of the trustees. Mr Mahoney advised that, despite Mr Mark’s earlier comments, the trustees still seek a decision on their application. As I had already received submissions on jurisdiction, I confirmed I would issue a decision in writing, and if I found in favour of the trustees, I would timetable the application towards a substantive hearing.

### **He aha a FNDC i wero ai i te mana o te kooti?**

*Why does FNDC challenge this court’s jurisdiction?*

[14] This application is made per s 18(1)(d) of Te Ture Whenua Māori Act 1993 (“TTWMA”). This provides:

#### **18 General jurisdiction of Court**

(1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:

...

- (d) To hear and determine any proceeding founded on contract or on tort where the debt, demand, or damage relates to Maori freehold land:

[15] Section 24A of TTWMA states:

**24A Powers of court relating to contracts privity and contractual remedies**

- (1) The court may exercise any power conferred on the High Court—
  - (a) by subpart 1 of Part 2 of the Contract and Commercial Law Act 2017; or
  - (b) by any of the provisions of sections 39, 43 to 48, and 50 to 52 of that Act.
- (2) However, a power conferred on the court by subsection (1) may be exercised only if the occasion for the exercise of that power arises in the course of proceedings (other than an application made for the purposes of section 16(2), 39, or any of sections 43 to 48 of the Contract and Commercial Law Act 2017) properly before the court under section 18(1)(d) of this Act.

[16] Mr Day argues that s 24A limits the court’s power under s 18(1)(d). He submits the court can only exercise those powers in the Contract and Commercial Law Act 2017 (“CCLA”) that are expressly referred to in s 24A. Contractual mistakes are provided for in subpart 2 of Part 2 of the CCLA, cancellation for misrepresentation is in s 37. As these provisions are not expressly referred to in s 24A of TTWMA, Mr Day contends the court has no jurisdiction concerning such issues.

[17] I first consider whether this application falls within s 18(1)(d) of TTWMA before turning to consider the effect of s 24A.

**Ka noho te tono i s 18(1)(d) o TTWMA?**

*Does the application fall within s 18(1)(d) of TTWMA?*

[18] Mr Day accepts this application falls within s 18(1)(d) of TTWMA.<sup>2</sup> I address this briefly.

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<sup>2</sup> 229 Taitokerau MB 66-107 (229 TTK 66-107), at 91-92.

[19] Earlier authorities found that s 18(1)(d) of TTWMA does not apply to general land owned by Māori, or to contracts concerning moveable chattels located on Māori freehold land, but which do not form part of the land.<sup>3</sup> That does not apply here.

[20] The ford agreement is a contract between the parties concerning repairs, maintenance, and associated costs to the ford crossing over the Tarawhaturua stream. The ford is located on Māori freehold land. The trustees seek to cancel the ford agreement, and a contribution from FNDC towards future maintenance and repairs. This is a proceeding founded on contract where the debt, demand or damage relates to Māori freehold land. This proceeding falls within s 18(1)(d) of TTWMA.

### **He aha te kaupapa a s 24A o TTWMA?**

*What is the effect of s 24A of TTWMA?*

[21] In order to determine the effect of s 24A, I first consider the legislative history of this provision before deciding how it applies.

*What is the legislative history of s 24A of TTWMA?*

[22] Section 24A was inserted, from 11 April 2001, by s 4 of Te Ture Whenua Māori Amendment Act 2001. At that time, the CCLA had not been enacted. Instead, contract privity and contractual remedies were regulated by the Contracts (Privity) Act 1982 (“CPA”) and the Contractual Remedies Act 1979 (“CRA”). As such, the original s 24A of TTWMA referred to this predecessor legislation:

**24A Powers of Court under Contracts (Privity) Act 1982 and Contractual Remedies Act 1979**

- (1) Subject to subsection (2), the Court may exercise any power conferred on the High Court—
- (a) by the Contracts (Privity) Act 1982; or
  - (b) by any of the provisions of sections 4, 7(6), 7(7), and 9 of the Contractual Remedies Act 1979.

<sup>3</sup> *Churton v Trustees of Mangaporou Trust* (2003) 132 Aotea MB 219 (132 AOT 219); *Gardner v Gorringer – Tauwhao Te Ngare Block* (2008) 93 Tauranga MB 63 (93 T 63); *Kotahitanga Log Haulage Limited v Forest Distribution Limited – Mangaroa & Other Blocks* (2015) 121 Waiariki MB 149 (121 WAR 149); *Ngataki v Kumete – Parish of Karaka Lot 64D (Whatapaka Marae)* (2016) 121 Waikato Maniapoto MB 184 (121 WMN 184).

- (2) A power conferred on the Court by subsection (1) may be exercised only if the occasion for the exercise of that power arises in the course of proceedings (other than an application made for the purposes of section 7(1) of the Contracts (Privity) Act 1982 or section 7(6) or section 9 of the Contractual Remedies Act 1979) properly before the Court under section 18(1)(d) of this Act.

[23] At that time, both the CPA and CRA conferred general jurisdiction under that legislation on the High Court.<sup>4</sup> In certain circumstances, the District Court had jurisdiction where the amount sought did not exceed \$200,000.00, and the Disputes Tribunal had jurisdiction where the amount sought did not exceed \$7,500.00.<sup>5</sup>

[24] As such, when s 24A was inserted into TTWMA, jurisdiction under the CPA and CRA fell to the High Court, and in some cases to the District Court and Disputes Tribunal. There was no direct jurisdiction conferred on this court under the CPA or CRA prior to the introduction of s 24A. Section 24A was therefore inserted into TTWMA to confer those High Court powers on this court as provided for in s 24A.

[25] The definition of ‘court’ in the CPA and CRA was amended on 19 December 2002.<sup>6</sup> This removed the reference to the High Court, District Court and Disputes Tribunal and inserted a new definition of ‘court’ as:

**Court** means, in relation to any matter, the court, tribunal, or arbitral tribunal by or before which the matter falls to be determined.

[26] These amendments were proposed in the Statutes Amendment Bill (No 2). The explanatory note in the Bill explained the purpose of the proposed change:

The definition is expanded to include the court, tribunal, or arbitral tribunal by or before which a matter falls to be determined. The amendment means that, if a contract is governed by New Zealand law, but the parties have agreed, or are obliged, to bring proceedings outside of New Zealand, the foreign court, tribunal, or arbitral tribunal by or before which the matter falls to be determined is able to exercise the powers conferred by the principal Act.

[27] The effect of this amendment in New Zealand was to extend jurisdiction under the CPA and CRA to all courts where the matter properly fell to be determined in that court.

<sup>4</sup> See the definition of ‘Court’ in the CPA, s 2 in force from 1 March 1989 to 18 December 2002, and the definition of ‘Court’ in the CRA, s 2 in force from 1 March 1989 to 18 December 2002.

<sup>5</sup> Contracts Privity Act 1982, ss 10 and 11, and Contractual Remedies Act 1979, ss 12 and 13.

<sup>6</sup> Contracts (Privity) Amendment Act 2002, s 3, and Contractual Remedies Amendment Act 2002, s 3.

This brought to an end the prior exclusive jurisdiction granted to the High Court, the District Court and the Disputes Tribunal. This interpretation is supported by the explanation in the Bill on repealing the limited jurisdiction of the District Court in the CPA and CRA:<sup>7</sup>

*Clause 108* repeals sections 10 and 11 of the principal Act. Section 10 relates to District Courts' jurisdiction under the principal Act. Section 10 is no longer necessary because District Courts now have a general jurisdiction, under section 29 of the District Courts Act 1947 (as amended by the District Courts Amendment Act (No 2) 1992), to hear and determine any proceeding where the debt, demand or damages claimed do not exceed \$200,00.00.

[28] Surprisingly, there was no corresponding amendment to s 24A of TTWMA. Instead, this continued to refer to the "power conferred on the High Court", even though the CPA and CRA had been expanded to apply to all courts.

[29] The CPA and CRA were repealed and replaced by the CCLA.<sup>8</sup> The purpose of the CCLA was to re-enact, in an up to date and accessible form, certain legislation relating to contracts, the sale of goods, electronic transactions, the carriage of goods and various other commercial matters.<sup>9</sup> The CCLA is a revision Act which is not intended to change the effect of the law, except as expressly provided.<sup>10</sup> The CCLA, amongst other things, consolidated the legislation regulating contractual privity, contractual mistakes and contractual remedies, which all fall under Part 2 of that Act.<sup>11</sup> Section 9 of the CCLA defines 'court' for the purpose of Part 2 as:

**court –**

- (a) means, in relation to any matter, the court, tribunal or arbitral tribunal by or before which the matter falls to be determined; but
- (b) in subpart 6, has the meaning set out in section 85.

[30] This definition continued the expanded approach under the CPA and CRA which conferred jurisdiction on all courts generally. Section 85 of the CCLA confers general

<sup>7</sup> This explanatory note relates to the amendments to the CPA. The explanatory note to the amendments to the CRA is identical.

<sup>8</sup> Contract and Commercial Law Act 2017, s 345.

<sup>9</sup> Above n 8, s 3.

<sup>10</sup> Above n 8, s 4.

<sup>11</sup> Above n 8, s 345.

jurisdiction on the High Court, and limited jurisdiction on the District Court and Disputes Tribunal, in relation to contracts with minors which is not relevant here.

[31] Schedule 6 of the CCLA set out consequential amendments to sixty-four other pieces of legislation. This included amending s 24A to the current provision in TTWMA. The amendment to s 24A did little more than amend the references to the new CCLA. Curiously, it retained the provision that this court may exercise specified powers “conferred on the High Court”. This is despite the fact that the powers referred to were not conferred exclusively on the High Court but on all courts generally.

[32] This legislative history demonstrates that at the time s 24A was inserted into TTWMA, the relevant jurisdiction under the CPA and CRA was conferred exclusively on the High Court. Section 24A was therefore necessary to also confer those powers on this court, in relation to a proceeding that fell within s 18(1)(d) of TTWMA. However, from December 2002, that was no longer the case. Jurisdiction under the CPA, the CRA, and later the CCLA, was conferred on all courts generally, including this court. Section 24A therefore became redundant. That it was retained without amendment, other than a cursory update to the legislative reference when the CCLA was enacted, can only be Parliamentary oversight or error. This error should be referred to Parliament for review. Despite that, as s 24A is still in force, I must determine how it applies here.

*Can this court only exercise the limited powers in the CCLA as expressly provided for in s 24A of TTWMA?*

[33] There are no authorities that determine the effect of s 24A of TTWMA. In *Kotahitanga Log Haulage Limited v Forest Distribution Limited – Mangarua & Other Blocks* and *Ngataki v Kumete – Parish of Karaka Lot 64D (Whatapaka Marae)* there was some comment on s 24A.<sup>12</sup> However, those comments were obiter and were not conclusive as the applications in both cases did not properly fall within s 18(1)(d) of TTWMA.<sup>13</sup>

<sup>12</sup> *Kotahitanga Log Haulage Limited v Forest Distribution Limited – Mangarua & Other Blocks* (2015) 121 Waiariki MB 149 (121 WAR 149) and *Ngataki v Kumete – Parish of Karaka Lot 64D (Whatapaka Marae)* (2016) 121 Waikato Maniapoto MB 184 (121 WMN 184).

<sup>13</sup> *Kotahitanga Log Haulage Limited v Forest Distribution Limited – Mangarua & Other Blocks* and *Ngataki v Kumete – Parish of Karaka Lot 64D (Whatapaka Marae)*, above n 11.

[34] Mr Day submits that the Court's power under s 18(1)(d) is subject to the limited powers expressed in s 24A of TTWMA. I do not agree.

[35] When interpreting these provisions, I have to do so in a manner that best furthers the principles set out in the Preamble. That includes:<sup>14</sup>

- (a) Promoting the retention of the land in the hands of the owners, their whanau and their hapū;
- (b) Facilitating the occupation, development and utilisation of that land for the benefit of the owners their whanau and their hapū; and
- (c) Maintaining a court and establishing mechanisms to assist the Māori people to achieve the implementation of those principles.

[36] Parliament also intended that the powers conferred by TTWMA shall be exercised as far as possible in a manner that facilitates and promotes the retention, use, development and control of Māori land as a taonga tuku iho by Māori owners, their whānau, their hapū, and their descendants.<sup>15</sup> These principles provide important guidance not only when interpreting these provisions, but how they interact with each other.

[37] This application properly falls within s 18(1)(d) of TTWMA which grants this court jurisdiction to hear and determine any proceeding founded on contract where the debt demand or damage relates to Māori freehold land. The powers under Part 2 of the CCLA is conferred on all courts generally including this court. As such, this court can exercise all powers under Part 2 of the CCLA per s 18(1)(d) of TTWMA.

[38] The jurisdiction under s 18(1)(d) is conferred on this court “[i]n addition to any jurisdiction specifically conferred on the court otherwise than by this section”. Section 18(1)(d) is not subject to s 24A of TTWMA. It is expressly described as a source of additional jurisdiction.<sup>16</sup>

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<sup>14</sup> Te Ture Whenua Māori Act 1993, Preamble and s 2(1).

<sup>15</sup> Above n 13, s 2(2).

<sup>16</sup> See *Mikaere-Toto v Te Reti B and C Residue Trust – Te Reti B and Te Reti C Block* (2014) Māori Appellate Court MB 249 (2014 APPEAL 249), and *Nikora v Tuhoe Te Uru Taumatua* (2020) 2020 Māori Appellate Court MB 248 (2020 APPEAL 248).

[39] Also, s 24A does not expressly limit the Court's jurisdiction under s 18(1)(d) of TTWMA. In order to exercise the powers under s 24A(1), the application must properly be before the Court under s 18(1)(d). Section 24A does not say that the Court's jurisdiction under s 18(1)(d) of TTWMA, or the CCLA generally, is limited by the express provisions of s 24A.

[40] Even if I applied the more limited powers expressly referred to in s 24A of TTWMA, I can still hear at least part of this proceeding. Contractual mistakes are regulated by subpart 2 of Part 2 of the CCLA, or ss 21-32. Those are not expressly referred to in s 24A(1) of TTWMA. However, s 24A(1)(b) expressly confers on this court the powers in ss 43 to 48 of the CCLA. These provisions set out the powers of the court to grant relief where a party cancels a contract including where induced to enter into it by misrepresentation.

[41] Mr Day argues that a party may cancel a contract for misrepresentation per s 37 of the CCLA, but as this provision is not expressly referred to in s 24A of TTWMA, this court cannot determine the matter unless the parties agree the contract was validly cancelled. This cannot be correct.

[42] Section 37 of the CCLA provides that a party may cancel a contract for misrepresentation in certain circumstances. This provision does not refer to a court at all. This is because s 37 allows the party asserting misrepresentation to cancel the contract. There is no power for the court to do so. This can be contrasted with s 28 of the CCLA which confers on the court the power to cancel a contract if a party was influenced to enter into it by mistake. As such, even the most limited reading of s 24A(1) of TTWMA cannot limit the court's power per s 37 of the CCLA as there is no power for any court under that provision. Rather, the court has power per ss 43-48 to grant relief where a party has cancelled a contract. In order to determine whether it can exercise its powers to grant relief, the court must also be able to determine whether a contract has been validly cancelled per s 37. This is a necessary finding before the court can consider whether to grant relief. The failure to refer to s 37 of the CCLA in s 24A of TTWMA cannot prevent the court from making such a finding.

[43] In this case the trustees seek a finding that the ford agreement has been cancelled, and FNDC should be liable for 50 percent of any future repair and maintenance costs to the ford crossing. Before deciding whether to grant such relief I must first consider whether the ford agreement has been cancelled.

[44] The above interpretation of ss 18(1)(d) and 24A of TTWMA, and the interplay between these provisions, is also consistent with the principles set out in the Preamble and s 2 of TTWMA. This approach allows the court to hear and determine any proceeding founded on contract where the debt demand or damage relates to Māori freehold land, including by exercising the powers conferred on all courts per Part 2 of the CCLA. Such an approach allows the court to facilitate and promote the retention, use, development and control of Māori land by Māori owners.

### **Kupu whakataua**

#### *Decision*

[45] Section 24A of TTWMA contains drafting errors. I direct the Registrar to refer a copy of this decision to the Parliamentary Counsel Office to consider whether s 24A should be amended or repealed in light of these findings.

[46] This court has jurisdiction to exercise the powers under Part 2 of the CCLA per s 18(1)(d) of TTWMA. Those powers are not limited by the application of s 24A of TTWMA.

[47] When applying s 24A of TTWMA, this court can determine whether a contract has been cancelled per s 37 of the CCLA in order to determine whether to grant relief per ss 43-48 of the CCLA.

[48] I have jurisdiction to hear this application.

### **Tohutohu**

#### *Directions*

[49] The facts in this case are in dispute. In this, and other related proceedings, evidence has been filed in an adhoc manner often attached to memoranda or simply emailed to the Registrar. To ensure this application progresses in an efficient manner, I direct that all

evidence is to be deposited by sworn affidavit. All relevant documents should be exhibited to those affidavits. The witnesses deposing the affidavits will need to be available for cross-examination unless leave is granted excusing their attendance. I direct as follows:

- (a) The trustees are to file and serve all evidence they rely on within six weeks of this judgment;
- (b) FNDC is to file and serve all evidence it relies on within a further six weeks;
- (c) The trustees are to file and serve any evidence in reply within a further three weeks.

[50] This application is then to be set down for a hearing of one day in Kaitaia on a date to be determined by the Registrar.

I whakapuaki i te 4:00pm i Whangārei te 28<sup>th</sup> o ngā rā o Hōngongoi i te tau 2022.  
*Pronounced at 4:00pm in Whangārei on this 28<sup>th</sup> day of Hōngongoi 2022.*

M P Armstrong  
**JUDGE**