

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

A20130006483

UNDER Section 326B Te Ture Whenua Māori Act 1993

IN THE MATTER OF Mangamuka West 3B2A Block

BETWEEN NGAWAI TUSON
Applicant

Hearing: 20 November 2013, 77 TTK 265-277
17 November 2014, 92 TTK MB 182-184; 91 TTK MB 26-28
4 May 2015, 121 TTK MB 172-202
11 December 2018, 183 TTK 112-139
12 April 2019, 190 TTK 150-174
(Heard at Whangarei)

Appearances: Hanamaraea Walker for the Applicant

Judgment: 9 December 2019

JUDGMENT OF DEPUTY CHIEF JUDGE C L FOX

Introduction

[1] On 17 July 2013, Ngāwai Tuson (the applicant) filed an application for an order under s 326B of Te Ture Whenua Māori Act 1993 to provide reasonable access to Mangamuka West 3B2A on the basis that the land is landlocked.

[2] In my preliminary decision on 23 February 2018, I determined that Mangamuka West 3B2A is landlocked and relief should be granted.¹ A preliminary decision issued on 23 February 2018 and it was distributed on 28 February 2018 to the applicant, the Far North District Council (FNDC) and other interested parties but not to all affected land owners.

[3] On 22 March 2018 the applicant objected to the proposed access route Route C, on the basis that flooding and erosion have made the route unsafe.

[4] Further hearings were held on 11 December 2018 and 12 April 2019.² The remaining question for determination is, in light of objections and submissions received, which proposed access route is the best, if any.

Background

[5] Mangamuka West 3B2A is Māori freehold land located in central Northland, south east of Kaitaia. It was created by partition order on 21 September 1950,³ and is now owned by Ngawai Tuson, Adam Harris and Waaka Harris-Tatana as joint tenants.⁴ The owners access their land over Mangamuku West 3F2C by way of agreement, with no formal arrangement in place.

[6] In my preliminary decision on 23 February 2018, I set out the full background and procedural history to the block and this application. I will not repeat it in full here, and instead will focus on events occurring since this judgment.

¹ 168 Taitokerau MB 17-53 (168 TTK 17-53).

² 183 Taitokerau MB 112-139 (183 TTK 112-139) and 190 Taitokerau MB 150-174 (190 TTK 150-174).

³ 23 Hokianga MB 73 (23 HK 73).

⁴ 15 Title Notice Taitokerau 16 (15 TNTOK 16).

Procedural history

23 February 2018 preliminary decision

[7] In my preliminary decision, I determined that Mangamuka West 3B2A was landlocked as there was no provision made for legal access to the block and there was no direct access to any public or other roads. I also determined that there was no reasonable alternative access to the block.

[8] In regards to whether relief should be granted, I discussed the considerations set out in s 326B(4) of the Act and determined that these were satisfied. The owners of the block had acted in a reasonable manner and attempted to negotiate access with the affected owners, but the outcome of negotiations was a general consensus that access should be created by a Court order. I found there would be significant hardship to the owners of Mangamuka West 3B2A if access was not granted. I considered that outweighed the potential hardship to adjoining owners caused by the grant of access. A grant of access would also help to achieve the purpose of the Act set out in Part 14: facilitating the use and occupation by owners of land owned by Māori by providing or facilitating access.

[9] The final issue for determination had been which access route should be adopted. Three potential access routes were identified, with a recommendation by the surveyor, Mr Lee, for Route B or C.⁵

Route A

[19] Route A proposes access from SH1 along part of the existing Mangamuka Church Road, continuing north over Mangamuka West 3F2C and following the right bank of the Mangamuka River, crossing the river onto Mangamuka West 3B2A at a point approximately 150 to 200 metres downstream from the boundary between 3F2C and 3B2A. The total distance of Route A is 430 metres from SH1 with 260 metres crossing over Mangamuka West 3F2C. An area of approximately 2600 square metres would therefore be required from 3F2C, assuming the width of the road as 10 metres.

[20] Mr Lee noted that Route A proposes to extend quite a length over Mangamuka West 3F2C and travels down the river to the point where Ms Tuson currently crosses. While Route A is currently the most practical crossing point, given that the river changes its location often, that crossing point may not be suitable in a few years. Mr Lee advised that Route A was his least preferred option due to the changeable nature

⁵ 168 Taitokerau MB 17-53 (168 TTK 17-53) at [19]-[25].

of the river and the fact that if any structure was constructed there the river might deviate away from it making it quite useless.

Route B

[21] Route B also proposes access from SH1 along part of the existing Mangamuka Church Road. However, where the road turns east, Route B turns west, travelling a short distance over Mangamuka West 3F2C and then crossing the river onto Mangamuka West 3B3. The route then travels north east following the left bank of the Mangamuka River to Mangamuka West 3B2A. The total distance of Route B is 400 metres from SH1, with 60 metres crossing 3F2C and 160 metres crossing 3B3. The land required for the access would therefore be 600 square metres from Mangamuka West 3F2C and 1600 square metres from Mangamuka West 3B3. Mr Lee noted that Route B appeared to have the shortest total distance for the access construction.

[22] In terms of the river crossing on Route B, it was proposed that a crossing structure be put in place at the point where the land drops down the hill towards the river. Mr Lee highlighted that the solid rock foundation on one bank would give the structure something solid to secure to, which means it is unlikely the river will move from that location. There may be an issue with the steep gradient for logging trucks turning, however Mr Lee appeared confident this could be addressed with works to smooth out the gradient and with the careful location of the structure. Mr Lee considered Route B to be a viable option but noted that it will need a crossing structure put in place before it is usable.

Route C

[23] Route C proposes access from SH1 further west from the other two routes, and would not include Mangamuka Church Road. The route travels directly from SH1 over a small portion of the right river bank and across the Mangamuka River onto Mangamuka West 3B3. It then continues north along the left bank of the river to Mangamuka West 3B2A. The total distance of Route C is 530 metres from SH1, traversing 420 metres over Mangamuka West 3B3 and requiring 4200 square metres to be taken from 3B3.

[24] Mr Lee noted that the area between SH1 and the right bank of the Mangamuka River is reserve land administered by the FNDC. He advised that FNDC indicated that while they have in the past approved similar vehicle access over such reserves for landlocked land, they would need to consider the particulars of any such application prior to approval. However, Mr Lee drew attention to another track located slightly north west of the Route C access point, generally opposite Makene Road. This track appears to avoid the areas of reserve land, going straight from the legal road to the river bed. The proposed access of Route C would also likely require approval from NZTA for the entranceway to SH1, however approval has already been obtained for the entranceway for both Route A and Route B.

[25] Mr Lee noted that Route C traverses a long length of Mangamuka West 3B3 and has slightly faster flowing water at the river crossing point, adding a safety consideration. However, he considered that Route C was a viable option and had the added benefit of being immediately usable in terms of the river crossing.

[10] I found that Route A would not provide reasonable or practical ongoing access as the changing course of the river would cause issues in the future and it was the most intrusive

option over Mangamuka West 3F2C. While Route B would provide reasonable access, I considered that due to practicality reasons, it was not the best option overall. I found Route C to be the most practical option, as it would be immediately usable, it was lower in cost to form than Route B, and it did not necessitate the ongoing use of the Mangamuka Church Road. Therefore, I determined that Route C was the best option for providing reasonable and practical access.

[11] I determined that access should be granted by way of an easement, due to the area of land the access way would run over. The issue of compensation was raised, but as there was no management structure in place for Mangamuka West 3B3 to whom compensation would be paid.

[12] My decision was preliminary. The Registrar was directed to send a copy of the judgment to parties and affected landowners. I stipulated that if no objections were received within one month of release, the proposed orders set out at [135]-[138] would become final.

Objection to preliminary decision

[13] On 22 March 2018, the applicant e-mailed the case manager and stated her objection to access via Route C. The applicant submitted that Route C was no longer a safe, reasonable or practical route due to flooding and erosion of the riverbank and instead considered Route B to be the best and safest route.

[14] The applicant also advised on 3 September 2018 that she had engaged Liam Stoneley as her solicitor. Submissions from the applicant were received on 10 December 2018, further explaining her objections to Route C and preference for Route B.

11 December 2018 hearing

[15] A hearing was held on 11 December 2018. The applicant's counsel spoke to her submissions and requested that the Court reconsider the preliminary decision by selecting Route B as the preferred access route.

[16] Various other adjoining landowners objected to Route B, and it became clear that many had not read or understood my preliminary judgment or the applicant's submissions.

[17] I clarified that the purpose of my preliminary decision was to make sure everyone had the same information about the proposed routes and demonstrating why Route C was the proposed solution.

[18] I adjourned the hearing and directed the Registrar pursuant to s 40 to conduct a meeting of owners to discuss the preliminary judgment, go through the evidence presented by the applicant, and then report back to the Court within 3 months.

The Registrar's Report

[19] Te Reo Hau, a practicing mediator and facilitator with Omeka Resolution Services, was engaged by the Registrar at the direction of the Court pursuant to ss 40 and 98(9)(aa) of the Act to facilitate a meeting of the owners of the blocks affected by the application. The purpose of this hui was to take the owners through the preliminary judgment of the Court, take them through evidence and submissions presented at the hearing by the applicant, and prepare a report for the Court.

[20] The meeting was held on 4 March 2019 in Kaitaia. The case manager also attended. Te Reo Hau produced a report for the Court on 26 March 2019.

[21] The report outlines what happened at the hui and the mediator's observations. Te Reo Hau firstly explained the preliminary decision, including the surveyors evidence, the three proposed access routes, and the Court's determination on various issues. The applicant at this stage said her preference was for Route B. Owners of Mangamuka 3F2C, Miriama Harris (owner of Mangamuka West 3B3) and Ray Harris (owner of Mangamuka West 3B1A1) said they preferred Route C as they wanted owners to get land back from the closing of the Mangamuka Church Road.

[22] Te Reo Hau explained to attendees that due to the objection from the applicant to Route C, the matter had returned to Court in December 2018. He discussed the applicant's submissions made at the hearing as to why she believed Route C would no longer provide reasonable access. He also referred to the Haig Workman engineers report, which concluded that Route B would offer a more stable river alignment for crossing than Route C alongside other considerations. Te Reo Hau also made reference to the objections made at the hearing.

[23] A question and answer session was held. Georgina Ranui, a trustee for the Te Aroha Wi Moka Whānau trust, owner in Mangamuka 3F2C, gave a presentation which proposed a draft access plan similar to Route C but took access across other lands not party to the existing application. A number of those present raised concerns about this, including needing to inform the other owners and the re-vesting of the road. Kim Pihema raised an alternative bridge option. When attendees were unable to offer new options or reach agreement, the hui was called to an end.

[24] Te Reo Hau's observations were that there was some animosity expressed towards Ngāwai Tuson by the other adjoining land owners, which appeared to stem from the original mortgagee sale and current ownership of the land. This caused an environment of mistrust which led to owners, particularly those of Mangamuka West 3F2C, not wanting to concede any land to the formation of the roadway. They did not trust the report prepared by Haig Workman and suspected it was bias in favour of the applicant as the initiator.

[25] While no agreement was reached, the outcome was that Te Reo Hau considered all attendees were fully informed of the Court's rationale and discretionary power in respect of the application filed and understood the preliminary decision, the subsequent submissions by the applicant and the engineers report.

12 April 2019 hearing

[26] I heard this matter again on 12 April 2019.⁶

[27] Te Reo Hau attended the hearing and discussed his report. He emphasised that attendees appeared to be fixed in their positions during the hui, which made negotiations difficult. There were no questions asked of him.

[28] The applicant again submitted that her preference was for Route B. Various owners in attendance spoke to their preference for Route C and many discussed their disappointment that more discussions within the whānau were not occurring. Individual views are set out in the submissions section.

⁶ 190 Taitokerau MB 150-174 (190 TTK 150-174).

[29] I reserved my decision to consider the material filed since the preliminary judgment and to make a decision in terms of this.

Submissions

Applicant

[30] The applicant first submitted her change in preference for Route B in an email dated 22 March 2018. Submissions received by the Court on 10 December 2018 provided further information.

[31] The applicant submitted that Route C no longer constitutes reasonable access due to significant erosion caused by flooding of the Mangamuka River which has occurred since the preliminary judgment. Route C, it was claimed, would now be more costly than Route B to develop.

[32] The applicant submitted that Route B was the traditional access way used by her grandparents. The applicant had obtained an engineer's report from Haig Workman. The report discussed that Route C would require a new access point from State Highway One, which requires permission from the New Zealand Transport Authority, whereas Route B would use the existing Mangamuka Church Road. The assessment of the engineers was Route C access was non-compliant when assessed against NZTA standards. The building of a bridge, in their expert opinion, would provide longevity of access to the land for future generations. The applicant said Route B would best assist the applicant and other owners to utilise their land and refusal to grant relief by way of access via Route B would cause significant hardship. Overall, it was submitted that Route B is the shortest route, takes the least amount of land, and the bridge will be secure against changing river alignment.

[33] The applicant submitted that Route A was still an unsuitable option, as it is only accessible by four-wheel drive and cannot be accessed during flooding.

[34] The applicant has continued her preference for Route B throughout the December 2018 and April 2019 hearings.

Opposition

[35] At the hearings on 11 December 2018 and 12 April 2019, various owners expressed their objection to the application and proposed route.

[36] Ruth Lemon, a trustee of Paul and Ruth Lemon Whānau Trust, filed a notice of intention to appear on 10 March 2019 and said she opposed the application. She said she had an amendment to Route C that would make it a safer and more practical option. Deidre Everitt and others as descendants of Paritu-Mangamuka West H5B and 3B2A blocks also filed a notice of intention to appear prior to the April 2019 hearing, advising they oppose the application and are filing a s 45 application.

[37] In the April 2019 hearing, Polly Tana said she disagreed with everything the applicant was doing. Moriana Wynyard said she supported access via Route C, as she is worried about the Church and Church Road being impacted. Victor Harris said Route C was the old way of travelling and does not impose too much on the land. Deidre Everitt said her preference was for Route C.

[38] Miriama Harris discussed her affidavit filed with the Court on 9 April 2019, opposing access through Route C and revoking her initial support at 168 Taitokerau MB 26. She rejected the construction of a 10-metre width road as an unnecessary land intrusion. She also discussed how Route C would cut through her maize crops.

[39] Orzogna Harris said that Route C took too much land and suggested a reconsideration of access routes was necessary. Ware Pihema said he thinks the whānau need to have discussions with proper procedure. Kathleen Deana Lye said she would support Route C but expressed her disappointment whānau could not get together and talk.

[40] In the December 2018 hearing, of those who did not speak at the latest hearing, Miriama Harris read an affidavit from Thomas Hape Taipiri, a shareholder of Maunga Taniwha 3B3 West who said as a hui has never been held as he wished, he does not consent or support any access for the applicant over their lands. Tenesia Tipoki said she opposed and Mamoka Makene Winikerei said she does not want any more land taken.

Law

[41] Section 326B of the Act provides:

326B Reasonable access may be granted in cases of landlocked Maori land

(1) The owners of landlocked land may apply at any time to the court for an order in accordance with this section.

(2) On an application made under this section,—

(a) the owner of land adjoining the landlocked land that will or may be affected by the application must be joined as a party to the application; and

(b) every person having an estate or interest in the landlocked land, or in any other piece of land (whether or not that piece of land adjoins the landlocked land), that will or may be affected if the application is granted, or claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract, or other instrument affecting or relating to any such land, and the local authority concerned, are entitled to be heard in relation to any application for, or proposal to make, any order under this section.

(2A) The applicant must, as soon as practicable after filing an application in the court, send a copy of the application to the local authority concerned.

(3) For the purposes of subsection (2), the court may, if in its opinion notice of the application or proposal should be given to any person mentioned in that subsection, direct that such notice as it thinks fit must be given to that person by the applicant or by any other person.

(4) In considering an application under this section, the court must have regard to—

(a) the nature and quality of the access (if any) to the landlocked land that existed when the applicant purchased or otherwise acquired the land; and

(b) the circumstances in which the landlocked land became landlocked; and

(c) the conduct of the applicant and the other parties, including any attempts that they may have made to negotiate reasonable access to the landlocked land; and

(d) the hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order; and

(e) the requirements of Part 3B of the Conservation Act 1987, if the application affects a conservation area; and

(f) issues of public safety raised by a rail operator, if the application affects a railway line; and

(g) such other matters as the court considers relevant.

(5) If, after taking into consideration the matters specified in subsection (4), and all other matters that the court considers relevant, the court is of the opinion that the applicant should be granted reasonable access to the landlocked land, it may make an order for that purpose—

(a) vesting in the owners of the legal estate in the landlocked land the legal estate in fee simple in any other piece of land (whether or not that piece of land adjoins the landlocked land) except land that is a national park, public reserve or railway line; or

(b) attaching and making appurtenant to the landlocked land an easement over any other piece of land (whether or not that piece of land adjoins the landlocked land), despite section 75 of the Railways Act 2005.

[42] In regards to determining the most appropriate route by which to grant access, the Court in *Roberts - Te Touwai B19A1* provided a non-exhaustive list of factors that can be taken into account:⁷

- (a) The current and future use of the landlocked and servient land;
- (b) What type of access is reasonably necessary to enable the occupier of the landlocked land to use and enjoy that land;
- (c) Whether the proposed access is practical;
- (d) The topography of the land;
- (e) The cost to form and maintain the access;
- (f) Whether the proposed route will cause hardship to the owners or occupiers of the servient land; and
- (g) What is the best overall option taking into account the interests of the owners or occupiers of both the landlocked and the servient land.

⁷ *Roberts - Te Touwai B19A1* (2015) 114 Taitokerau MB 131 (114 TTK 131) at [97] citing *Nukutere Lands Trust v Trustees of Whitikau A1 – Opape 28* (Whitikau A1) (2013) 70 Waiariki MB 272, *Asmussen v Hajnal* (2009) 10 NZCPR 551 (HC), *J T Jamieson & Co Ltd v Inland Road Ltd* [2013] NZHC 3313 and *Roberts v Cleveland* (1990) 1 NZ ConvC 190, 452 where similar principles were taken into account.

Discussion

[43] Aerial photographs accessed via Māori Land on Line indicate that the predominant use of Mangamuka West 3B2A is an agricultural or horticultural production unit with some forestry or native bush either on or near the block. The same mixed use is discernible for Mangamuka West 3F2C and Mangamuka West 3B3. There are also houses in the area. Such utilisation for all blocks is unlikely to change.

[44] The type of access reasonably necessary to enable the owners and occupiers of Mangamuka West 3B2A is vehicular access to enable entry onto the block.

[45] The evidence of the applicant was that Route C is no longer practical as an option given the topography of the land, primarily involving the Mangamuka River. She claimed it was no longer a safe, reasonable or practical route due to flooding and erosion of the riverbank and instead considered Route B to be the best and safest route. She also provided the report of the Haigh Workman engineers comparing Routes B and Route C. They conclude and recommended the following:

Route B would appear to offer more stable river alignment for a river crossing. At both crossing points the river banks are undergoing active erosion/ accretion and rock armouring will be required to safeguard the bridge abutments.

The length of earthworks embankments for the bridge abutments constructed on the lower terrace floodplain should be kept to a minimum to minimise the reduction in available floodpath width that would otherwise increase the risk of upstream flooding.

The required bridge span and length of crossing at lower terrace level is expected to be similar for both crossing points.

The Route B will utilize the existing Mangamuka Church Road formation achieving a saving of approximately 280 m of road construction over Route C.

Route C will cross a longer length of the lower terrace putting this at risk from changes in river alignment as well as increased likelihood of flooding.

Downstream of the Route B crossing both alignments follow a narrow corridor along the north bank between the river and Mangamuka West 3B3 property boundary. This river bank is undergoing active erosion and rock armouring is urgently required to avoid encroaching onto the neighbouring property.

NZTA has provided confirmation for the formation of a new vehicle crossing (for Route C) onto State Highway 1 subject to minor vegetation removal. Haigh Workman have assessed the sight line available for the intersection at the western end of Mangamuka Church Road against NZTA standards as non-compliant.

[46] While the engineers in their comparative analysis were concerned with cost there was sufficient to raise real concerns for the Court regarding Route C. It does now appear to be impractical and potentially unsafe given the amount of rock armouring needed to protect the river bank and road from inevitable changes in the river course.

[47] Those opposed owners in Mangamuka 3F2C who offered alternatives to Route B have not produced any evidence from engineers to validate their proposed alternative routes and without such evidence the Court is not in a position to be able to assess these adequately. That is also true for those who still support Route C as an option.

[48] In addition, it is now clear that most of the owners of both Mangamuka 3F2C and Mangamuka 3B3 oppose either Route B or Route C. I have had regard to the opposition from the owners of Mangamuka 3F2C and Mangamuka 3B3. I do not consider that undue hardship would be caused to either block of owners if the order for a right of way was granted, with more impact occurring for the Mangamuka 3B3 owners should Route C be confirmed. That is because the current utilisation of all the land blocks should remain relatively unaffected. Maize crops can be compensated for or the construction of the road can progress after harvest. For both Routes B and C the ownership of the land will not be unsettled. The current owners will remain owners of their land.

Decision

[49] Having regard to the new evidence from Haigh Workman Engineers produced by the applicant, and weighing all views expressed, I now consider it prudent to adopt Route B, as it provides the most practical access out of the range of options currently before the Court. The only way my view on that will change is if any of the opposing owners produce within 2 months engineering advice on alternatives or confirming the Route C option is the best practical option.

Orders

[50] There is an order under s 326B(5) of Te Ture Whenua Māori Act 1993 granting access by way of a right of way easement to the Mangamuka West 3B2A block via Route B.

[51] Pursuant to s 326C of the Act, the easement will be granted subject to the following terms and conditions:

(a) The easement will be subject to the rights and powers implied by clauses 1, 6, and 10 to 13 of Schedule 4 of the Land Transfer Regulations 2002, and the implied covenants detailed in Schedule 5 of the Property Law Act 2007 regarding rights of vehicular rights of way. Note that the right in clause 2(d) of Schedule 5 of the Property Law Act 2007 shall prevail over clause 11 of Schedule 4 of the Land Transfer Regulations 2002. The Court retains jurisdiction in relation to any disputes.

(b) The owners of Mangamuka West 3B2A will need to construct, at their own cost, the access way over the easement.

(c) Compensation for the grant of the easement will be determined by the Court and, if necessary, paid by the applicant as directed by the Court.

[52] Pursuant to s 73 of the Act, the above orders will be made conditional upon:

(a) The Court determining whether compensation is payable, the level of compensation, and to whom it is payable; and

(b) The applicant filing a suitable survey plan depicting the route of the easement, such plan to be approved by the Court.

[53] Once the survey plan is completed the Registrar is directed to engage a valuer per ss 69 and 98 of the Act for the purpose of determining compensation payable. Once the valuer's report is completed the Registrar is directed to send the report out to all affected parties and set this matter down for one last hearing. At that hearing I will hear from the parties any further submissions regarding compensation.

[54] This is all conditional upon there being no objection with supporting engineering evidence filed within two months of the release of this decision.

[55] There is finally an order under s 86 amending the preliminary decision dated 23 February 2018 by changing the words "I carried out a site visit" in paragraphs 103 to 'Judge

Ambler carried out a site visit” and at paragraph 107 changing the words “I noted” to “Judge Ambler noted”.

Pronounced at 11.00 am in Gisborne on Monday this 9th day of December 2019.

C L Fox
DEPUTY CHIEF JUDGE