

ME

A20170007278

And

WĀHANGA

Section 18(1)(a), Te Ture Whenua Māori Act 1993

Under

MŌ TE TAKE

Kaiti 336F (Roadway)

In the matter of

MAKORORI FORESTS LIMITED

Te kaitono

Applicant

ME

A20180001869

And

WĀHANGA

Sections 326B and 318, Te Ture Whenua Māori
Act 1993

Under

MŌ TE TAKE

Kaiti 336F (Roadway)

In the matter of

MATUAOKORE AHU WHENUA TRUST

Te kaitono

Applicant

Hei timatanga kōrero - Introduction

[1] This proceeding began when the New Zealand Transport Agency (NZTA) sought rights of permanent access over a small part of Kaiti 336F, which is a Māori roadway, for the purposes of the State Highway 35 Wainui Cycleway Stage 2 Project. This project extends the existing national cycleway. In order for the Māori Land Court to grant the access sought, it was necessary to ascertain the legal status of the roadway, and identify its owners. That ought to have been straightforward, but it was not.

[2] Indeed, if I may be forgiven for colloquial language, a can of worms has opened as a consequence of this modest exercise of incorporating access over a little area of Māori land in the national cycleway.

[3] The Native Land Court created Kaiti 336F Roadway in 1913 pursuant to s 48 of the Native Land Amendment Act 1913. We now know that, over the decades since, various parties have made assumptions about ownership and rights of use there that may have been wrong, and now fall to be tested as a matter of law.

[4] This judgment comprises a decision on only one of several legal questions that may require answers. The parties tell me that the decision they require to inform the constructive discussions that are underway is one pursuant to s 18(1)(a) of Te Ture Whenua Māori Act 1993: determination of ownership of the roadway comprised in the block known as Kaiti 336F Roadway.

[5] Let me begin by describing the parties and their various interests in the proceeding, together with some background.

Ngā kiritake me ō rātou ake whakapono - The parties and their positions

Makorori Forests Limited

[6] Makorori Forests Limited is the applicant that seeks the Court's determination under s 18(1)(a) of rights in the roadway known as Kaiti 336F. The director of the applicant company who has appeared in Court is Thomas Carroll.

[7] In an affidavit dated 27 March 2018, Mr Carroll says that he wants the Court to determine who has a legal right to use Kaiti 336F as a roadway because uncertainty about that is affecting his business. Makorori Forests Limited “is currently subdividing Makorori’s land and is marketing sections for sale”.¹

[8] Mr Carroll says that his company owns land (CFR Identifier 783562) that has the benefit of a right of way over land owned by Shona Zame (CFR Identifier 783561). Makorori Forests Limited’s land is described in an appended Certificate of Title as comprising 3.4390 hectares, while the Certificate of Title to Ms Zame’s land says it comprises 7.8700 hectares. Both of these are titles to general land. The land that Makorori Forests Limited is proposing to subdivide was formerly known as Kaiti 336E, which is shown on the plan attached to the Court Order of 1913 as lying at the end of the roadway comprised in Kaiti 336F.

[9] Mr Carroll says in his affidavit that the roadway provides access to “the land previously described as Kaiti 336E which is now Makorori’s land”.² He goes on to say “it is my opinion that the owner of Makorori’s land and any future owners are entitled to use Kaiti 336F as a roadway”³, but “the proprietors of Kaiti 336F have expressed the opinion that the owners of Makorori’s land do not have any legal right to use Kaiti 336F as a roadway”.⁴ The owners have not sought to block access,⁵ but Mr Carroll had to cancel an auction to sell the subdivisions of former Kaiti 336E block because of “concerns over access”,⁶ and he wants the issue determined.

[10] In support of Makorori Forests Limited’s right to use Kaiti 336F Block for access, the company’s then lawyer Mr Witters, in a memorandum dated 27 March 2018, brought to the Court’s attention certain words on the certificate of title for the subject land. Under “Interests”, it says “175405.1 Court Order laying out a roadline over Kaiti 336F Block (FS3B/1109) – 31.7.1989 at 9.42am”. This indicates that Makorori Forests Limited’s title includes rights in the Kaiti 336F Roadway. Mr Witters also argued that the effect of s 326 of Te Ture Whenua Māori Act was to make the right to access run with the land when it was sold to Makorori Forests Limited. I look further into the arguments pursuant to s 326 below.

¹ Affidavit of T Carroll, 27 March 2018 at [18].

² Above n 1 at [13].

³ At [14].

⁴ At [16].

⁵ At [17].

⁶ At [19].

The Matuaokore Ahu Whenua Trust

[11] The Matuaokore Ahu Whenua Trust represents the Māori owners in Kaiti 336F Roadway.

[12] When the NZTA wanted to construct the cycleway extension over the Kaiti 336F Roadway, they found that the roadway, which intersects with State Highway 35 along which the cycleway was to run, was undivided Māori land. No entity had been established to represent the owners.

[13] On 1 March 2016, the Māori Land Court created an entity to engage in discussions about the cycleway by constituting the Matuaokore Ahu Whenua Trust in respect of the block known as Kaiti 336F Roadway. The trust was stated to be ‘for the sole purpose of working with New Zealand Transport Agency regarding the extension of the existing cycleway’. It appointed Tammy Watene, Frances Stokes, Rangi Katamo Hokianga and Arapera Harrison as trustees.

[14] The trustees worked with the NZTA and granted a Licence to Occupy dated 26 January 2018 pursuant to the Public Works Act 1981 to create permanent access for the cycleway, and agreed also to apply to the Māori Land Court to vary the original roadway order (the Licence and Variation Agreement). In the Agreement, the Matuaokore Ahu Whenua Trust also undertakes to:⁷

- (b) Make an application to the Māori Land Court for variation of the [1913 roadway] order to provide for pedestrian and/or cyclist members of the public as the class of persons entitled to pass and repass across the Cycleway Land for the purpose of a cycleway/walkway being constructed and maintained by the Crown and/or Gisborne District Council.

[15] The terms of the licence and the variation of the Court Order are stated to be subject to “ratification by the Māori Land Court”.⁸ The agreement provides for the Crown to pay to the Trust a licence fee of \$5,000, and the licence is for a term of twelve months, so it appears that it has now lapsed.

⁷ Memorandum of N Milner, dated 27 February 2018 Appendix “A”, Licence and Variation Agreement dated 26 January 2018.

⁸ Paragraph F of the Background in the Licence and Variation Agreement.

[16] The initial position of the NZTA concerning Kaiti 336F Roadway was that because the Native Land Court declared Kaiti 336F to be a roadway it was available for public use.⁹

[17] The order laying out the roadline arose from the 1913 partition of Kaiti 336 Block into several parcels. The Court considered it “necessary and expedient for the purpose of giving access or better access” to those several parcels via the roadline.

[18] However, the land over which the Court laid the roadway was not amenable, because of its topography, to providing actual vehicular access – or at least not reasonable access. As the trustees said in their memorandum to the Court of 20 September 2017:¹⁰

Kaiti 336F Roadway does not provide reasonable access being physical access of the nature and quality that may be reasonably necessary to enable the Māori Owners for the time being of Part Kaiti 336D2A Block, Identifier 282979, Part Kaiti 336D2B Block, Identifier 284499 and Part Kaiti 336D2C Block, Identifier 283033 (“Māori Owners’ Properties”) to use and enjoy that land.

[19] The trustees’ position is that Kaiti 336F Roadway does not confer on the Crown or the public the right to use it as a public road.¹¹ The roadway order says in terms “and it is hereby ordered that until such road line shall be proclaimed a Public Road it shall be known as Kaiti 336F Block”. The Court therefore created the road line to be for the benefit only of the owners of the partitioned blocks that needed it for access, until such time as it was proclaimed a public road. There has been no such proclamation, however. Section 318 of Te Ture Whenua Māori Act 1993 makes it clear that the general proposition in sub (1), that roadways over Māori land confer on all persons the rights of user as if it were a public road, is subject to sub (2), where the Court may define or restrict rights of user as it deems fit. The Court’s order in this case provided that this roadline was not to be used as a public road until it was proclaimed as such. This was in accordance with s 48(3) and (4) of the Native Land Amendment Act 1913, which provided:

- (3) The Governor may, by Proclamation, proclaim any roadline laid out under subsection one hereof to be a public road, and the same shall thereupon vest in the Crown as a public road accordingly.
- (4) Unless and until such a Proclamation is made, the lands so set apart as roadlines shall remain Native land held in common ownership as if no partition order had been made, but subject to such rights of way thereover (if

⁹ 57 Tairāwhiti MB 29-36 (57 TRW 29-36).

¹⁰ Above n 9 at 33.

¹¹ Above n 10.

any) as shall be stated in the orders made on partition and specified in the manner provided by subsection two hereof.

[20] Because the roadway was not proclaimed a public road, the roadway land remained Māori freehold land in the ownership of the owners at the time of the 1913 partition orders.

[21] Nevertheless, in 2020, the ownership of the roadway is not straightforward because the circumstances of the land that was the subject of the partition have altered considerably. Most of the land that was partitioned in 1913 is no longer in the hands of its traditional owners, and subsequent purchasers, their advisers, local government and Crown representatives have developed, and acted upon, various understandings about the status of the roadway and rights to use it. The trustees for the Matuaokore Ahu Whenua Trust, which now represents the owners of the roadway, have different views on the roadway and who may use it. Two other applications in addition to the present one are before the Māori Land Court as a result.

[22] Section 427 of the Māori Affairs Act 1953, which was in force in 1961 when the land comprised in Kaiti 336E was first sold, made provision for the ownership of roadways in substantially the same terms as s 326 of the current Act. Section 326 provides:

326 Alienation of land to include alienation of interest in roadway giving access to that land

- (1) Where any roadway that is comprised in a separate instrument of title has, whether before or after the commencement of this Act, been laid out by the Court over any Māori freehold land, the transfer by sale or otherwise of any land to which the roadway gives access shall, unless the instrument of alienation expressly provides to the contrary, be and be deemed to have been a transfer by the alienor to the alienee of the alienor's interest (if any) in the roadway.
- (2) If any such instrument of title is registered under the Land Transfer Act 1952, the alienee may apply for registration under that Act of any interest to which the alienee has become entitled under this section, and the District Land Registrar may register the same accordingly.
- (3) In any case to which subsection (1) of this section does not apply, the alienee of any land to which any roadway gives access (whether or not a separate title exists in respect of the roadway) shall have the same rights of access and be subject to the same obligations as were enjoyed by or imposed on the alienor in respect of the roadway before the transfer.

[23] The trustees argue that Makorori Forests Limited, as successor in title to the Māori land that was first partitioned as Kaiti 336E, cannot rely on this provision to claim rights in

the Māori roadway called Kaiti 336F. The arguments that the trustees' counsel has advanced in support of this proposition are multi-layered, and I will go through them now.

The trustees' arguments

[24] The trustees say that because Kaiti 336E (now the Makorori Forests Limited land) has road frontage on SH35, it did need access via the Kaiti 336F roadway. It had access directly to SH35 from its road frontage. Subsequent alienations would not get the benefit of the provision in section 326(1), because although – on paper at least – Kaiti 336F roadway leads to Kaiti 336E, the block was not reliant on the roadway for access. The purpose of the provision was to ensure that subsequent alienees of the block were not left without access to the road. Successors in title to Kaiti 336E did not need that protection.

Makorori Forests Limited's response

[25] Makorori Forests Limited makes two arguments in response. It says:

- (a) There is a gazette notice on the certificate of title for Makorori Forests Limited's land that declares SH35 to be a limited access road. The effect of this, they say, is that SH35 may be accessed only by a legal road access. There is no legal road access directly from Makorori Forests Limited's land. The only legal road access is where Kaiti 336F Roadway meets SH35; and
- (b) Even if SH35 were not a limited access road, physical access from the part of Makorori Forests Limited's land where it abuts SH35 is too steep and narrow to provide actual access. Again, the owners are reliant on access via Kaiti 336F Roadway's road frontage.

The trustees' reply to these points

[26] The Native Land Court created the Kaiti 336F Roadway under s 48 of the Native Land Amendment Act 1913 when it partitioned Kaiti 336. It did so “for the purpose of giving access or better access” (the wording in s 48) to the partitioned blocks.

[27] When the Court partitioned Kaiti 336, the partitions whose only access to a public road was via Kaiti 336F Roadway were Kaiti 336D2A, Kaiti 336D2B and Kaiti 336D2C

(because the other partitions all fronted on SH35). In these blocks lie the parts of Kaiti 336 still in the hands of its ancestral owners, and of course they still remain owners in the Kaiti 336F Roadway. While the Roadway continues to provide legal access to the Māori owners' land, it does not provide – and never did provide – physical access. That is because the land over which the Native Land Court laid out the road was not, and is not, suitable for that purpose. The owners pointed to letters of advice from engineers about what would be involved in constructing the road. The costs estimate was more than \$2 million, with significant works required to overcome the topographical challenges of the Roadway route.

[28] Kaiti 336F does not provide 'access or better access' (the words of s 48) to the Makorori Forests Limited land (derived from Kaiti 336E) or to Shona Zame's land (derived from Kaiti 336D), because it does not afford vehicular access. Rights to the roadway are derived from s 326, and because those areas enjoyed road frontage themselves; (a) they were not reliant on the Roadway for access; and (b) the Roadway did not provide actual physical access because it was impassable for most of its length.

[29] Historically, and to the present, access to the land now owned by Makorori Forests Limited and Shona Zame, and indeed also the land at the back still in Māori hands, took a route through what is now Ms Zame's land, originally in the form of a farm track.

[30] Annexures to the trustees' submissions of 28 March 2018 include documents that the trustees' counsel Mr Wright obtained under the Official Information Act 1982 from the Gisborne District Council about the right of way over Ms Zame's land. The right of way was noted on the title to Makorori Forests Limited's land (Lot 3 DP 382362) by way of an Easement Instrument in 2011. When surveyors Grant & Cooke put the right of way proposal to the Council in 2009, their communication to the Council said:

1. The Proposal

The proposal to formalise vehicular access via the upgraded farm track by creation of the proposed Right Of Way.

At present legal access to the rear of Part Kaiti 336E Block is provided by Kaiti 336F Block (Roadway). However, parts of the alignment are not practicable for vehicular access.

Consequently the existing farm track located on Lot 3 DP 382462 [Shona Zame's land] has been upgraded on a more practicable alignment.

While the proposed Right Of Way is contained entirely within Lot 3 DP 382462 sections of Kaiti 336F Block (Roadway) can be utilised to “bridge” the gap from Wainui Road [SH35] at the northern end and to Part Kaiti 336E Block at the southern end.

The attached court order [the Native Land Court’s 1913 order] sets out the legality with respect to access over Kaiti 336F Block (Roadway).

The owner of Lot 3 DP 382462 (CFR 329620) has agreed to register the Right Of Way over their property in favour of the owner of Part Kaiti 336E Block (CFR GS2B/1047) [the land now owned by Makoroi Forests Limited].

The legal width of the right of way is 10 metres.

Please attend to processing of this application and approval under Section 348 of the Local Government Act 1974.

[31] The right of way was duly made and is now noted on Makorori Forests Limited’s title, as I said.

[32] It is evident that the right of way relies in part on Ms Zame’s property having a right of access over Kaiti 336F Roadway where it meets SH35. The trustees say that neither Ms Zame’s nor Makorori Forests Limited’s titles “has a legal right or proprietary interest with respect to the Kaiti 336F Roadway”.¹² Rather, each of the properties enjoys “the benefit of its inherent common law right of road frontage legal access directly to State Highway 35”.¹³ The submissions go on to say:

- t. Gazette Notice 93152 dated 26 November 1968 declaring State Highway No 35 a Limited Access Road to the extent that it provided for vehical access from SH35 over the Kaiti 336F Roadway to the Adjoining Properties 1 [Ms Zame’s property) and 2 [Makorori Forests Limited’s property] is of no legal effect.
- u. Usage of Kaiti 336F Roadway for the purpose of road frontage access by the owners of Adjoining Properties 1 and 2 has occurred as a consequence of Gazette Notice 93152, is recent in origin, and is not based on any property right.

[33] In his submissions dated 2 December 2019, the trustees’ counsel Mr Wright elaborates further on what he says are errors of law concerning rights to Kaiti 336 Roadway. His arguments proceed from the proposition that the inability to use Kaiti 336 Roadway for actual access, and the availability of other road frontage, means that no interests in the roadway passed by virtue of s 326 and its antecedents with any of the alienations of land

¹² Submissions of W Wright, 26 March 2018 at [12](r) and (s).

¹³ Above n 12.

parcels originally partitioned from the block Kaiti 336 in 1913. All subsequent dealings with the land – which assume that alienations of all the partitions carry rights to Kaiti 336F Roadway – have therefore been wrongly premised, and have no legal basis:¹⁴

8. The Crown errors have been the launching pad for a series of conemporaneous or subsequent errors including the consents of the Gisborne District Council to the registration of a right of way over the land of Mrs Zame in favour of the land of MFL [Makorori Forests Limited] and subsequent subdivision thereof and the registrations and issue of new titles by Land Information New Zealand.

The Crown (LINZ and NZTA)

[34] The interest of the Crown in these proceedings is in securing legal rights to use the part of the cycleway at Kaiti that crosses over a small area of land comprised in Kaiti 336F Roadway. As I have said, a licence agreement was in place, but its term was only a year, which may mean that the licence has now lapsed. In any event, Mr Milner for LINZ has participated in the Court’s hearings to the extent necessary to explain the Crown’s interest in getting the legal questions answered so that its arrangements for the cycleway can be put on a secure and permanent footing. Mr Milner has not urged on the Court any particular outcome in terms of the legal questions being asked. Effectively, his clients are abiding the Court’s decision.

Kōrerorero - Discussion

[35] The Māori Land Court has looked at questions concerning rights to Māori roadways before.

The Maungakawakawa Roadway

[36] In the memorandum to the Court of the Matuaokore Ahu Whenua Trust dated 2 September 2017 signed by Tammy Watene on behalf of the trustees and by Warwick Wright as legal counsel, long quotations from the judgment in *Maungakawakawa Roadway* are tendered in support of the Trust’s submissions.¹⁵ The memorandum does not explain how the judgment supports the Trust’s case, but simply says at page 10:

¹⁴ Submissions of W Wright, 2 December 2019 at [8].

¹⁵ *Gaililee – Maungakawakawa Roadway* (2011) 33 Taitoekrau MB 64 (33 TTK 64).

- b. Kaiti 336F Roadway does not provide legal access to Adjoining Properties 1 and 2 [Shona Zame’s and Makorori Forests Limited’s titles] each of which has enjoyed the benefit of road frontage legal access since the 1913 Partition Order of the Kaiti 336 Blocks.

[37] In the *Maungakawakawa Roadway* case, Judge Ambler found that, as in that case, there was a roadway created by order of the Court pursuant to s 46 of the Native Land Amendment Act of 1913. As here, the effect of the order was to create a separate roadway freehold title. There, as here, the roadway in question was a paper road and had not been formed as a road, so that the access it provided was not physical access but legal access.¹⁶

[9] Mr Galilee was aware of the existence of the roadway at the time he purchased his land in about 1952. He said that the roadway had never been “activated or used as a road since the original survey”. That is, it is largely unformed and is what is commonly referred to as a paper road.

[10] The roadway provides legal access to several blocks of land that are now mostly General land with some Māori freehold land.

[38] The questions put to the Court about the Maungakawakawa Roadway were similar but not identical to those arising on the present facts. In that case the question was who had the right to form and construct the roadway, but as here those questions turned on who had rights of ownership and use of the roadway – whom the Judge said were ‘likely to be the same people as per s 326(1)’. He said:¹⁷

Consequently, as per s326(1), where the roadway continues to provide access to titles derived from Maungakawakawa 5 and 13, unless the instrument of alienation expressly provides to the contrary, the purchase of the land acquired the vendor’s interest (if any) in the roadway.

[39] The judgment makes plain in the following paragraph that the access to which the Judge was referring is legal access. The Judge’s conclusions about rights in that roadway are directly applicable to this case:¹⁸

In summary: the Maungakawakawa roadway is a roadway created by the orders of the Court in relation to Maungakawakawa 5 and 13; the roadway remains Māori freehold land; the roadway has owners who may be defined; any right of use of the roadway is restricted to the owners of the blocks to which the roadway continues to provide legal access (and their invitees);...

¹⁶ Above n 15 at [9]-[10].

¹⁷ At [39].

¹⁸ Above n 15 at [48].

[40] The Judge was not required to and did not address the arguments that the trustees now put forward: that when s 326 refers to access it must mean actual, physical, reasonable access not merely legal access such is provided by means of a paper road. However, Judge Ambler’s judgment makes it plain that he considered that the rights to the paper road – the legal access over the Māori roadway – are deemed to pass from the alienor to the alienee when a transfer occurs of land that had the benefit of the legal access.

Parekura Hei Road

[41] A similar set of facts arose also in the case concerning rights of access over Parekura Hei Road at Te Kaha.¹⁹ In the lower Court, the Judge held that although Parekura Hei was a private road that provided no legal right of access for members of the public or the Ōpōtiki District Council,²⁰ purchasers of land in the original partition serviced by the road, Te Kaha 41A Block, also derived interests in the Parekura Hei Road. Thus:²¹

Mr Livesey, because of the operation of section 427/53 and 326/93, was a successor in title to Te Kaha 41A and to the ownership interest held in the Parekura Hei Road. That means those who acquired title from him within the Livesey subdivision became owners in common with the Māori owners of the road.

[42] The Māori Appellate Court dismissed an appeal against this decision in 2004.²² Members of the hapū Te Whānau a Ehotu wanted to restrict ownership of the roadway to the original owners at the time of the partition, and advanced various arguments in support. The Court agreed with the Judge at first instance that rights in the roadway passed to Mr Livesey when he obtained the land.²³ The Court said:²⁴

Sections 326/93 and 427/53 specifically state that where a roadway, which is comprised in a separate instrument of title, has been laid out by the Court “whether before or after the commencement of this Act”, the transfer of land to which the road gives access also transfers the interest in the roadway. This wording makes it clear that the sections have effect both retrospectively and prospectively to pass on the access rights. If the time of creation of the rights does not affect the operation of the section, then we do not see that the time of the creation of the “separate instrument of title” is relevant. To hold otherwise would be to create an anomalous situation where, despite the existence of a “separate instrument of title” to access rights created in 1915, Mr Livesey would not receive the benefit of ss326/93 and 427/53. That seems to us to undermine the purpose of the provisions.

¹⁹ *Re Parekura Hei Roadway* (2003) 81 Ōpōtiki 178 (81 OPO 178).

²⁰ At 189.

²¹ At 287.

²² *Matchitt – Parekura Hei Road (part Te Kaha Block)* (2003) 10 Appellate MB 253 (10 AP 253).

²³ Above n 22 at 260.

²⁴ At 260.

[43] The Court goes on to observe that “Confusion over whether access rights have been passed on the transfer of land may well be disadvantageous to Māori owners.”²⁵

[44] In these passages, the Māori Appellate Court articulates the importance of certainty when it comes to land titles. If, as the Matuaokore Ahu Whenua trustees contend, whether successors in title to the Kaiti 336 subdivisions had rights in the Kaiti 336F would be determined by ascertaining whether at the time of transfer, as a matter of fact, the transferor was exercising the rights of access afforded by the roadway, or had available another means of accessing the land, the situation would be very unclear. By contrast, if the question is one only of legal access, that is ascertainable from the Native Land Court’s 1913 order and plan, together with the effect of s 326(1) and its antecedents on the interests of alienees.

Kupu whakataua - Conclusion

[45] It is most unfortunate that, in the case of the Kaiti 336 partitions, the descendants of the traditional owners now retain only parcels of land that have no easy access to SH35. They own shares in the legal access afforded by the Kaiti 336F Roadway, but as we have seen, there are serious practical obstacles to making a road along that route. The actual access that the Māori owners of the remnant blocks have used historically when permitted to do so, and that Ms Zame and Makorori Forests Limited now use, is the farm track over Ms Zame’s land that is now a legal right of way for Makorori Forests Limited. The Māori owners of the remnant blocks have no right of way over Ms Zame’s land.

[46] Regrettable though this situation is, sympathy for the Māori owners’ situation cannot influence the determination I must make as to interests in the Kaiti 336F Roadway. The effect of s 326(1) is clear on its face: rights in roadways that provide legal access to land pass to the new owner when that land is transferred. There are no authorities that distinguish between legal access and actual, physical access. To do so would create considerable uncertainty, because in each case it would be necessary to inquire into the nature of the access afforded by the roadway and determine on that basis whether rights of access passed upon transfer or not. The simple fact is that the difficult topography of the roadway comprised in Kaiti 336F does not derogate from the fact that it constitutes legal access. All the successors in title to the owners of the original partitions whose land is contiguous to Kaiti 336F

²⁵ At 261.

Roadway therefore obtained with each land parcel the interests in the roadway of the previous owner.

[47] Makorori Forests Limited’s application is “to determine rights of user in respect of Kaiti 336F block pursuant to section 18(1)(a) of Te Ture Whenua Māori Act 1993”. That section is certainly the appropriate vehicle for asking the Court to look into and decide claims to rights of ownership, possession, or any other right, title, estate, or interest in any Māori freehold land.

[48] Having considered the parties’ submissions and investigated the relevant facts and law, I can now summarise the situation as follows. The Kaiti 336F Roadway is a roadway created in 1913 by the orders of the Native Land Court in the context of creating partitions of the block known as Kaiti 336; the roadway is comprised in a separate instrument of title; the roadway remains Māori freehold land; the land is now vested in the trustees of the Matuaokore Ahu Whenua Trust; upon transfer by sale of any land to which the roadway gives legal access, the alienor’s interest in the roadway passes to the alienee; any right of use of the roadway is restricted to the owners of the blocks to which the roadway provides legal access (and their invitees).

[49] Like Judge Ambler in the *Maungakawakawa Roadway* case, I do not consider that I need to make orders under s 18(1)(a). I have set out the law as it relates to the circumstances of this case, and it is now for counsel to assess the effect of this judgment on their clients’ interests, and act accordingly.

[50] At the hearing before me on 31 July 2019, I exercised my discretion under s 37(3) of Te Ture Whenua Māori Act to amend the terms of the Matuaokore Ahu Whenua Trust pursuant to s 244 so that the trustees’ powers were extended beyond the restrictive wording of the Court order constituting the trust.²⁶ It may be that, upon reflection, it will be appropriate to seek other amendments to that Court Order, now that there is fuller understanding of the beneficial interests vested in the trustees. There has also been mention of amending the 1913 Roadway Order in various ways. Consideration of whether that is necessary, and what amendment might be sought, can now occur in light of this judgment.

²⁶ 88 Tairāwhiti MB 231-269 (88 TRW 231-269) at 249.

I whakapuaki i te 4.30pm i Te Whanganui-a-Tara te 3 o ngā rā o Pēpuere te tau 2020

C M Wainwright
JUDGE