

to improve the drainage and road on his property as the proposed right of way would cause run off onto his land.

[4] A further meeting of owners was held on 9 August 2017. Mr Aperau was the only landowner to oppose the right of way.

[5] Following Mr Mokoroa filing his application, a site visit and on-site meeting was held on 20 April 2018. Mr Aperau asked for the matter to be recalled to Court, as his lawyer was not present.

[6] When the matter was next set down, the Committee of Management for the Proprietors of Uruau, established by order of the Court on 4 October 2017,¹ requested an adjournment for a further special meeting of members to be held. Naea Robati, in a letter to the Court dated 3 May 2019, expressed her concern at the adjournment, saying she had not been consulted by the Committee as a landowner.

[7] At the 30 April 2019 hearing, Mr Rasmussen appeared for the respondent, but the application was adjourned at the request of the applicant. The hearing scheduled for 9 May 2019 unfortunately did not go ahead, and the applicant and respondent submitted letters to the Court, dated 17 May and 28 May 2019 respectively.

[8] A memorandum direction was sent to parties on 24 February 2020 calling for final submissions in writing, in anticipation of deciding the matter on the papers. A memorandum was received from the applicant on 10 March 2020. Counsel for the respondent requested and was granted an extension, and filed submissions on 22 May 2020. Submissions in response from the applicant were received on 2 June 2020.

Submissions for the Applicant

[9] Mr Mokoroa submits that the existing right of way is not satisfactory.

[10] He submits that it does not comply with the boundaries of the land and crosses into Naea Robati's land. Ms Robati no longer wishes for the right of way to pass through her land

¹ Application no. 396/16. Order made on 4 October 2017 and sealed on 28 February 2018.

as she cannot turn cars around, trucks cannot get through, and water runoff is corroding the backs of her buildings.

[11] Mr Mokoroa also submits that the existing right of way frequently suffers damage when there is heavy rain, due to inadequate stormwater and drainage. When established, the applicant submits no consideration was given to the provision of essential services such as water, power and phone, nor to the possibility of any future developments.

[12] Mr Mokoroa submits the new right of way, which will connect to an existing road built in the 1960s-1970s, will provide reasonable and more stable access. It will also provide access to those living on the hill, whose lands are currently landlocked. He submits it will benefit many residents and intending residents who may wish to build on the land.

[13] A report by the Chief Surveyor dated 31 January 2017, and an engineer's report dated 23 November 2016, support the right of way as proposed by the applicant, he submits.

[14] The applicant also submits he has the support of landowners. A consent form attached to Mr Mokoroa's submission shows 42 signatures in favour of the proposed right of way.

[15] In his letter dated 17 May 2019, Mr Mokoroa offered to pay \$16,000 compensation across three instalments to Mr Aperau. This is the amount recommended in a property valuation report completed in July 2017. In submissions dated 2 June 2020, the applicant said he had also offered the respondent an extension of his parcel of land to compensate for the loss, or \$20,000 as financial compensation, all of which the respondent turned down.

[16] In submissions received by the applicant on 10 March 2020, he said if the new right of way is approved, a new Engineers Report would need to be prepared which ensures proper road, drainage and environmental considerations are fully addressed.

Submissions for the Respondent

[17] Mr Aperau is the sole landowner of Uruau 77B2B1. The proposed right of way would require 355m² from Mr Aperau's land.

[18] Mr Aperau has repeatedly expressed his opposition to the proposed right of way and turned down all offers of compensation.

[19] He submits that he has already subdivided his 8000m² block into 1000m² for each of his eight children. He believes swapping land for land or accepting compensation would disadvantage his children, who are wanting to start building on the land as soon as possible. Mr Aperau is in the process of getting access to the partitioned blocks from the other side, so sees no benefit in the new right of way.

[20] His view is that the applicant should use the existing right of way. He disputes the applicant's claim that the land is landlocked, and submits the only obstacle is Ms Robati closing off her land, but she stands to benefit from the new proposed right of way. Additionally, the respondent submits there is also access from the West of the property. The applicant has also not considered improving the existing access.

[21] The respondent notes the applicant is the immediate boss of Mr Tenga Mana, who wrote the engineers report, and an independent engineer should have been hired.

[22] The lack of adequate provision for stormwater, power and phone utilities is an issue for Taua landowners, the respondent submits, and not for Uruau landowners. He submits Taua landowners should grant more of their land for a new right of way as they will be the only ones to benefit from the new roadway.

[23] The respondent submits before the right of way is granted, inquiry into the viability of improving the current right of way, and an independent engineers report, should be carried out. Overall, the respondent submits the Court should find in favour of the respondent as there are alternatives available to the applicant.

Submissions in reply

[24] In submissions in reply received on 2 June 2020, the applicant disputes many points made by the respondent.

[25] The applicant submits both Taua and Uruau landowners will benefit from the new right of way and all landowners were supportive of the proposed access aside from the respondent.

[26] The applicant reemphasises that there is no alternative legal access, therefore his land is currently landlocked, the current road is unsafe in bad weather conditions, and Ms Robati no longer wishes for her land to be used as it is a real disturbance to her house.

[27] The applicant requests the Court grant the right of way to ensure a safe, accessible road is provided for those using Taua and Uruau land.

Law

[28] Section 11 of the Cook Islands Amendment Act 1963 inserted a new s 409A to the Cook Islands Act 1915. It provides:

409A. Access to Native land –

- (1) Notwithstanding anything expressed or implied in any order pertaining to the ownership of Native land, [[the Land Court]] may by order, at any time and without the consent of any person being required, lay out a right of way over any Native land (whether the title thereto has been investigated or not) for the purpose of providing access to any other Native land in accordance with the provisions of this section.
- (2) Any such order may be made for the purpose of providing additional or improved access to any Native land in respect of which rights of access exist at the time of the making of the order.
- (3) For the purpose of providing access to any Native land, rights of way may, subject to consents being given as hereinafter specified, be laid out –
 - (a) Over any European land with the consent in writing of the owner and of every other person having any estate or interest therein; or
 - (b) Over any Crown land, with the consent in writing of the [[High Commissioner]] and of every person having any estate or interest therein.
- (4) Any such order may be a separate order or may be incorporated in any other appropriate order of [[the Land Court]].
- (5) Every such order shall have endorsed thereon a plan of the land laid out as a right of way or shall describe that land in a manner sufficient to enable an accurate survey to be made of it, and shall define or limit the persons or classes of persons entitled to the use thereof.
- (6) The laying out of a right of way under any such order shall, subject to any limitation contained in the order, confer upon the persons entitled to the use thereof the same rights of user as if it were a public road.
- (7) In any such order laying out a right of way or any variation of that order [[the Land Court]] may impose conditions as to the formation or fencing of the right

of way or as to any other matter that it thinks fit, and may suspend or limit the right to use the right of way until those conditions have been complied with.

- (8) The laying out of a right of way over any land shall not affect the ownership of the land comprised therein, or its description as Native land, or Crown land, or European land, as the case may be.
- (9) [[The Land Court]], may, on the making of an order laying out a right of way, determine the amount of compensation (if any) payable in respect thereof, and shall, if it considers that any compensation should be paid, determine the person or persons by whom the same shall be payable, and the person or persons to whom or for whose benefit the same shall be paid:

Provided that no person shall be entitled to compensation in respect of any right of way, if the Court is satisfied that he has consented to the laying out of that right of way and has agreed that he shall not be entitled to any compensation in respect thereof.

- (10) Where any right of way has been laid out or constituted by [[the Land Court]], whether by order pursuant to the provisions of this section or by any other order or determination, and the Court is satisfied that the right of way is no longer necessary or that the conditions in respect thereof or any of them should be varied or cancelled, the Court may, on application, vary or cancel that order or determination in so far as it relates to the right of way.
- (11) No right of way over European land or Crown land shall be varied under the provisions of subsection (10) of this section, save with the consent of the persons whose consent is required under the provisions of subsection (3) of this section.
- (12) On the variation or cancellation pursuant to subsection (10) of this section of any order in relation to a right of way, [[the Land Court]] may make such incidental provisions in relation to compensation or any other matters as it considers equitable between the owners of the land comprised in the right of way and any other persons.
- (13) The provisions of subsections (5) and (6) of section 359 of this Act shall apply with respect to any compensation payable pursuant to this section.

[29] The Court in *McNair – Nukupere 3C and 3F2B* considered an application to limit persons entitled to use a right of way and considered that:²

[21] The Land Court has a broad power in regards to granting right of ways across land. Under s 409A(1) the Court may order a right of way ‘at any time and without the consent of any person being required’. Section 409A(10) allows the Court, upon application, to vary or cancel an order if considered necessary.

[30] While noting that s 409A does not require the Court to obtain the consent of landowners before granting or varying a right of way, the Court found evidence that 73% of owners

² *McNair – Nukupere 3C and 3F2B* (14 September 2012).

supported the variation was compelling.³ The Court also considered the variation would assist in the protection of the roadway and thus granted the application.⁴

Discussion

[31] The issue for determination is whether I should grant the right of way as sought by the applicant.

[32] Under s 409A(2) I am able to grant a right of way where it would provide additional or improved access to any Native Land. Given the present issues with drainage and Ms Robati wishing to reutilise her land, it is clear that the proposed right of way would provide improved and more secure and stable access to the land blocks. This includes providing access to the landlocked land in the hills. All these issues were visible at the site visit which I attended.

[33] The only person to object to the proposal was Mr Aperau. In this case, as in *McNair–Nukupere 3C and 3F2B*, a large majority of landowners are in favour of the new right of way. While it is not necessary that the Court obtain landowners consent, it is significant that only one objection has been received, showing the other landowners are clearly dissatisfied with the present state of affairs and favour an amendment. As stated, the unsatisfactory state of affairs was evident at the site. Further, Mr Aperau's refusal to accept this and further his refusal to accept land or monetary compensation demonstrates his inflexible and unhelpful demeanour.

[34] I acknowledge that Mr Aperau has already partitioned his land, and some work will be required to take into account the land taken for the right of way. However, the right of way proposed is the most reasonable in the circumstances, will improve access to the land particularly in adverse weather conditions, and has the support of a majority of landowners.

[35] Having one access way which is used by all of the properties will also save money in formation and ongoing maintenance and upkeep. I would encourage Mr Aperau if the access on the other side to his partitioned land is still being formed, that he use the new right of way being established.

³ At [22].

⁴ At [25].

Decision

[36] The application for right of way by Mac Mokoroa is granted. An order is made under s 409A establishing a right of way over Uruau Sections 77B2B1 and 77B2B3 and Taua Sections 102C2 and 102C3. The right of way is as set out in the map approved by the Chief Surveyor on 19 July 2017. It is also appended to the end of this judgment.

[37] The persons entitled to use the right of way are the landowners of the subject blocks and their invitees and agents.

[38] As Mr Aperau has refused compensation, there is no order made as to compensation. As stated above, he too can benefit from this roadway.

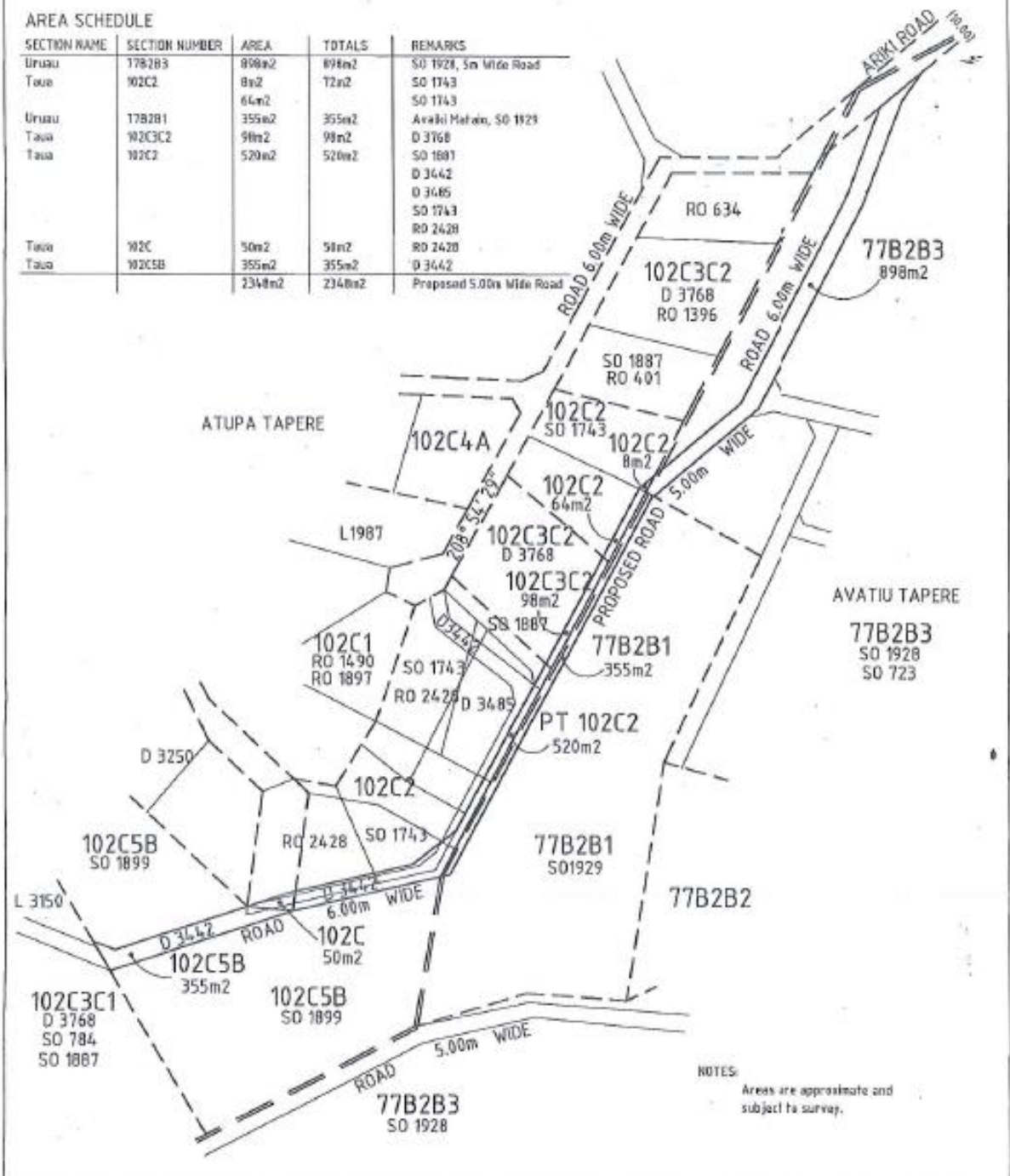
[39] There will be no order made as to costs.



A copy of this decision is to be sent to all parties.

Dated at Gisborne, New Zealand this 4th day of June 2020.

W W Isaac
JUSTICE

AREA SCHEDULE				
SECTION NAME	SECTION NUMBER	AREA	TOTALS	REMARKS
Ururu	17B2B3	898m ²	898m ²	SO 1928, 5m Wide Road
Taua	102C2	8m ²	72m ²	SO 1743
		64m ²		SO 1743
Ururu	17B2B1	355m ²	355m ²	Avaki Mafai, SO 1929
Taua	102C3C2	98m ²	98m ²	D 3768
Taua	102C2	520m ²	520m ²	SO 1887
				D 3442
				D 3685
				SO 1743
				RO 2428
				RO 2420
				D 3442
Taua	102C	50m ²	50m ²	
Taua	102C5B	355m ²	355m ²	
		2348m ²	2348m ²	Proposed 5.00m Wide Road



Approved:  19/7/17 CHIEF SURVEYOR		Field Book: Ref Plans: Job Ref:	Scale: 1:1250 Scheme Plan No. A3-
Land: Several Tapere: Atupa/Avatiu District: Avarua Island: Rarotonga	Purpose: PROPOSED 5.00m WIDE ROAD Applicant: Mac Mokeroa	Surveyed: Compiled 11/7/2017 Schemed: T. Tangiruaime 11/7/2017 Drawn: T. Tangiruaime 12/7/2017 Checked:  19/7/17	