

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

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

AP-20240000007895

WĀHANGA
Under

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

MŌ TE TAKE
In the matter of

Otamatea B2B3 Block

I WAENGA I A
Between

BRENDON LEWIS
Te Kaitono
Applicant

ME
And

THE OTAMATEA D5 AHU WHENUA TRUST,
THE TRUSTEES OF THE HAPI AND ALICE
PIHEMA WHANAU TRUST AND OTHER
SHAREHOLDERS IN THE OTAMATEA D 5
BLOCK
Ngā Kaiurupare
Respondents

Nohoanga:
Hearing

24 April 2025, 289 Taitokerau MB 242-251
6 March 2025, 286 Taitokerau MB 15-16
3 September 2024, 278 Taitokerau MB 118-127
(Heard at Whangārei)

Kanohi kitea:
Appearances

S Davies-Colley for Applicant

Whakataunga:
Judgment date

25 September 2025

TE WHAKATAUNGA A KAIWHAKAWĀ T K T A R WILLIAMS
Judgment of Judge T K T A R Williams

Copies to:

S Davies-Colley, WRMK Lawyers Ltd, Private Bag 9012, Te Mai, Whangārei 0143, simon.davies-colley@wrmk.co.nz

P Wilson, Henderson Reeves, P.O.Box 11, Whangarei 0110, PaulaWilson@hendersonreeves.co.nz

Hei tīmatanga kōrero*Introduction*

[1] This is an application by Brendon Lewis (“Brendon”), for an order providing access to the Otamatea B2B3 block. across the Otamatea D 5 Block on the basis that the land is landlocked pursuant to s 326B of Te Ture Whenua Māori Act 1993.

[2] The Otamatea D 5 Block is vested in the Otamatea D5 Ahu Whenua Trust. The Otamatea Trust Board are recorded as the administrators of the Ahu Whenua Trust.

Kōrero whānui*Background*

[3] The Otamatea B2B3 block is General Land that became landlocked as a result of the survey and partition of the Otamatea block in 1912. The land at that time was Māori land owned by Fredrick Lewis, Brendon’s grandfather. The Otamatea D5 block was created by partition order dated 20 August 1912 and continues to be Māori Freehold land.

[4] Frederick Lewis sought a status change to the Otamatea B2B3 block from Māori land to General land and orders to that extent were made on the 8th of April 1969.

[5] Over the years, the Otamatea D5 block has been transferred to various parties who are members of the preferred class of alienees. The ownership record shows that the Otamatea D5 block was vested in the Otamatea Trust Board on the 29th of May 2001 who remain as the registered proprietor today.

[6] Thompson Lewis (Brendon’s father) purchased the Otamatea B2B3 block from Frederick Lewis (Thompson’s father). The titles show that the land was transferred to Thompson Davis Lewis on the 18th of January 1984.

[7] It was then settled under the Joint Family Homes Act 1964 on Thompson Davis Lewis and Lavana Sharon Lewis, his wife, in June 1984.

[8] When the land was purchased, a verbal agreement was entered into between Thompson Lewis and Sir Graham Latimer along with Russell Kemp who were the trustees of the Otamatea Trust Board and the lessees of the Otamatea D5 block, for Thompson to

construct and maintain a driveway over the Otamatea D5 block. That driveway provided him with physical access to Otamatea B2B3 block as well as access for the Otamatea D5 owners and lessees to harvest and crop the tress that had been grown on Otamatea D5. This driveway agreement was never formalised. Despite this Thompson constructed and formed the driveway and it has been maintained by the Lewis family from 1984 to 2025.

[9] Both Thompson and Lavana Lewis have passed away. The Otamatea B2B3 block is now held by Mr Brendon Lewis, the son of the late Thompson Davis Lewis and Lavana Sharon Lewis. Brendon Lewis inherited the Otamatea B2B3 block from his mother Lavana's estate and he is also the administrator of her estate.

[10] Brendon Lewis now wants to formalise the driveway access across Otamatea D5 as he needs to sell the Otamatea B2B3 block to repay expenses that were incurred for Lavana Lewis' care prior to her passing. Real estate agents have advised him that without formal access rights being established he will have considerable difficulty in selling the land.

Ko te hātepe ture o te tono nei

Procedural history

[11] In 2001, the Court granted orders vesting the Otamatea D5 block in the Otamatea Trust Board. The Trust Board does not appear to have been a formally constituted entity. As stated earlier Sir Graham Latimer and Russell Kemp were the trustees on the Otamatea Trust Board.

[12] Also, in 2001, the Court appointed Steven Pihema, Paula Stewart and Rhoda Chalmers as advisory trustees of the Otamatea Trust. As both Sir Graham Latimer and Russell Kemp had passed away, Brendon Lewis had been in contact with, Steven Pihema as an advisory trustee, to discuss formalising access via the driveway.

[13] However, discussions and exchanges with Steven Pihema had not resulted in a positive outcome. It is noted that Steven Pihema is also one of the trustees of the Hapi and Alice Pihema Whanau Trust who is the largest shareholder in the land.

[14] Brendon Lewis then applied and appeared in Court seeking orders granting formal access across the Otamatea D5 block. He sought to rely upon the verbal agreement entered

into between Thompson Lewis and the Otamatea Trust Board Trustees as well as the discussions he had with Steven Pihema. However, the Court required the application to be served on a larger proportion of the shareholders.

[15] There are 66 allocated owners in the Otamatea D5 block who collectively hold 165 shares in the land. Directions as to service of the application for reasonable access were made.

[16] The Court ordered that notice of the application for access should be served on the trustees of the Hapi and Alice Pihema Whanau Trust who hold 73.54 shares, Frances, Robert and Willimene Kerei who collectively have an interest in 22.5 shares, the administrators of the Meringaroto and Mare Pihema Whanau Trust who hold 4.8 shares, the Tira Riki Kerei Walsh Whanau Trust who hold 7.5 shares, and the Renata and Parekura and Piripi Whanau Trust who hold 2.4 shares. So collectively, notice was to be sent to 110.74 shareholders in the land representing just under 70 percent of shareholding in the land.

[17] Brendon Lewis complied with the orders as to service and a hearing was set down and heard on the 29th of August 2025. Several parties opposed the application for access. Most notably the Hapi and Alice Pihema Whanau Trust.

[18] Following the hearing, the Court visited the property and undertook a site visit of Otamatea D5, Otamatea B2B3, Otamatea B2B4B and the Te Mata A1 block.

[19] As a result of the site visit, the Court required further information, which Ms Wilson for the Hapi and Alice Whanau Trust has now provided.

[20] Therefore, the Court is now in a position to issue a decision.

Te tono

The application

[21] The evidence was that when Thompson Lewis bought the Otamatea B2B3 block and sought to build a house on the property, he was persuaded by the Otamatea Trust Board trustees, Sir Graham Latimer and Russell Kemp, to construct a driveway down the adjoining Otamatea D5 block. The driveway would provide a benefit not only to Thompson Lewis but

also to the Otamatea Trust Board who would be able to use the driveway to forest and crop trees on the land.

[22] The verbal agreement provided that the driveway constructed would be paid for and maintained by Thompson Lewis. Further that he would maintain the common boundary fence-line that ran along the driveway, complete the fencing, maintain that and release cutting scrub from the fence.

[23] What was constructed is approximately a 130m driveway which runs along the border line between Otamatea D5 and Otamatea B2B4B, in order to provide access from Bickerstaffe Road down the Otamatea D5 block, to the house that has been built on the Otamatea B2B3 block.

[24] Brendon Lewis says that not only have the Otamatea D5 block owners had the benefit of being able to utilise the driveway to remove the first rotation of trees that were forested on the Otamatea D5 block but that the Lewis whanau maintained it for over 40 years at their cost. He now seeks to sell Otamatea B2B3 but cannot do so without formalising the access across Otamatea D5.

[25] The reason for the sale is that prior to his mother's passing, she required residential care. In order for the residential care to be provided to her, she was granted a residential care loan through the Ministry of Social Development. That loan was secured by a caveat over the Otamatea B2B3 block. Now that she has passed, that loan needs to be repaid.

[26] Lavana Lewis passed away in October 2023 and the debt in relation to the residential care loan has mounted. The Ministry of Social Development have required repayment of the loan within 12 months of his mother's passing. That date was the 23rd of October 2024 which has been and gone. Correspondence from the Ministry of Social Development dated 9 May 2024 show that debt to be \$83,921.79.

[27] There is also money owed to Heritage Lifecare for residential care fees and other miscellaneous estate debts. Correspondence from Credit Consultants on behalf of Heritage Lifecare dated 5 March 2024 show that debt to be \$24,785.15.

[28] Mr Lewis has indicated that there are no other assets in the estate, and he personally is unable to repay the residential care loan and fees and other estate debts without being able to sell the land.

[29] Real estate agent have been engaged to market the property. They have advised that formal legal access was required in order to facilitate the sale of the property as it was landlocked. Brendon Lewis says that there have been a few people interested in purchasing the block but have been put off due to the informal access arrangement over the Otamatea D5 block.

[30] Discussions with advisory trustee Steven Pihema to organise and formalise the access agreement have been unsuccessful. He also says that he had been unable to find the other advisory trustees.

[31] Keith Pomare, an engineer, provided evidence in relation to the accessway and the viability of the existing and alternative accessways.

[32] His evidence was that the cost of constructing the driveway was approximately \$5,000.00 for a 130m driveway and that over the 40 year period the cost to the Lewis whanau of maintaining that road would have been between \$16,000.00 to \$20,000.00. So, a ballpark figure for constructing and maintaining the driveway would be in the vicinity of \$20,000.00 to \$25,000.00.

[33] Further, that there was no other realistic access to the Otamatea B2B3 block that could be constructed on a cost-effective basis. This is due to the natural and environmental characteristics of the area and the prevalence of ground water and stream water, which meant that there was no realistic option of constructing an alternative driveway to the Otamatea B2B3 block for anything less than \$80,000.00. This also included the proposition of constructing a driveway across the Te Mata 1 land block.

Ngā tautohe a ngā kaiurupare
The Position of the Respondents

[34] The position of the opponents to the application is that they are concerned that once access is granted that it will become permanent and available to non-Māori who do not

whakapapa to the land. They say this risks severing cultural connections and authority over the land.

[35] Further that the application process does not enjoy the support of a majority of the owners who have voted against granting access and are concerned that the proposed easement does not provide collective benefit to the owners or enhance the value or wellbeing of the whanau.

[36] In addition, there are concerns that granting an access sets a long-term precedent for future applications and that the whanau have concerns that granting an easement may interfere with an aspiration to utilise and develop the land and that any subsequent sale by Mr Lewis to non-Māori or people who do not descend from the land.

[37] This would mean permanent access to people who do not have a whakapapa connection to the land. It is seen as a potential loss of cultural connection and ownership for the people of the Otamatea D5 block and its beneficiaries.

[38] Mr McCleod for the Hapi and Alice Pihema Whanau Trust in opposition to the application says there was no legal authority for the driveway access to be created in the first place. That is due to the fact that the Otamatea Trust Board and in particular, the trustees, Sir Graham Latimer and Russell Kemp, had no authority to grant the right for the accessway to be created.

[39] At the time that the agreement was entered into, he says that the Otamatea Trust Board only leased the land, they were not the owners in the land and, as such, they did not have the right to part with possession or utilisation of the land without the consent of the landowners.

[40] In addition, the accessway provides no benefit to the Trust and that when Mr Lewis sought to build on the land, correspondence was provided by Thompson Lewis' sister who owned the neighbouring Te Mata A1 block in which she offered to provide access across her land block in favour of the Otamatea B2B3 land. As such it is that access that should now be developed as opposed to the access already formed across Otamatea D5.

[41] In response to further questions from the Court, Ms Wilson for the Hapi and Alice Pihema Whanau Trust was unable to confirm who the owners of the trees on the Otamatea D5 block are at this time and advises that currently there appears to be an absence of legal forestry rights. However, given that the trees are several years old now and situated on the Otamatea D5 block, and the Otamatea Trust Board is now effectively defunct, the assumption is that the Otamatea D5 shareholders may own the existing trees per s 5 of the Land Transfer Act 2017.

[42] She also advises that the trees that are on the land are in a second rotation and given the above, are thought to be owned by the Otamatea D5 Ahu Whenua Trust. In support of this proposition she points to Mr Lewis' affidavit where he stated that the Otamatea Trust Board had made extensive use of the Government Forestry Scheme and the Project Employment Programme for the planting and ongoing maintenance of the forestry block on D5 under the management of Russell Kemp.

[43] Ms Wilson then advises that the Otamatea D5 trees have not been maintained and need to be managed safely going forward and the Trust is working with forestry consultants to manage the trees the Otamatea D5 block. She clarifies that there are no leases recorded on the title and the Trust to date has not received any income from the trees.

Ngā take

Issues

[44] All parties acknowledged that the Otamatea B2B3 block is landlocked. Therefore, the issues to be considered by this Court are:

- (a) Should relief by way of formal access across Otamatea D5 in favour of the applicant Brendon Lewis be granted;
- (b) If the answer to the first issue is yes then what conditions, if any, should be imposed on that access including, where appropriate, payment of compensation.

Te Ture*The law*

[45] In reaching a determination on the issues s 326B(4) is clearly relevant which says:

- (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.

[46] Section 326B(5) states:

- (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]].]

[47] Mr Lewis is not seeking ownership of the driveway that has been constructed over the Otamatea D5 block. Rather, he seeks orders:

- (a) Granting reasonable access by way of right of way easement to identifier NA18B/1015, Otamatea B2B3 block (the landlocked land) over property identifier 491822, Otamatea D5 block (Otamatea D5 block) which is Māori freehold land.
- (b) He has then provided an easement instrument that he proposes to be registered over the Otamatea D5 block. This easement instrument attachment to Mr Lewis' affidavit dated 16 December 2024 is in the standard Land Transfer Act form pursuant to s 109.

[48] The draft easement provides that a right of way be granted in favour of Mr Lewis which is to be maintained and repaired by Mr Lewis or any subsequent successors in title to Mr Lewis as required.

[49] It also provides that any damage which is caused to the right of way by use of that right of way by the Otamatea D5 block owners or their invitees shall be remedied by the Otamatea D5 block owners without delay or cost to Mr Lewis and / or successors in title to Mr Lewis.

[50] The uncontested evidence filed in support of the application, was that the Lewis family have paid for constructed and maintained not only the driveway across the Otamatea D5 block but also the boundary area which abuts the driveway which is some 100 metres.

Kōrerorero *Discussion*

[51] Given that ownership of the driveway is not being sought by Brendon Lewis, I do not consider the arguments raised around severing cultural connections and who has authority over the land to have weight. The shareholders in the land will continue to own the land under which driveway access is sought.

[52] In considering the application I then address the various provisions of s 326B(4).

What is the nature and quality of the access, if any, to the landlocked land that existed when the applicant acquired the land.

[53] The access existed at the time that Brendon Lewis acquired the land. Access had been enjoyed via a 130m formed gravel driveway across the Otamatea D5 block from Bickerstaffe road.

[54] The nature of the access and quality of the access is what one would expect for reasonable vehicular access to the house and land block. The driveway access has been used for over 40 years to access the Otamatea B2B3 block and to harvest the trees on the Otamatea D5 block. Therefore, it is of sufficient quality for both cars and trucks to utilise it.

[55] If the shareholders in the Otamatea D5 block were to develop the block for papakainga, then the currently constructed driveway would be helpful. It is the only existing vehicular access into the block.

[56] That access has never been formally recognised but has been enjoyed by both the applicant and his family as well as the Otamatea D5 trustees and shareholders.

The circumstances in which landlocked land became landlocked

[57] The land became landlocked pursuant to a partition of the land in 1912. At that time both the Otamatea B2B3 and Otamatea D5 blocks were owned by Frederick Lewis so access wasn't an issue. It became a problem when the Otamatea D5 block was transferred to whanau members. As it was held by whanau members, access continued to be granted on an informal basis.

[58] Mr Thompson Lewis then purchased the land from his father (Frederick Lewis) and was persuaded to do so both through discussions with Frederick (Brendon Lewis' grandfather). Additionally the agreement reached with Otamatea Trust Board trustees; Sir Graham Latimer and Russell Kemp, that he could construct a driveway across Otamatea D5 was a persuasive factor.

[59] As a result of that agreement to purchase, loans and mortgages were incurred in order to construct the house and driveway. Therefore, costs have been incurred by the Lewis whanau in order to create that accessway.

[60] Further, the Otamatea Trust Board had been granted a lease of the Otamatea D No 5 block by the owners of the block. The lease was granted so that the Otamatea D No 5 block could be planted with trees, and those trees be harvested.

[61] The Otamatea Trust Board may not have been the responsible trustees of the Otamatea D No 5 Ahu Whenua Trust at the time the driveway agreement was made, and it is acknowledged that Sir Graham Latimer and Russell Kemp may not have had the authority to grant a right of access. However, there was no evidence of any objection to the driveway access. The absence of any opposition indicates to me that there has been tacit acceptance of that access by the shareholders.

[62] In any event, they were able to utilise the driveway to harvest the trees that had been growing on the Otamatea D5 block. They have also been saved the cost of constructing and maintaining a driveway so there has already been a financial benefit to the Otamatea D 5 owners.

[63] Further, as the existing driveway provides the Otamatea Trust with the ability to harvest the second rotation of the trees, I do not accept the proposition that there will be no collective benefit to the owners.

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

[64] As indicated above the Lewis family engaged with who they thought had the authority to deal with the Otamatea D5 block when purchasing the Otamatea B2B3 block, creating the driveway and incurring debt. They have also covered all costs of its maintenance without assistance from the Otamatea D5 shareholders.

[65] Brendon Lewis's evidence was that he attempted to contact who he thought were the relevant parties to negotiate access. Given Sir Graham Latimer and Russell Kemp had both passed away, he says that he thought contacting Steven Pihema, as an advisory trustee was the appropriate way to go about that process.

[66] There was also evidence that he had been contacting Mr McCleod of the Hapi and Alice Whanau Trust to discuss the accessway but that was also unsuccessful. Whilst Mr

McCleod may have misunderstood the capacity that he was being contacted, Brendon Lewis sought to engage with him as a trustee of the majority shareholder in the Otamatea D5 block to formalise access.

[67] Through the Court process he has contacted other shareholders about the application for access and those parties have now had an opportunity to express their position about the proposed access and been assisted by counsel.

[68] The evidence was that an earlier offer had been made by shareholders in Otamatea D5 to purchase the Otamatea B2B3 block. However, that proposal did not proceed.

[69] In my view, Mr Lewis has taken considerable steps to try and negotiate reasonable access to the landlocked land but has been unsuccessful in doing so.

Hardship 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

[70] The hardship that would be caused to Mr Lewis is apparent. The evidence indicates that the cost of trying to create access across any other blocks of land would be somewhere between \$50k to \$80k and even in that situation it would need to go across someone else's land.

[71] The proposal to develop a driveway to go across Te Mata A1 would mean firstly having to require access across land purchased by Mr Santana Harvey. Mr Harvey had purchased Te Mata A1 some 16 years ago. There is no evidence that he was aware that when he acquired Te Mata A1, that access was proposed across Te Mata A1 to the Otamatea B2B3 block.

[72] Further, the suggestion that access should be created across the Te Mata A1 block is not, in the Court's view, feasible.

[73] When the land was viewed by the Court it was clear that there are environmental and slope issues which would cause considerable difficulty in providing the access required to the Otamatea B2B3 block as well as considerable imposition to Mr Harvey, who is an innocent party in this whole matter.

[74] Secondly, significant construction work would be required to form an accessway across Te Mata A1 including potentially a bridge or culvert. There is a stream that runs along the boundary of Te Mata A1 that would need to be traversed in order to get to Otamatea B2B3.

[75] It is the Court's position that a proposed easement across the Te Mata A1 block is not appropriate.

[76] In addition, there are the outstanding debts for Lavana Lewis' care which exceed \$100,000.00. The Otamatea B2B3 block is the only asset available to Brendon Lewis to meet those debts. He must be provided with the ability to sell the asset in order to meet those debts.

[77] Finally, the fact that the Otamatea D5 shareholders have derived a minimal benefit from the lease between the Otamatea 5 Trust and the Otamatea Trust Board is of little weight. No fault can be laid at the feet of the Lewis whanau for that.

[78] I add that the existing access has been located as close as possible to the existing boundary line with Otamatea B2B4 and therefore the degree of hardship caused to the owners of Otamatea D5 is minimal.

[79] Having considered these matters I consider that considerable hardship would be caused to Brendon Lewis if access was not granted per s 326B of the Act.

Kupu whakataunga

Decision

[80] Pursuant to s 326B(5)(b) of Te Ture Whenua Māori Act 1993, reasonable access is granted by way of easement to the Otamatea B2B3 block across the Otamatea D N5 block.

[81] Pursuant to s 326C the easement is granted subject to the following terms and conditions:

- (a) The implied covenants in Schedule 5 in the Property Law Act 2007 as amended by;

- (b) the easement instrument provided by the Applicant in support of the application.
- (c) All costs of the registration of the instrument including the legal costs for the grantor and grantee shall be met by Brendon Lewis.

I whakapuaki i te 5:00pm i Whangārei, rua tekau ma rima o ngā rā o Hepetema i te tau 2025.

Pronounced at 5:00pm in Whangārei on this 25th day of September 2025.

T K T A R Williams
KAIWHAKAWĀ