IN THE MĀORI LAND COURT OF NEW ZEALAND
TAIRAWHITI DISTRICT

A20140008775

UNDER	Section 18(1)(a), Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Kiwinui A Block
BETWEEN	PETER WILLIAM OWEN AND CHERYL RAHI Applicants
AND	WAHAPEKA HAUITI Respondent

Hearing: 4 November 2014, 43 Tairawhiti MB 215-231
2 February 2015, 45 Tairawhiti MB 153-192
24 April 2015, 48 Tairawhiti MB 42-145
(Heard at Ruatoria)

Appearances: Ms M Insley for the Applicants
Mr L Watson for the Respondent

Judgment: 15 March 2016

RESERVED JUDGMENT OF DEPUTY CHIEF JUDGE FOX

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Introduction

[1] Peter Owen and his daughter Cheryl Rahi seek an order for determination of ownership of a homestead (including a sleep out) situated on Kiwinui A Block, and described as 81 Whakaangiangi Road, Te Araroa. The applicants say that they have been responsible for the old homestead on the block since the time Peter and Henrietta Owen started renovating the homestead over the period 1978-1979. The applicants ask the Court to grant Peter Owen a life interest in the dwelling with ownership vested in his and Henrietta's four children. I note that Mr Owen has been diagnosed with the early stages of Alzheimer Dementia and is cared for by Cheryl.

[2] Wahapeka Hauiti objects to the application. His case is essentially that the original homestead was built by Hirau Karaka for all his descendants and Hirau gifted the original homestead to him as kaitiaki. He is of the view that Peter and Henrietta Owen renovated the original homestead at their own cost with the knowledge that the homestead was to be open to all of Hirau Karaka's descendants and, as such, no order should be made in their favour.

[3] Wahapeka now proposes that a whānau trust be established to manage the homestead. He says that each of the descent lines from Hirau Karaka should have a representative on that trust and that matters of occupancy be dealt with by the trust. Wahapeka also proposes that Peter Owen be granted a life interest to reside in the current homestead.

[4] The applicants oppose Wahapeka's proposal and ask the Court to make an order in their favour.

Background

[5] On 1 December 1963, the Committee of Management of Marangairoa A9 awarded Hirau Karaka 3 acres as a papakainga for him and his family. The value of his shares was to be used to make up the 3 acres allocated to him. There were five resolutions made that day by the Committee and those relevant were Resolution 1 and 3. I have reproduced these resolutions below, in Māori, as written in the books of the Committee, following which I have translated them into English:

> Ko Te Take Tuatahi - whakahaeretia na Hapuku i motini ko te Toru eka mo Nehe ratau ko Tana whanau hei PaPa kainga i raro i te Ture o "Town and Country House Planning" e ngari ma ona Hea wariu kei runga i te whenua e whakaki te Toru eka nei. Tapiri atu ki Tenei Take mo Te PaPakainga nei ko Tenei na – me Tuku noa atu te whare mo Nehe ratou ko Tana whanau kia pai ai Ta ratou noho. Na Hirau i Tautoko, whakaea katoa matou.
>
> The first resolution moved by Hapuku was for 3 acres to go to Nehe and his family as required under the Town and Country House Planning Act, but the value of his shares will be required to equate with that area. Associated with the resolution regarding the papakainga, the house on the site goes to Nehe and his family to facilitate their occupation. Hirau supported the motion and it was passed unanimously.
>
> Take Tuatoru
>
> Na Peti i motini kia whakaeatia e te Hui kia wehea kia toru nga eka hei PaPa'kainga mo Hirau ratou ko Tana whanau – i raro i te KauPaPa o Te Take TuaTahi - na Nehe i Tautoko whakaea katoa matou.
>
> Resolution 3
>
> Peti moved a motion to be agreed by the hui to set aside 3 acres as a papakainga for Hirau and his family under those terms set out in resolution 1. Nehe supported the motion and it was passed unanimously.

[6] As such Hirau and Nehe, and their families, were awarded land for a papakainga and the houses on the sites in proportion with the value of their shares in the land.

[7] Marangairoa A9 was subsequently amalgamated in 1964 into the original Kiwinui block by order dated 16 July 1964 under s 435 of the Māori Affairs Act 1953. Under that section, the Court could give effect to agreements reached by the owners of the several blocks that existed pre-amalgamation. In this case the Court minutes and order record that Hirau's right of occupation was to continue but the area provided was reduced.[1]

[8] The Court minutes record that valuation of the amalgamated title was to exclude the improvement values for Hirau and Nehe's occupation sites however the unimproved value of both sites were to be included in setting the relative interests of the owners. This indicated that title to the land was to remain with all the beneficial owners of the combined titles including Nehe and Hirau.

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[1] 132 Waiapu MB 84 (132 WP 84)

[9] Those Court minutes were followed by an order which limits the rights to occupation rights to the dwellings and the areas upon which they stood as follows:[2]

> the occupation rights heretofore existing in respect of the dwellings occupied by Hirau Karaka or Hirau Mahunu as to an area of 0acres : 2roods : 00 perches : and Nehe Reihana Mahunu or Reihana Mahunu as to an area of 1 acre : 0roods : 00 perches on the area previously known as Marangairoa A9 Block be and the same are hereby preserved.

[10] On 27 June 1967, the Court made a further amalgamation order under s 435 of the Māori Affairs Act 1953 combining Kiwinui and Marangairoa A14 and creating the current Kiwinui A title.[3] The effect of that order was to amalgamate the Kiwinui title as it was declared on 16 July 1964, including the occupation rights in the dwellings and on the sites allocated.

[11] It does not appear, from the evidence that Hirau resided on the block much longer after 1967. By the 1970s he was residing with his daughter Elizabeth. He died intestate (without a will) on 28 May 1977. Hirau had 14 children, five of whom predeceased him.[4] Of those who predeceased, four left children. The succession minutes to Hirau's estate describe a home of the deceased in Te Araroa, as a family home. Final orders for succession dated 17 February 1986 were granted in favour of all Hirau's children, with substitution of issue for those who had passed away before him.[5]

[12] After Hirau's death, his daughter, Henrietta and her husband Peter decided to rebuild the original homestead from the foundations upwards. Peter and Henrietta and their immediate family ("the Owen whānau") have since built a detached sleep out on the block and undertaken extensive landscaping. The Owen whānau have taken responsibility for the homestead since 1978 to the present day and have paid the rates and insurance associated with the homestead.

[13] In terms of the main block, Kiwinui A, it is now held in trust for the benefit of 763 beneficial owners. The block comprises 572.596 hectares. Approximately 0.1012m2 hectares of the block is set apart as a Māori reservation for the common use and benefit of

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2 132 Waiapu MB 83 (132 WP 83)
3 134 Waiapu MB 221 (134 WP 221)
4 123 Gisborne MB 334-336 (123 GIS 334-336).
5 23 Ruatoria MB 186 (23 RUA 186)

Moeke Waititi, his present wife Ripeka Wharepouri Waititi and his sister Pirihira Waititi or Iopa and their descendants.[6]

[14] The balance of the block is administered by an ahu whenua trust, including the site where this homestead is situated. That trust was constituted on 16 December 1988 under s 438 of the Māori Affairs Act 1953.[7] The current trustees are Boy Te Kehua Karaka, Dawn Tuhi Brooking, Hera Boyle, John Waerehu, Mark Owen, Ngahiwi Kereopa Maraki, Retimana Karaka, Tony Ansell and Hirau Charles Karaka.[8]

Procedural History

[15] This application first came before me on 4 November 2014.[9] Ms Insley appeared for the applicants. She spoke to the long occupation of the homestead by the applicants. She pointed out that Mrs Owen applied to the trustees for an occupation order, but passed away before an application was lodged in the Court. Concerns were raised about the history of the dwelling site and other occupations on the land. Given those concerns I adjourned the application for the respondents to seek legal advice.

[16] A further hearing was held on 2 February 2015.[10] Mr Leo Watson appeared on behalf of Wahapeka Hauiti and the descendants of Hirau Karaka in opposition to the application. At the conclusion of that hearing, I adjourned the application and directed both counsel to file evidence in chief and replies.

[17] The final hearing was held on 24 April 2015, following which I invited counsel to file closing submissions upon receipt of the Court minutes.[11] Those submissions took a number of months to be filed and reply submissions did not arrive in my office until September 2015. By that date I was on enforced sabbatical leave from the Māori Land Court for several months. Thus there has been a delay in producing this judgment.

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6 New Zealand Gazette Notice dated 16 November 1976, No 73 p 2073. Note: There has been no change in trusteeship since that reservation was established. The trustees are recorded as Moeke Waititi and Ripeka Waititi.
7 27 Ruatoria MB 79 (27 RUA 79)
8 49 Tairawhiti MB 116 (49 TRW 116)
9 43 Tairawhiti MB 215 (43 TRW 215)
10 45 Tairawhiti MB 153 (45 TRW 153)
11 48 Tairawhiti MB 42 (48 TRW 42)

The Law

[18] Section 18(1)(a) of Te Ture Whenua Māori Act 1993 provides:

> (1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:
>
> (a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:

[19] The Court's jurisdiction is declaratory in nature. The Court may declare existing ownership rights at law or in equity but cannot transfer or create new ownership rights.[12]

Issues

[20] The primary issue for determination is whether the Court should make an order determining ownership of the homestead in favour of the Owen whānau. In determining this issue it is necessary to consider the following:

(a) What interest in the land was held by Hirau Karaka?

(b) Is the homestead a fixture or a chattel?

(c) Who owns the current homestead and associated buildings?

(d) What occupancy rights do the Owen whānau possess?

(e) What is the effect of the license held by the Owen children?

(f) Can the trustees revoke and should the Court authorise this?

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[12] In *Williams v Williams Matauri 2F2F* (1991) 3 Taitokerau Appellate MB 20 (3 APWH 20), in *McCann - Waipuka 3B1B1 and 3B1B2B1C2A* (1993) 11 Takitimu Appellate MB 2 (11 ACTK 2) and *Paki – Matauri X Incorporation* (1996) 5 Taitokerau Appellate MB 16 (5 APWH 16).

What interest in the land was held by Hirau Karaka?

[21] To clarify the situation for all parties, I begin my analysis by considering whether Hirau Karaka held an interest in land at the time of his death.

[22] All the parties generally agree the homestead and the area upon which it stands was to be for Hirau Karaka and his whānau. No one sought to argue that the rights or the area granted to Hirau Karaka was in any way limited. I acknowledge that, according to the resolution made by the Committee originally 3 acres of land was set aside specifically for Hirau Karaka and his whānau for a papakainga and that the dwelling was also acknowledged to be for him.

[23] However upon amalgamation of Marangairoa A9 block despite the Court preserving the occupation rights the size of the area granted was reduced from 3 acres to approximately ½ acre. Thus, this smaller area upon which the original homestead stood is all that Hirau was legally entitled to occupy.

[24] In addition, the legal interests Hirau held were merely occupation rights which were recorded in his name only. His family was not mentioned in the Court minutes or the order. As such the rights recognised by the Court were personal to Hirau. In other words, by the 1964 amalgamation order of the Māori Land Court, Hirau Karaka was only granted something akin to a license. That is because no order was made granting a partition.

[25] Accordingly Hirau Karaka's rights of occupancy expired when he died in 1977. That is the legal position and the only way to rectify that is by applying to the Kiwinui A trustees for a licence to occupy or by filing an application for an occupation order in this Court. Alternatively, an application to the Chief Judge pursuant to s 45 of Te Ture Whenua Māori Act 1993 may be needed.

[26] Under the current application I am bound to give effect to those orders. This means that the occupation by the Owen whānau from 1978 has been at the pleasure of the trustees, who could have moved at any stage to expel them from the land.

[27] I note that Hirau Karaka became a shareholder in Kiwinui A after amalgamation in 1964 and before his death and that Mrs Owen succeeded, along with her siblings or their

issue to those shares in 1986. Some of Mrs Owen's shares in Kiwinui A were vested in her four children pursuant to s 164 of Te Ture Whenua Māori Act 1994 in 2008 while she was alive.[13] The rest were succeeded to by her children subject to a life interest in favour of Peter Owen in 2014.[14] Thus all Mrs Owen's children are beneficial owners of Kiwinui A. They, in common with all the other owners of Kiwinui A, own beneficial interests in the land upon which the old homestead is situated, but their shares are subject to a life interest in favour of Peter Owen.

Is the homestead a fixture or a chattel?

Applicant's Submissions

[28] Counsel for the applicants submits that the current homestead is clearly affixed to the land and is a fixture that cannot be moved. Therefore the Court has the jurisdiction under s 18(1)(a) to determine ownership of the house.

[29] Counsel further submits that the evidence demonstrates that the original homestead was not a "house" as at the late 1970's. The homestead was dilapidated and in an uninhabitable condition. Counsel argues that none of the original homestead materials could be used and the Owen whānau in reality built a totally new house from the foundations upwards.

[30] Counsel also points out that neither Hirau Karaka nor the trustees of Kiwinui A Trust or anyone else have ever sought an order in the Māori Land Court for determination of ownership of the original homestead. She notes there is no certificate of title to the homestead.

[31] In addition, counsel advises that Mrs Owen was accorded the right to apply for an occupation order over the area of land where the current homestead is situated by the trustees on 21 December 1996. She acknowledges, however, that Mrs Owen did not seek an order to this effect from the Māori Land Court.

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13 215 Aotea MB 175-176 (215 AOT 175)
14 43 Tairawhiti MB 182-186 (43 TRW 182-186)

[32] Counsel contends that the Court should have regard to the Māori Appellate Court decision of *Tohu – Te Horo 2B2B2B Residue* where the Court determined that the homestead formerly owned by Haami and Te Ani Tohu on Te Horo 2B2B2B block together with the skyline garage built by Matthew Tohu were the property of Sebastian Matthew Tohu. Counsel submits this case is persuasive and in favour of the Owen whānau as the Owen whānau built a new house in place of the former derelict house that was originally built by Hirau Karaka.

Respondent's Submissions

[33] Mr Watson, submits that the original homestead is a chattel not a fixture and therefore s 18(1)(a) does not apply. Counsel submits that the renovations and alterations undertaken by the applicants do not alter the intentions or the underlying status of the original homestead as a chattel.

[34] Counsel acknowledges that whilst there is a presumption that a house affixed to the land is part of it and therefore a fixture, that assumption can be rebutted by evidence of an intention to the contrary. Counsel argues that in this case there is clear evidence that Hirau Karaka's ownership in the original homestead was always regarded as separate from ownership in the land.

[35] Counsel points to the minutes for the Marangairoa A9 meeting outlined above which records the trustees passing a resolution that Hirau Karaka be granted occupation of three acres as a site for him and his family. He also refers to the Court minutes when Marangairoa A9 was amalgamated into the original Kiwinui block. Those minutes record that Hirau's rights of occupation existing in relation to the dwelling were to be preserved.

[36] Counsel noted there in no claim made by the trustees, or any other party, that the house belongs to the trust. Rather the trustees have only considered which claim to ownership of the homestead they would like to support.

[37] Counsel points out that Hirau Karaka died intestate in 1977 and at the time of succession to his estate, the original homestead is recorded in the Māori Land Court records as "family home in Te Araroa".

[38] On this basis, Counsel argues that the actions of the parties and their subsequent activities on the site are consistent with an intention that the house be treated as a chattel and separate from the block.

[39] Counsel submits that if the Court does determine the homestead to be a fixture there is no legal basis to support a claim to ownership in one branch of the family and any claim based on constructive trust principles cannot be satisfied.

[40] Further, he contends that the Owen whānau are primarily concerned with Peter Owen being kicked out of the homestead. Concern for Mr Owen cannot create legal rights in the homestead.

[41] Finally, counsel submits there is insufficient support from the descendants of Hirau Karaka, the trustees of the block or any of the beneficial owners to support the application.

Legal Principles

[42] In terms of whether the house and buildings present on the Hirau Karaka site are now fixtures, I refer to *Auckland City Council v Ports of Auckland*,[15]which adopted the approach set out by the House of Lords in *Elitestone Ltd v Morris and Anor*.[16] In *Elitestone* the House of Lords proposed a broader, common sense approach to the question of whether an improvement could properly be said to have become part and parcel of the land. The main indicators that an improvement is a fixture are the degree of annexation and the purpose of annexation.[17]

[43] In terms of the legal test of the "degree of annexation", Judge Ambler, in *Stock v Morris – Wainui 2D2B* set out the test as follows:[18]

> In the case of the house, the answer is as much a matter of common sense as precise analysis. A house which is constructed in such a way so as to be removable, whether a unit or in sections, may well remain a chattel, even though it is connected temporarily to main services such as water and electricity. But a house which is constructed in such a way that

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15 *Auckland City Council v Ports of Auckland* [2000] 3 NZLR 614
16 *Elitestone Ltd v Morris and Anor* [1997] 1 WLR 687; [1997] 2 All ER 513
17 *Nga Uri a Maata Ngapo Charitable Trust v Mcleod - Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223) at [41]
18 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [20]

> it cannot be removed at all, saved by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty.

Discussion

[44] In this case it is not disputed that Hirau Karaka built the original homestead and that it was affixed to the land.[19] The evidence produced indicates that at the time the Owen whānau commenced restoration work, it was in disrepair. The degree of deterioration is disputed, but it is clear from the evidence that it needed maintenance work.

[45] The original homestead, the repairs and renovations completed have all contributed to permanently affixing the homestead to the land. Likewise the sleep-out and other associated buildings are in all practical terms also affixed to the land. That was the intention when they were placed upon the land.

[46] While for the period of the lifetime of Hirau Karaka, he was given occupancy rights to this homestead by the Committee of Management of the former Marangairoa A9 block and by the more limited terms of the amalgamation order of 1964, I find that there was nothing in the minutes of the Committee or the Court separating the house from the land, other than excluding the improved value from the amalgamation order when determining the relative interests of the shareholders. That alone cannot lead to a conclusion that the house was to be considered a chattel.

[47] Thus I find that all the buildings renovated or erected by the Owen whānau are fixtures on the land.

Who owns the current homestead and associated buildings?

Applicant's Submissions

[48] Counsel submits that the Owen whānau have continuously occupied the homestead since the rebuild and paid the rates and insurance premiums associated with the homestead. They have also been the sole financial contributors to the rebuild and the cost of erecting the additional building on the site.

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[19] 132 Waiapu MB 84 (132 WP 84)

[49] Counsel submits that the Owen whānau have expended $500,000 plus on the rebuild as well as labour and time. Neither the trustees nor the beneficial owners of the block have contributed to those costs. Counsel argues that the equitable interest in the homestead belongs solely to the Owen whānau given their financial contributions and they are in effect the kaitiaki of the site.

[50] In terms of support for the application counsel submits that those opposing the application are primarily from one of the fourteen branches of the whānau and the evidence of those who did not appear for cross examination should be excluded. Counsel notes that seven branches of the whānau support the application, five oppose it, one person did not respond and one person expressed no support. Thus, the majority are in favour of the Owen whānau being granted ownership.

[51] Counsel argues that the trustees have changed their support over time but have until recently supported the Owen whānau occupation.

[52] With regard to the assertions made by Wahapeka that he was promised the homestead by Hirau Karaka in 1965, that is denied. Counsel for the applicant argues that there is no credible evidence of the promise by Hirau Karaka that Wahapeka be kaitiaki of the homestead. Furthermore, Wahapeka acknowledges that no one owns the house. If that is so Hirau Karaka cannot have transferred the house to him as he did not own it.

[53] Given the amount expended on the house the Court is invited to make an order in favour of the Owen whānau.

Respondent's Submissions

[54] Counsel submits that any claim by the Owen whānau can only be based on the contributions they made to the renovations and upkeep. However, equitable claims of this nature must satisfy strict criteria. Counsel points to and distinguishes the constructive trust cases of *Lankow v Rose* and *Gillies v Keogh* on the basis that they concern "cohabitation" or matrimonial relationships.

[55] Further, counsel submits that the Owen whānau were not owed particular fiduciary obligations, and nor were they in a contractual arrangement whereby the descendants of

Hirau Karaka have been unduly enriched. He says the Owen whānau took it upon themselves to expend money on a commonly-owned asset and have benefited from that asset on a rent free basis.

[56] Counsel argues that the evidence does not satisfy all of the most basic constructive trust requirements and can be distinguished from the Māori Land Court decision of *Tipene – Motatau*. There is no evidence of a common understanding that the Owen whānau would receive an interest in the property.

[57] Counsel argues that Hirau Karaka laid down a kaupapa whereby Wahapeka would be kaitiaki of the homestead site and the remainder of the land would be available for other whānau members to build on. This submission relied upon the evidence of Wahapeka that there was a family understanding to this effect, as Hirau told all the family present at a Christmas function that was his wish.

[58] Counsel contends further that Wahapeka and Mrs Owen entered into an express agreement in 1981, wherein Wahapeka gave Mrs Owen permission to move into the homestead on the condition that the *Kaupapa* would be respected, the homestead was to remain open to all whānau and there would be no money issues.

[59] Counsel argues that if the Court were to grant ownership to one branch of the whānau it would offend the principles and objectives of the Act.

[60] Further, Counsel contends that the expectation of an interest, in these circumstances, is unreasonable as it would alienate the remaining branches of the Hirau Karaka whānau from the homestead. Counsel says it would be unconscionable for Wahapeka to agree to an ownership interest being granted to the Owen whānau exclusively. However, Wahapeka does agree that there should be some acknowledgment of the Owen whānau's contribution.

[61] In addition, Counsel argues that of the six children of Hirau Karaka that are still alive, four oppose the application, one supports it and the other is neutral. Of the eight other branches there is insufficient support and as the evidence of the last meeting shows the trustees of Kiwinui A do not support the application.

Legal Principles

[62] At law, ownership of a fixture runs with the land and therefore the trustees as legal owners of the land are assumed to own it. However, s 18(1)(a) enables the Court to recognise that one or more of the owners may separately own a particular improvement. In determining these matters the Court has equitable jurisdiction and may recognise constructive trusts.[20]

[63] The Māori Appellate Court has discussed the effect of s 18 in a number of cases. The Māori Appellate Court in *Tohu – Te Horo 2B2B2B Residue* has for example commented that if an owner of multiply owned land, builds a house on the land, the house if affixed to the land, forms part of the title to the land and belongs to all the owners of the land according to their respective shares.[21] That is the legal position.

Equitable Principles

[64] However the Māori Appellate Court also recognised that the Lower Court has used its equitable jurisdiction under s 18(1)(a)/93 and awarded title to a house, thus giving title of the house separate from the land. They commented that as the order appears to separate the house from the land and treat it is a chattel, there is no ability to succeed to any such order, it not being an interest in land and the order is treated as being personal to the holder and lapsing on death. Anyone who wishes to sustain a further claim for the house needs to apply for another order.

[65] I followed this line of reasoning in *Herewini – Maungaroa No 1 Section 23K*, where I dealt with an application to determine ownership of dwellings on Māori land.[22] The applicants had converted the original skyline garage on the block into a four bedroom home affixed to the land at an estimated cost of $50,000 including labour. The application was opposed on the basis that it was originally intended that the garage would be available to all the whānau concerned. It was argued that it was never intended that only one whānau would own or occupy it indefinitely. In that case, given the length of occupancy by the

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20 *Nga Uri a Maata Ngapo Charitable Trust v Mcleod - Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223) at [35]

21 *Tohu – Te Horo 2B2B2B Residue* (2007) 7 Taitokerau Appellate Court MB 34 (7 APWH 34)

22 *Herewini – Maungaroa No 1 Section 23K* (2013) 85 Waiariki MB 141 (85 WAR 141)

applicants and the improvements made, I determined the matter in favour of the applicants using the equitable jurisdiction of the Court under s 18(1)(a) to do so.

[66] The situation of a non-owner in the land is different, but I have made decisions in favour of non owners based upon an analysis of whether buildings were fixtures or chattels. In *Brokenshaw – Te Kaha B6X2* the applicant claimed ownership of all buildings on the land on behalf of all the owners on the basis that they were fixtures.[23] The application was opposed on the basis Mr Ottoway, the widow of an owner, had an interest in the buildings. His family argued the buildings *on the property were chattels*. I found that the buildings had been affixed to the land and were fixtures. I also found that Mr Ottoway had made significant contributions to the land during his marriage. I found that a remedial constructive trust had arisen and monetary compensation was appropriate.

[67] A similar approach was taken by her Honour Judge Milroy. In *Nga Uri a Maata Ngapo Charitable Trust v Mcleod - Harataunga West 2B2A1* she noted that:[24]

> [37] The Māori Appellate Court in *Tohu – Te Horo 2B2B2B Residue* commented:
>
> > [18] An order under section 18(1)(a)/93 appears to separate the house from the title to land and to treat it as a chattel. There is no ability to succeed to any such order, it not being an interest in land and the order is treated as being personal to the holder and lapsing on death. Anyone who wishes to sustain a further claim for the house needs to apply for another order.
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> [38] I note that the learned Judge in the decision *Stock v Morris – Wainui 2D2B* took a different view of the law and considered that when the Court makes a s18(1)(a) order the nature of the improvement as a fixture and the legal ownership of the land remains unchanged, although as a result of the Court's equitable jurisdiction the house may be owned separately by those specified in the order. As the learned Judge put it:
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> > ... The Court is merely declaring the co-existence of legal and equitable interests in land. That is what s 18(1)(a) expressly empowers the Court to do. In my view, there is no need to conceptualize the house as a chattel.
>
> [39] In the *Stock* decision the learned Judge set out the history of the preceding sections to s 18(1)(a) and came to the view that there is no restriction on who may apply for an order under s 18(1)(a) – the applicants are not restricted to the legal owners. In reaching that conclusion the Judge relied on the case of *Sadlier – The Proprietors of Anaura* which considered s 30(1)(a) of the Māori Affairs Act 1953, the predecessor section to s 18(1)(a).

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23 *Brokenshaw – Te Kaha B6X2* (2003) 81 Opotiki MB 18 (81 OPO 18)

24 Ibid at [37]-[40]

> [40] I have also made a s 18(1) order in favour of a non-owner in the *Matenga v Bryan* case. I note however that in *Matenga* the decision was that on making the s 18(1)(a) order the house was treated as a chattel and able to be removed by the person in whose favour the order was made.

[68] Judge Milroy determined, in that the *Nga Uri a Maata Ngapo Charitable Trust v Mcleod - Harataunga West 2B2A1* case, that the buildings were intended to be permanently situated on the land, despite the fact that the construction allowed for the buildings to be relocated if necessary. Judge Milroy went on to determine ownership in favour of the Ngā Uri a Maata Ngapo Charitable Trust, knowing they were not an owner in the land. Her order was made conditional upon the trust removing the building if other pending applications were successful.

[69] I have also considered the decision of His Honour Judge Ambler in *Stock v Morris – Wainui 2D2B* and agree with his view on the state of authorities and the law.[25] I repeat his position as follows:[26]

> [65] Section 18(1)(a) enables the Court to "do equity" in relation to Māori freehold land. While the Preamble and ss 2 and 17 set the kaupapa of the Act and promote the interests of the owners, the Court cannot allow the actions of owners to cause injustice to non-owners. The case law provides helpful guidance on the appropriate remedies where non-owners have contributed to improvements on Māori freehold land.
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> …
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> [70] The following principles can be distilled from these cases. There is no bar to the Court making a s 18(1)(a) order in favour of a non-owner. However, an order vesting interests in the land or a right to possession of the land (or part of it) in favour of a non-owner will likely offend the kaupapa and provisions of the Act. Although in Grace the Court of Appeal did not completely rule out that possibility. Where the Court concludes that a non-owner is entitled to equitable relief, the Court will in the first place look to awarding monetary compensation. If monetary compensation is inappropriate, the Court may award ownership of the house if it can be removed from the land. The Court will take into account the non-owner's free occupation of the land as a factor. Ultimately, each case depends on its own facts.

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25 *Stock v Morris – Wainui 2D2B* (2012) 14 Taitokerau MB 121 (14 TKT 121)

26 Ibid at [65] and [70]

Discussion

[70] I agree with the sentiments as expressed by Judge Ambler in *Stock v Morris* that the Court should not allow the actions of owners to cause injustice to non-owners, in this case Mr Peter Owen.

[71] However, the position of Mr Peter Owen is different to the situation in *Stock v Morris* where there was a contest between Mariao Stock, an owner in the land, and her former partner, Rex Morris, a non-owner. Mariao claimed ownership of the cottage and was supported by her fellow owners. Rex paid for the construction of the cottage and claimed a monetary interest.

[72] The decision in *Brokenshaw – Te Kaha B6X2* was also different as Mr Ottoway was deceased. He was the second husband of the land owner who had her own natural children from a previous marriage. Mr Ottoway's children (not his wife's children) claimed the matrimonial home. Those children had no rights to the land and were not members of the preferred class.

[73] In this case, Mr Peter Owen and his late wife Mrs Owen started renovations of the existing homestead in the 1970s together. They did this work for their family and no contribution made exceeded the other. Later, their children (all owners) also contributed to this family enterprise. Therefore, the facts are different and it cannot be said that Mr Owen clearly holds a greater interest than his family in the homestead and associated buildings.

[74] The evidence was that the homestead was dilapidated when the Owen whānau returned in the 1970s. I accept that without their intervention the homestead would not have been restored to the same extent that it has. I further note the allegations of sheep running through the house and that the timber of the house had rotted. Reg Karaka gave evidence to this effect although he did not go so far as to say the house was unliveable. He considered the bedrooms and living room to be "comfortable". There was also evidence that the original homestead had no power or water services and no toilet facilities. That has now been rectified and the homestead and surrounding buildings are well maintained and cared for.

[75] Wahapeka Hauiti contested the evidence as to the state of the house and I accept that the house was still in part liveable, but the evidence of the amount of work Mr Owen and his family completed on the homestead is compelling. I have no reason to doubt the veracity of the evidence provided by the Owen Whānau as to what work was completed on the homestead. That evidence suggests that it was a family labour of love, not the sole effort and contribution of Mr Peter Owen.

[76] As noted above, Wahapeka contested the evidence as to how the Owen whānau took occupancy. He claimed he was a whāngai mokopuna of Hirau Karaka and was raised by him until he was 14 years old, following which he returned to his parents. Sydney Karaka supported his evidence in this regard. The applicants agreed he was regarded as a mokopuna rather than a child of Hirau Karaka. They point to the fact that Mrs Owen was a natural child and a generation ahead of him. In tikanga terms that is significant because she was his elder.

[77] Wahapeka claimed that Hirau Karaka told him and the wider whānau in 1965 that he was to be kaitiaki for the house. The evidence for the applicants, contests that Wahapeka is the kaitiaki for the area, and denies that Hirau would have appointed him to such a role. They are supported in this view by a number of other whānau who gave evidence. They point to the fact that there is no corroborating or written evidence to support Wahapeka's claim.

[78] I agree that there is limited corroborating or written evidence of Wahapeka's claim. I am left with the succession minutes to Hirau Karaka's estate in 1986. There is no record of such an agreement being discussed or provided for in terms of giving Wahapeka greater rights to the homestead than any other child of Hirau Karaka. Indeed, this could not be done legally given the situation concerning the land. Hirau left no will and something this important should have featured in such a document. Nor did anyone raise it in Court in 1986. I am, therefore, not able to find in favour of Wahapeka in this respect without more substantive evidence.

[79] Wahapeka also claimed there was an express agreement between him and Mrs Owen in 1981. He says that they agreed that the Owen whānau could occupy, but the house was to remain open to all the whānau and money was not to become an issue. The

applicants again point to the fact that there is no corroborating or written evidence to support this claim.

[80] I consider that had this been known to Mrs Owen she would have discussed this with Peter and her family who had no knowledge of such an agreement. I further consider that it is too easy to make such a claim where the other party is deceased. Unless such a claim can be corroborated, I cannot give it much weight and I prefer the evidence of Mr Owen in this respect.

[81] Thus I find that the Owen family have a greater right of occupation in this homestead and associated buildings, over and above any other branch of the Hirau Karaka whānau. I also find that this occupation right commenced with consent from Hirau Karaka and is now sourced to the joint contributions of Mr and Mrs Peter Owen with their children, including all their significant work and expenditure made on the property. That contribution was made jointly.

What occupancy rights do the Owen whānau possess?

[82] In my view the facts of this case indicate that the Owens family hold a bare licence. In *Lazarus – Peter Pene Moses* Judge Ambler discussed the nature of a licence to occupy:

> [39] Licences to occupy became popular in the 1980's as the preferred legal tool to enable Maori to build on and occupy multiply-owned Maori freehold land. A licence is personal to the licensee and is not an interest in land. At law it is not "real estate". But, just because a licence to occupy is described as a "licence" does not necessarily mean it is, at law, a licence. It may be a lease.
>
> [40] The distinction between a lease and a licence is discussed in detail in Hinde McMorland & Sim, Land Law in New Zealand (student ed, Lexis Nexis, Wellington, 2004) vol 2 at paragraphs 11.009 and 11.0010. At paragraph 11.009 the authors observe:
>
> > The basic distinction between a lease and a licence is that a lease confers on the tenant a legal or an equitable estate in the land, whereas a licence is a mere personal permission to enter the land and use it for some state purpose which does not confer any estate in the land on the licensee. In distinguishing between a lease and a licence the crucial question is whether a legal right of exclusive possession has been given. The only intention of the parties that matters is their intention as to substantive rights, not their intention as to legal classification. In Fatac Ltd v Commissioner of Inland Revenue the Court of Appeal quoted with approval the following statement made by Windeyer J in Radaich v Smith:

> Whether the transaction creates a lease or a licence depends upon intention, only in the sense that it depends upon the nature of the right which the parties intend the person entering upon the land shall have in relation to the land.

[41] The leading English authority on this issue is Street v Mountford [1985] AC 809 where the House of Lords concluded that the Court should simply decide whether, upon its true construction, the agreement confers on the occupier a legal right of exclusive possession. Lord Templeman said (p 826):

> ...[T]he only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent.

[42] He continued (pp 826-827):

> Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession might be referable and which would or might negative the grant of an estate or interest in the land include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office.

[43] The leading New Zealand authority is *Fatac Ltd v Commissioner of Inland Revenue* [2002] 3 NZLR 648 which adopted the *Street v Mountford* approach (paragraphs 66-67):

> Our conclusion is that in this country, as elsewhere, the fundamental distinction between a tenant and a licensee is that the former alone has the right to exclusive possession. For exclusive possession to be meaningful there must be a minimum finite term, whether fixed or periodic. Rent is an important indicator of an intention to be legally bound but its absence does not per se negate a tenancy. The terminology employed by the parties in describing their relationship will be immaterial unless it helps in deciding whether there is a right to exclusive possession. Restrictions upon the use to which the occupier may put land are not inconsistent with exclusive possession...

Discussion

[83] In this case there has been no lease or tenancy created in favour of the Owen whānau, conferring exclusive possession. There is also no written licence to occupy (unlike in the *Lazarus – Peter Pene Moses* case). There was the right given to apply for an occupation order from the Court in favour of Mrs Owen. She never completed that process.

[84] However, there has been possession permitted by the trustees for many years in favour of the Owen whānau. The Owen whānau commenced occupation with consent from

Hirau Karaka. They have as a family, paid the rates and maintained the property in a more than satisfactory state. I also take into account the fact that the trustees allowed occupation to continue before and after the death of Mrs Owen until these proceedings.

[85] On the facts while Mrs Owen was alive, she and her children held a bare license to occupy revocable at will on notice. Her four children now hold that license.

[86] The position as it concerns Mr Owen is clear. He is not an owner as he only holds a life interest in some of the shares held by his children. Thus he cannot be granted a licence or any other interest in the house as a fixture on the land. I also do not consider that a remedial constructive trust can be found in the circumstances of this case, involving as it does a joint effort on the part of the whole family to develop the buildings and the site.

What is the Effect of the License Held by the Owens Children?

[87] In *Paraire v Paraire – Part Mangatawa 10 Block* Judge Clark in determining an application for an injunction discussed the nature of a bare licence:[27]

> [42] A bare licence is revocable at will. The decision to revoke a bare licence must be communicated to the licensee for effective revocation. This may be by express or implicit notice, or by the licensor doing some act inconsistent with the continuance of the licence, or by threatening proceedings for trespass.

Discussion

[88] There has been no formal revocation of permission to occupy the land, including the house by the trustees of Kiwinui A. While the trustees appear now to oppose this application, they have not formally revoked the bare licence held by the Owen's family.

[89] I find that possession has continued in favour of Mr Peter and Henrietta Owen's children.

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[27] *Paraire v Paraire – Part Mangatawa 10 Block* (2015) 105 Waikato Maniapoto MB 67 (105 WMN 67)

Can the trustees revoke and should the Court authorise this?

[90] A bare licence may be supported by estoppel. The rules on this once required that there be:[28]

- A mistake as to legal rights on the part of a representee;
- Expenditure by or detriment suffered by such person;
- Awareness on part of the a representor of the rights at issue;
- Knowledge of the mistake being made; and
- Encouragement or silence on his or her part.

[91] In such a case a person could claim the benefit of an estoppel. The problem was that these 5 probanda were not always easy to establish on the facts. So the Courts have tended towards taking a more flexible approach, in family settings in particular, indicating that there is no need for the mistake on the part of the representee, or for a representor to know the extent of his or her rights.[29]

[92] In *Paraire v Paraire – Part Mangatawa 10 Block* Judge Clark referred to the doctrine of proprietary estoppel as follows:[30]

> [63] In the case of *Gillies v Keogh*, the Court of Appeal referred to what are known as the five probanda required to be shown by a party seeking to rely upon the doctrine of proprietary estoppel.
>
> [64] Richardson J noted that there had been a trend away from the strict application of those five probanda to a more flexible test of unconscionability. Despite that he considered that there are three essential elements which need to be satisfied namely:
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> a) The creation or encouragement of a belief or expectation;
>
> b) Reliance by the other party; and
>
> c) Detriment suffered as a result of that reliance.

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28 *Wilmott v Barber* (1880) 15 Ch D 96, 105-106

29 See Bennion, Brown et el (ed) *New Zealand Land Law* (Brookers, Wellington, 2009) [7.7.01]

30 Ibid at [63] –[64]

[93] I note that this case concerned a defacto relationship but the principles therein expressed are still pertinent to this situation as I discuss below.

Discussion

[94] I am convinced that application of the flexible approach to finding an estoppel is appropriate in this case, involving as it does a family setting. Such application is not inconsistent with how the Courts have used estoppels to provide relief where an equity was found to exist.

[95] The evidence of the Owen whānau establishes that an estoppel does exist in this case. That is because they carried on the development of this site in the belief that they had a right to do so, they relied upon the fact that there was never any opposition until recently, and they expended a considerable amount of money and effort on the site.

[96] I consider their position reasonable in the circumstances, given that the trustees have not sought ownership of the homestead and associated buildings. In fact, at one stage they encouraged Mrs Owen to seek an occupation order.

[97] Nor do the trustees seek to disturb the current occupation of the site by descendents of Hirau Karaka. The Owens family have been encouraged in their belief that the site is for their whānau and that they were free to expend money on it.

[98] There can be no doubt that they will suffer detriment if the trustees and other owners were permitted to claim the homestead and associated buildings. It would be detrimental to the Owen whānau if they were now denied the ability to enjoy the benefits of that expenditure. To hold otherwise would unjustly enrich the Kiwinui A Trust, as the legal owners of the fixtures on the block.

[99] In addition it would be unjust for the trustees to award a licence to occupy or lease or tenancy to the homestead in favour of all Hirau Karaka's children or their issue, now that it has been fully developed. They too would be unjustly enriched by such a determination.

[100] In coming to a decision I must attempt to strike a balance between giving effect to the expectations held by the Owen whānau and provide relief to do the "minimum equity to do justice."[31] I note the Owen whānau have enjoyed, and will continue to enjoy, the benefit of the site rent free. I also note that this was always meant to be a papakainga site of 3 acres for the entire family. The fact that this was not ordered by the Māori Land Court in 1964 is unfortunate and the trustees of Kiwinui A or the respondents may wish to review this situation by way of a s 45 application to the Chief Judge.

[101] However, that will not change the result of my decision today as far as the occupation of the homestead and associated buildings are concerned, given where the manifest fairness of this case lies.

Decision

[102] I find that the children of Mr and Mrs Owen do not own the Hirau Karaka homestead or associated buildings at law or in equity but rather they hold a bare license to the house and the other buildings on the land. I make this finding because the buildings are fixtures.

[103] I also find that the trustees should be estopped from revoking that license to occupy, given the manifest unjust enrichment that they would receive should that be permitted. Thus the Owen's children can be said to enjoy the benefit of an irrevocable licence to occupy.[32]

[104] Under Te Ture Whenua Māori Act 1993, I also have authority to direct the trustees to formalise a licence. The trustees should grant a license to occupy in favour of the four children of Mrs Owen as a practical way of giving effect to what the previous and current trustees have authorised since the 1960's. The Owen whānau should, however, be restricted to the current area that they occupy. That will allow other members of the Hirau Karaka whānau to pursue a licence to occupy over the balance of the 3 acres that Hirau should have received but for the 1964 order of the Māori Land Court.

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[31] See Bennion, Brown et el (ed) *New Zealand Land Law* (Brookers, Wellington, 2009) [7.7.03]
[32] Thomas v Thomas [1956] NZLR 785, 793-794

[105] I make this decision because the contribution of Mr Owen and his whānau to the development of this homestead and associated buildings has been of such magnitude that to deny the family would be unjust.

[106] I also find that it would be inequitable for the Owen whānau to be required to leave the occupation site and attempt to remove any of the buildings.

[107] The Court is doing no more than declaring under s 18(1)(a) what the situation in practical terms has been for decades, although I am limiting it to a certain extent. That is on the death of the last surviving Owen sibling, the trustees can assess whether new licences to occupy should issue to accommodate the needs of the family.

[108] In this manner, the Preamble, ss 2 and 17, including the need to find a practical solution that is fair as per s 17(2)(e), are complied with. This solution achieves, in my view, the best outcome for all parties.

[109] Wahapeka and his supporters were very vocal in their opposition to this ownership application. That position changed with the suggestion of constituting a whānau trust. However, there are 13 descent lines (one child having died without issue) from Hirau Karaka. The Court has not received sufficient evidence to determine the full extent of opposition or support from this extended family to the idea of a whānau trust offered as a solution by Wahapeka. Thus, I am not prepared to constitute such a trust.

Order

[110] There is an order under s18(1)(a) declaring that Mr Peter Owen and his four children do not own the homestead and associated buildings on Kiwinui A which are the subject of this application but that they do hold a irrevocable licence to occupy those buildings until the date of death of the last surviving sibling.

[111] Using s 37(3), the trustees are directed pursuant to ss 236-238 of Te Ture Whenua Māori Act 1993 and s 66-67 of the Trustee Act 1956 to grant a licence to occupy to the four children of Mr and Mrs Owen.

[112] The licence should be supported by a sketch plan depicting no more than 1100 square metres over the area upon which the buildings are situated with a right of access. The rates should be paid by the occupants and the licence should record that. The costs of having the licence drafted by a lawyer, and the work on the sketch plan produced by a surveyor, are to be met by the Owen whānau.

[113] The Registrar is to send a copy of this decision to the parties.

Pronounced in open Court in Gisborne at 2:00pm on the 15th day of March 2016.

C L Fox
DEPUTY CHIEF JUDGE