I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O AOTEA
In the Māori Land Court of New Zealand
Aotea District

A20210011403

WĀHANGA *Under*	Section 328, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Hīmatangi 1H1A
I WAENGA I A *Between*	REIHANA ROBINSON KOTUKU ADLAM Te Kaitono *Applicant*
ME *And*	REIHANA REIHANA, VICKI LAITA, RUSTY REIHANA, RIKI REIHANA, MAKARETA REIHANA, STEVE CALO, NICOLE CALO, EDWARD (TED) DEVONSHIRE, TONI-ANN LANGBEIN, KAREN DEVONSHIRE, RIPIA LANCE, LINDA MARSHALL, ELIZABETH BUCKLAND, ROBYN DEVONSHIRE AND JACQUELINE WALL Ngā kaiurupare *Respondents*

Nohoanga: *Hearing*	14 December 2021, 445 Aotea MB 60-93 30 March 2022, 446 Aotea MB 265-312 (Heard at Whanganui in person and via Zoom)
Whakataunga: *Judgment date*	8 April 2022

TE WHAKATAUNGA Ā KAIWHAKAWĀ A H C WARREN
Judgment of Judge A H C Warren

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E kore au e ngaro, he kākano I ruia mai I Rangiātea.[1]

Hei tīmatanga kōrero
Introduction

[1] Reihana Adlam is a talented and passionate Ngāti Te Au rangatahi. He seeks to build a home on Ngāti Te Au ancestral whenua, at a location close to where his *whenua* is buried.[2] Specifically, he wishes to build on Hīmatangi 1H1A by virtue of a koha of shares from his mother, Hayley Bell, and uncle, Denby Reihana. This will be the first home Mr Adlam will own if I grant the occupation order and his project is realised. A home he will share with his wife Jacinta Rose.

[2] Mr Adlam has prepared and presented a comprehensive application for an occupation order and his efforts are acknowledged. His application has skilfully interwoven aspects of te reo me ōna tikanga, underpinned by the following whakatauki:[3]

> Hokia ki ō maunga kia purea koe e ngā hau o Tāwhirimātea.
> *Return to your mountains to be cleansed by the winds of Tāwhirimātea.*

[3] My primary role as a Judge of this Court is to assist Māori to realise the implementation of important principles.[4] I am also compelled to exercise my powers (and in this context my discretion) in a manner that facilitates and promotes retention, use, development, and control of Māori land as a taonga tuku iho, as far as possible.[5]

[4] This decision seeks to give effect to those principles, in the context of an application for an occupation order per s 328 of Te Ture Whenua Māori Act 1993 ("the Act"). An application that is contested by some owners, not because they differ fundamentally on the importance of those principles, but because they have differing views about when this application should be considered and granted.

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1 Reflecting Hīmatangi as their Rangiātea and the owners being a seed of it.
2 Whenua meaning placenta in this context.
3 See application filed by Mr Adlam on 13 September 2021.
4 Te Ture Whenua Māori Act 1993, Preamble, ss 2 and 17.
5 Te Ture Whenua Māori Act 1993, s 2.

Whakataunga
Outcome

[5] After considering the application and the evidence and submissions filed, both in support and opposition to the application, I grant the application for an occupation order on the terms set out in this judgment. I set out my full decision and reasons below.

Horopaki
Context and factual matters

The land

[6] As noted, the application relates to Hīmatangi 1H1A, which has the status of Māori freehold land ("the block"). The block is located in the rohe of Ngāti Te Au. There are now 38 owners with a total of 11,093 shares. The block is 28.5507 hectares in size and is flat to gentle rolling land, which abuts State Highway 1 ("SH1") 10 km north of Foxton and 8 km inland from Hīmatangi Beach.

[7] The breakdown of the internal classifications of the block are as follows:

Part of Block	**Area (hectares)**
[Existing] House Site	0.800 ha
Medium sandflats – permanent pasture	23.700 ha
Rough grazing only (pine trees etc)	4.0507 ha

[8] Mr Adlam became an owner in the block by way of a vesting order I granted.[6] He has 78.62 shares in the block, being 0.709 per cent of the total 11,093 shares. There is currently one dwelling on the block, which is occupied by major shareholder Denby Reihana.[7]

[9] Local authority zoning rules allow for one residential dwelling unit and one family flat per site, on sites up to 40 hectares, as a permitted activity. For two or more residential dwelling units or family flats on the block, it is considered a discretionary activity under the District Plan requiring a specific resource consent.[8]

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6 445 Aotea MB 54-56 (445 AOT 54-56); and 445 Aotea MB 57-59 (445 AOT 57-59).
7 There is no occupation order or similar in place with respect to this dwelling.
8 See Affidavit of Vincent Ashman, Horowhenua District Council dated 9 December 2021.

[10] There is currently legal access to the block from SH1, but no formed access to the proposed house site.[9]

[11] The block is currently informally leased by a neighbouring dairy farmer. There is no governance or management structure for the block.

The proposal

[12] Principally, Mr Adlam wants to build a home for him and his wife. He explained that "…by living at Hīmatangi this will build up ahi kā and strengthen Ngāti Te Au as a hapū…".[10]

[13] Mr Adlam requests an area of approximately 2,023 square metres (excluding the access way) for an occupation order ("the site").[11] This area is equivalent to his shareholding in the block. The general location of the site is depicted in the first image below. The second image is a close-up depiction of the proposed site, proposed access way and the existing house.

9 Legal access is via a registered right of way with a Gazette Notice declaring the adjoining SH1 to be a limited access road. See Telfer Young *Advisory Report*, 7 March 2020 at 6.

10 Application of Reihana Adlam, filed 13 September 2019, Appendix L at [2.1].

11 Above n 8, at 3.

[14] Mr Adlam seeks to:

(a) Construct, at his cost, a new and legal access way from SH1 to the site.

(b) Build a four-bedroom home on the block and a small two-bedroom home under the same occupation order for his Mum in the future.[12]

(c) Support the balance of the block being developed, expressing ideas such as communal gardens, more housing and whānau enterprise; and

(d) Have the occupation order in place for his lifetime, with the right of succession to future uri.

[12] He would therefore like the occupation order to allow for these two houses, although I note that this is not a priority for Mr Adlam. See minutes of facilitated hui of owners dated 19 March 2022 at 8.

Initial Owner Engagement

[15] On 31 July 2021, Mr Adlam presented his proposal for an occupation order to the owners of the block ("the July hui").

[16] The July hui was publicly advertised in the Horowhenua Chronicle and was attended by 21 people. According to the July hui minutes, 16 of the attendees were owners in the block, with most of the others being children of landowners, some of whom were speaking for their parents.

[17] Of the 38 owners (now including Mr Adlam), 34 have offered a view on the application over the course of the proceedings. Five owners are deceased, with one of those owners passing away during the course of the proceedings after they had provided an initial view. Whānau of four of the deceased owners have also provided a view on the application.

[18] At the conclusion of the first hearing, not all owners supported the application. In poll terms, 15 individual owners were in support and 18 owners opposed the application. In shareholding terms, 54.8 per cent supported the application and 39.3 per cent opposed the application.

Te ara o te tono
The course of the proceedings

[19] I set out the course of the proceedings, including the main pieces of evidence received and considered.

[20] Mr Adlam lodged his application on 13 September 2021, together with a number of relevant documents. The matter was set down for hearing and, in advance of that first hearing, I issued directions setting out a series of questions for the applicant and other owners to address and a minute in respect of a proposed site visit.[13]

[21] An affidavit dated 9 December 2021 from Vincent Ashman of the Horowhenua District Council was then filed, confirming the local authority process to approve the construction of one further house on the block.

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13 441 Aotea MB 62-64 (441 AOT 62-64).

[22] I held a site visit to the block on 13 December 2021, where all owners were invited to attend. A hearing was then held in Whanganui on 14 December 2021 ("the first hearing").[14] Seven owners attended the hearing, either in person or by way of Zoom.

[23] Following the first hearing, I ordered a s 40 report be compiled by the Registrar, to include an expert land use and valuation report that was prepared by Telfer Young ("the land use report").[15] The main findings were:[16]

(a) Rural lifestyle housing was considered the best use and development option;

(b) Followed by diary run off and/or a stock fattening unit;

(c) With respect to the housing options, there were zoning limitations that may make the best use option unrealistic;

(d) The impact on the owners of granting this application is that, because of local zoning rules, it is highly unlikely any other dwellings could be placed on the block;

(e) It would be logical to move the proposed house site more centrally and closer to the existing house site, so not as to obstruct the gateway into the next paddock and so that the existing access does not need to be redesigned and constructed; and

(f) Based on Mr Adlam's shareholding in the block, an area of 2,023 square metres was calculated.

[24] On my direction, the Pae Tukutuku circulated a full list of owners, recording their positions on the application as understood by the Court following the first hearing. Each owner was asked to confirm whether the Court had an accurate record of their positions.

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14 445 Aotea MB 60-93 (445 AOT 60-93).
15 442 Aotea MB 78-82 (442 AOT 78-82).
16 See Telfer Young *Advisory Report*, 7 March 2020.

[25] At the conclusion of the first hearing, I recommended as opposed to directed that a further meeting of owners be held.[17] This was subsequently held via zoom on 19 March 2022, which was facilitated by Hayden Potaka and included a presentation by Pae Tohutohu Caroline Green about governance options for the block ("the March hui").

[26] I subsequently received a comprehensive s 40 report prepared by Caroline Green, that attached the following:

1. Report of Hui Facilitator, Hayden Potaka received 25 March 2022 with supporting documents:
    - 1.1. Minutes of meeting held by Zoom on 19 March 2022 incorporating:
        - a. results of the voting
        - b. powerpoint presentation
        - c. Management Structure Options information sheet
        - d. whiteboard notes
2. Report of Valuer, Peter Loveridge (Telfer Young, Property Valuers and Advisors) – note that the highlighting in this report is mine.
    - 2.1. includes a Note for File dated 15 March 2022 recording a telephone conversation with the Valuer to clarify some points.
3. Notice of Meeting - Letter to owners sent by email on 25 February 2022, with plans of the land
4. Other documents relevant to this Report:
    - 4.1. the informal agreement to lease, with supporting minutes
    - 4.2. Horowhenua District Council re rates (email dated 24 February 2022)
    - 4.3. Affidavit of Vincent Ashman (Horowhenua District Council) dated 9 December 2021 re Resources Management
    - 4.4. Horowhenua District Council – email enquiry RMA matters
    - 4.5. Search of LINZ title WN18C/410
    - 4.6. Court Minutes:

      441 Aotea MB 62-64 dated 3 December 2021 – directions for site visit

      442 Aotea MB 78-82 dated 21 December 2021 – directions for hui

      445 Aotea MB 60-93 dated 14 December 2021 – hearing (occupation application)

      445 Aotea MB 177-178 dated 21 February 2022 - Valuer appointed

      445 Aotea MB 179-180 dated 21 February 2022 - Facilitator appointed.

[17] 442 Aotea MB 78-82 (442 AOT 78-82).

[27] I then convened a second hearing of the application on 30 March 2022 ("the second hearing").[18] In advance of the second hearing, I circulated a list of specific issues/questions that I wanted to hear from the owners about.[19] I invited owners not present at the second hearing to confirm via email their final position on the application, before determining it. I then reserved my decision and indicated that I would do my best to issue a decision by Friday 8 April 2022.

Te Ture
The Law

[28] Section 328 of the Act gives the Court a discretion to grant an occupation order. Section 329 of the Act outlines the matters I must consider in exercising that discretion.

> **328 Occupation orders**
>
> (1) The Maori Land Court may, in its discretion, make, in relation to any Maori freehold land or any General land owned by Maori, an order vesting in—
>
> (a) the owner of any beneficial interest in that land; or
>
> (b) any person who is entitled to succeed to the beneficial interests of any deceased person in that land; or
>
> (c) any beneficiary of a whanau trust that holds a beneficial interest in that land,—
>
> exclusive use and occupation of the whole or any part of that land as a site for a house (including a house that has already been built and is located on that land when the order is made).
>
> (2) Where the land that will be affected by the order is—
>
> (a) land in respect of which a trust is constituted under Part 12; or
>
> (b) land vested in a Maori incorporation,—
>
> the court shall not make the order without the consent of the trustees or of the management committee of the incorporation, as the case may require.
>
> (3) Notwithstanding any rule of law, an order under subsection (1) shall not be deemed to be a partition, development, or subdivision of the land to which the order relates.
>
> (4) In making an order under subsection (1), the Maori Land Court may specify—
>
> (a) that the occupation order is for a specified period; or
>
> (b) that the occupation order ends on the occurrence of a defined event.

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18 446 Aotea MB 265-312 (446 AOT 265-312).
19 Directions issued 25 March 2022.

> **329 Matters to be considered**
>
> (1) In deciding whether or not to exercise its jurisdiction to make any occupation order, the Maori Land Court shall have regard to—
>
> (a) the opinions of the owners as a whole; and
>
> (b) the effect of the proposal on the interests of the owners of the land; and
>
> (c) the best overall use and development of the land.
>
> (2) Notwithstanding subsection (1), the Maori Land Court shall not make any order, unless it is satisfied—
>
> (a) that the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and
>
> (aa) that the owners of the land to which the application relates understand that an occupation order—
>
> i) may pass by succession; and
>
> ii) may be for a specified term or until the occurrence of a defined event:
>
> (b) that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter:
>
> (c) that, in the circumstances, the extent of the beneficial interest in the land held by the person in whose favour the occupation order is to be made, or to which that person is entitled to succeed, justifies the occupation order.

[29] The Māori Appellate Court has developed principles with respect to applications for occupation orders. The relevant principles include:

(a) The Māori Land Court may grant an occupation order in spite of opposition, but must consider each of the requirements as set out in s 329 of the Act and make a decision based on merit;[20]

(b) In exercising jurisdiction the Court must be mindful of the interests of other owners in the land and has power to take into account those interests by limiting the term of the order;[21]

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[20] *Rudolph v Reti – Otetao B3A2* [2011] Māori Appellate Court MB 143 (2011 APPEAL 143) at [37]. See also *Sione – Te Hapua 24* (2000) 4 Taitokerau Appellate MB 275 (4 APWH 275).

[21] *Rudolph v Reti*, above n 13, at [38]. See also *Bidois – Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 AP 102).

(c) In exercising discretion, the Court must take into account relevant matters of context. The Court must measure the matters set out in s 329 against the factual background and all the circumstances in each particular case;[22]

(d) The Court has adopted the decision of the High Court in *Brown v Maori Appellate Court* that what amounts to "sufficient" support for a proposal is a matter for case-by-case analysis.[23] In *Brown*, the High Court in the context of a partition application, stated that because of ss 2 and 17 of the Act, greater support than a straight majority either in shares or numbers may be required.

[30] I adopt the reasoning of these principles.

[31] I am also required to give the Preamble weight in interpreting and applying the jurisdiction of the Act, per ss 2 and 17 of the Act.

> **Preamble**
>
> Nā te mea i riro nā te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: ā, able te mea e tika ana kia whakaūtia anō te wairua o te wā i riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: ā, nā te mea e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki ō rātou whānau, hapū hoki, a, a ki te whakangungu i ngā wāhi tapu hei whakamāmā i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mō te hunga nōna, mō ō rātou whānau, hapū hoki: ā, nā te mea e tika ana kia tū tonu he Te Kooti, ā, kia whakatakototia he tikanga hei āwhina i te iwi Māori kia taea ai ēnei kaupapa te whakatinana.
>
> Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.
>
> **2 Interpretation of Act generally**
>
> (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.

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22 *Rudolph v Reti – Otetao B3A2* [2011] Māori Appellate Court MB 143 (2011 APPEAL 143) at [40].
23 *Brown v Maori Appellate Court* [2001] 1 NZLR 87.

(2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

(3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

17 General objectives

(1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—

(a) the retention of Maori land and General land owned by Maori in the hands of the owners; and

(b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.

(2) In applying subsection (1), the court shall seek to achieve the following further objectives:

(a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:

(b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:

(c) to determine or facilitate the settlement of disputes and other matters among the owners of any land:

(d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:

(e) to ensure fairness in dealings with the owners of any land in multiple ownership:

(f) to promote practical solutions to problems arising in the use or management of any land.

The status of tikanga

[32] Tikanga formed a major part of the evidence presented by Mr Adlam and kaumātua and owner Manu Kawana and supported by a number of other owners. A number of aspects of tikanga were expressed including:[24]

(a) The metaphor and practice of ahi kaa

(b) The notion of warming up the whenua;

[24] See application of Reihana Adlam filed 13 September 2021; 445 Aotea MB 60-93 (445 AOT 60-93); and 446 Aotea MB 265-312 (446 AOT 265-312).

(c) The desire to re-establish a Marae on the block, being a turangawaewae base for all owners;

(d) Tupuna lived and breathed on the land;

(e) Ngā kaitiaki, ngā kaitiaki whenua, kaitiakitanga o te whenua;

(f) Whanaungatanga and the different roles whānau/hapū/iwi play;

(g) Being close to one's whenua/placenta; and

(h) The land calling the owners home.

[33] These matters prompted how I should consider and weigh matters of tikanga in the context of this application when Part 15 of the Act does not specifically engage tikanga as other parts of the Act do. More specifically, how I should assess tikanga in light of the tikanga matters raised in this application.

Tikanga in the Act

[34] I turn to the Preamble of the Act as set out above, to determine how I am to consider, weigh and apply tikanga when determining an occupation order application.

[35] The first part of the Preamble is about the reaffirmation of the kawanatanga and rangatiratanga exchange as captured in Te Tiriti o Waitangi (the Māori version) or at least the wairua of that exchange. This specific reaffirmation of the protection of rangatiratanga goes to the heart of whenua Māori, because Article Two of Te Tiriti o Waitangi is all about rangatiratanga as it relates to "whenua, kainga me nga taonga katoa".

[36] The reaffirmation of rangatiratanga as framed in the Preamble, must logically include all aspects of whenua Māori, including any relevant tikanga (principles and practices). This would be consistent with the holistic Māori world view underpinned by whanaungatanga, where everything is connected and interrelated.[25] Tikanga is also considered a taonga in of itself and therefore falls within the Article Two rangatiratanga protections.[26]

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[25] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) Vol 1 at 16-17.

[26] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīnga Whāruarua Oranga Tamariki Urgent Inquiry*

[37] In this sense, the Preamble imports into the Act a much broader focus, covering tikanga principles and values as it relates whenua (most obviously).[27] This broader approach stems from the protection of rangatiratanga in Te Tiriti. As the Waitangi Tribunal commented:[28]

> Article 2 guarantees te tino rangatiratanga. The exercise of mana by rangatira was underpinned and sustained by the adherence to tikanga.

[38] The second part of the Preamble introduces the more specific tikanga concept of *taonga tuku iho*, which is repeated in s 2(2) of the Act when expressing how the Court is to interpret specific provisions of the Act. The term *tuku iho* expressed in this manner can be interpreted as a specific customary practice, but also as a values-based system that underpins how Māori relate to whenua and how whenua relate to Māori.

[39] Chief Judge J.V. Williams, as he was then, found that taonga tuku iho was an "important relevant principle" when determining how far the Court's jurisdiction extended on a specific provision of the Act.[29]

[40] Because the Preamble is about the principles of the Act, a tikanga principles lens can be cast over the Act and within the clear statutory constraints of the statutory language. This is confirmed in s 2(1) of the Act. It also follows that relevant tikanga principles can also assist in the balancing and weighing process when the Court is to exercise discretion, as I am here per s 328 of the Act. This clearly includes considering the block as a taonga tuku iho. This is provided for per s 2(2) of the Act, which of course in no way limits the generality of s 2(1) of the Act, allowing other matters of tikanga to be weighed and considered.

The application of tikanga

[41] I am mindful that the Court should not be the determiners of all tikanga, but rather it must respect, weigh and apply relevant tikanga (and more specifically the principles/values)

(Wai 2915, 2021) at 17.

27 This much broader focus by reference to Te Tiriti was commented on by the Māori Appellate Court in the recent judgment *Kruger v Nikora – Tūhoe Te Uru Taumatua* [2021] Māori Appellate Court MB 444 (2021 APPEAL 444) at [32] "Mr Harman encouraged us to observe that the Preamble, and in particular its reaffirmation of rangatiratanga, imports into the Act a focus that is much broader than land. He argued this broader focus does not require trusts to be focussed on land to fall within s 236. This argument has some attraction, but we need not decide it conclusively".

28 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 3.

29 *Bell – Te Kuiti B5* (2000) 117 Otorohanga MB 127 (117 OT 127) at 130.

in a way that helps Māori achieve other specific principles of the Act; retention, development and, in this context, the possible occupation of the block by one of its owners.

[42] In my view, the Preamble is sufficiently broad to give the Court the ability to weave tikanga and its principles/values into the very fabric of its decisions, even when a provision of the Act does not specifically engage tikanga, such as Part 15 of the Act. This should be done in a very careful and diligent way, but in a Māori way, or in this case, a Ngāti Te Au way.

[43] Naturally, the weight to be given and how tikanga principles, values or practices are to be applied, must invariably depend on the nature of the application before the Court, the issues, and how the parties choose to raise these matters in evidence. In other words, it comes back to the context and circumstances of each case and the relevance of tikanga principles/values such as whakapapa, whanaungatanga, mana, manaakitanga, aroha, wairua and utu.[30]

[44] The place of tikanga under the Act in this much broader sense, can also be viewed in the context of tikanga and Te Tiriti being principles of law, even where legislation is silent on those matters or as part of the common law.[31]

Ngā take
The issues

[45] The overarching issue in any application for an occupation order is whether the Court is satisfied of the matters set out in s 329 of the Act.

[46] There are also some secondary issues for this application:

(a) Should the occupation order allow for two dwellings as proposed?

(b) Whether the proposed access way is acceptable;

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30 Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ Law Review 1 at 4.
31 Above n 30, at 12.

(c) Whether the occupation order is for a specified period or for the lifetime of Mr Adlam; and

(d) What other conditions should be imposed, such as a ground rental to be paid by Mr Adlam?

Te wewete
Analysis

[47] At first blush, an application by an owner to live on ancestral land aligns with the principles of the Act, and thus should be supported by the Court. However, the granting of an occupation order is a balancing exercise.

[48] Although, not an alienation in absolute terms, there is most definitely an exclusivity element in granting an occupation order, making the context vital in assessing the merits of the application. Many of the critical assessments required to be made under s 329 of the Act are not mathematical or formulaic ones, but rather assessments based on judgment, degree and balancing. This, as I have determined, includes tikanga principles.

[49] Many of these assessments naturally overlap, so in some instances, there is no need to repeat evidence or matters already analysed.

Opinions of the owners as a whole – Section 329(1)(a)

[50] I summarise below the main opinions expressed by the owners. These are set out in no particular order and reflect the language used by the owners:

Those in Support

(a) The whenua is lonely;

(b) The land is more likely to be sold, if we do not get the ball rolling now and occupy it;

(c) Returning to the whenua is directly linked to the ability to maintain all of the aspirations we spoke about [at the Waitangi Tribunal hearing];

(d) How long it has taken the older generation to get anything done [on the block]; and

(e) There is need to warm the whenua back up because it is calling the owners back.

Those that Oppose

(a) The need for a trust to be established before making decisions for one owner;

(b) A Marae should be built first for everyone to use [before looking at housing options];

(c) Would like to see things sorted with the block, including the lease, before anything like building houses commences;

(d) The need to understand more about what this [occupation order] involves before agreeing to it;

(e) The owners need about 12 months to address the matters noted above, before Mr Adlam's application should be considered and granted.

(f) The site selected means we will be restricted from accessing the back of the block.

[51] The consistent complaint raised by the opposing owners was the call for a delay in granting this application to allow time for further discussion about the development of a plan for the block. For example, kaumātua and owner, Ted Devonshire, was of the strong view that the current lease needed sorting and a trust was required before he would support the application.

[52] I find that the opposition is not absolute, but rather, conditional opposition. Conditional on a plan being agreed first, which would take time, (some owners suggesting 12-18 months). The conditional nature of the opposition was reiterated at the second hearing by these same owners.

[53] However, during the course of the second hearing some owners changed their position from one of conditional opposition, to one of conditional support.

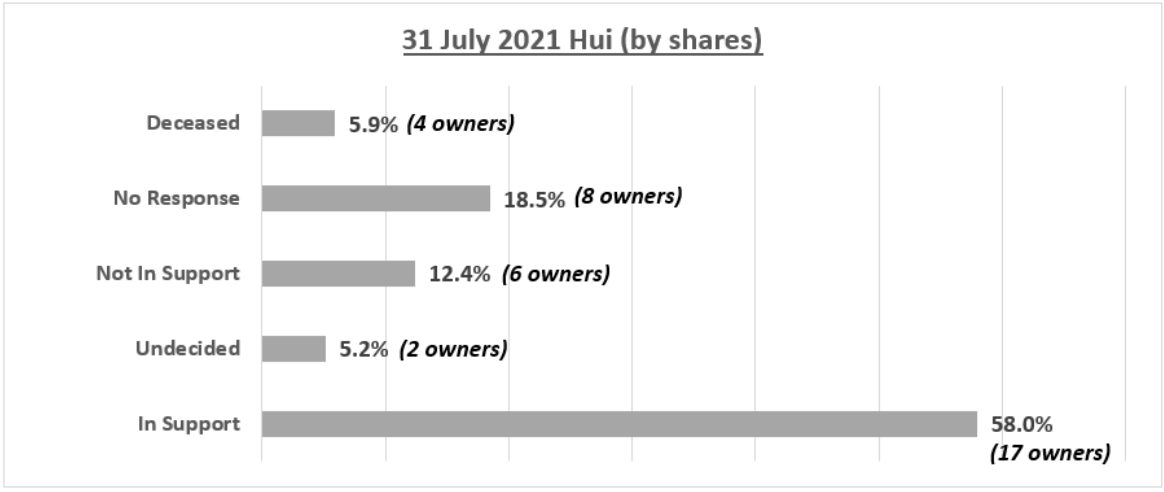
[54] Given this late change in positions, by the end of the second hearing there were three distinct camps as it related to the opinion of the owners:

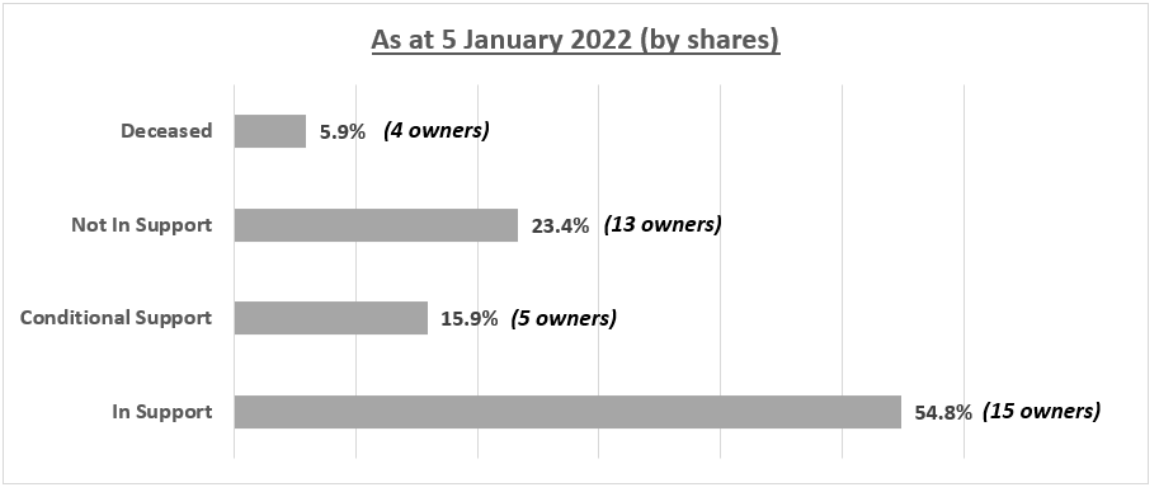
(a) Owners that unconditionally supported the application;

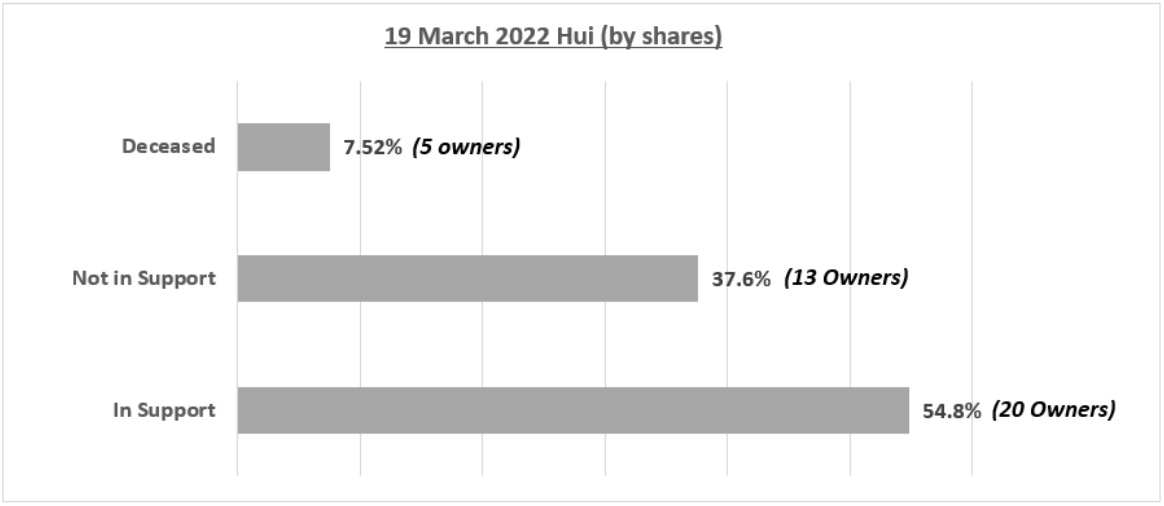
(b) Owners that now support the application, but on the condition that they have input into the specific terms of any occupation order; and

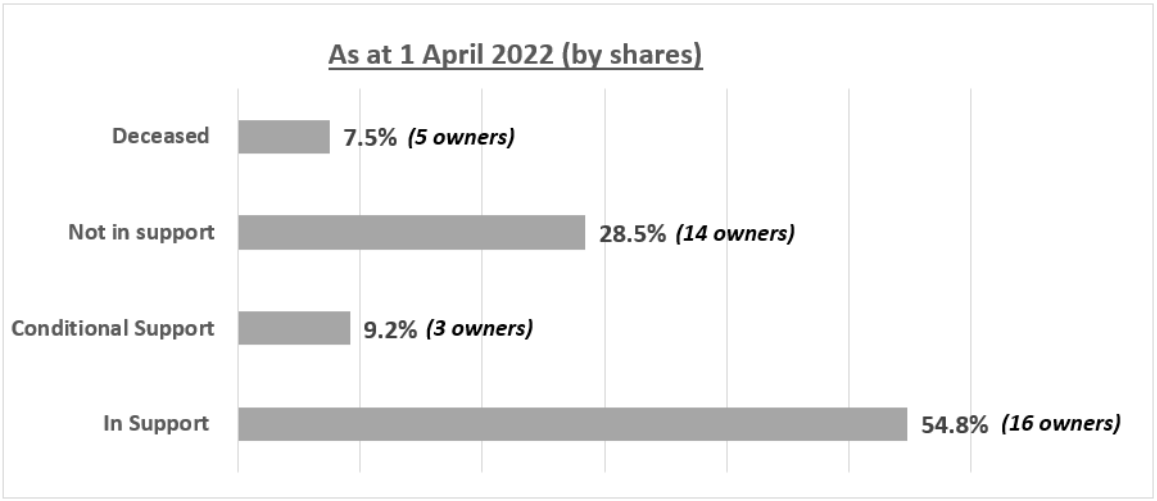
(c) Owners that remain in conditional opposition, with key individuals wanting a trust established before granting any rights to build on the block.

[55] The following graphs show the changing positions of the owners during the course of the proceedings, based on key hui and the two hearings:









[56] The request to delay determining the application is a reasonable one in the circumstances and is a natural response, given that the block has effectively been "idle" for many years, with only informal lease arrangements in place. However, there is an alternative narrative that also has merit. That is, these same owners have had every opportunity, over many years, to pull the owners together for the purposes of developing the type of plans now called for. I am mindful that, despite attempts in the past, such as those by Ted Devonshire to set up a trust, they have borne no fruit.

[57] During the first hearing, I tested the proposition of whether the owners could hit "two birds with one stone". That is, granting the application now with the owners continuing to progress their wider plan for the block. This approach was in my view in line with promoting practical solutions per s 17(f) of the Act. At that time, some opposing owners agreed that this could be possible, albeit it was not their preference. Those owners who now give their

conditional support, agree with the "hitting two birds with one stone" approach and acknowledge that this is achievable.

[58] I am also of the view that this can be achieved. The owners have now been considering their future plans for the block, in the context of this application, since July 2021, if not earlier. I am now satisfied, following the March hui, that all owners are aware of what is required in order to develop a wider plan for the block, including how to establish a trust. The owners now have the benefit of the land use report and there is almost complete owner engagement, including whānau of deceased owners.

[59] This application has prompted the owners into action and that was acknowledged by the owners during the second hearing, with one whānau member describing the application as an "accelerant".[32] Mr Adlam should therefore not be penalised for his proactive attempt to live on the block, when it has engineered a desire by many owners to action their vision for the block. A vision that includes owners living on the block.

[60] I also give weight to the opinions offered by Manu Kawana because he placed his whānau's support for the application into an appropriate tikanga construct. A construct that spoke about Mr Adlam warming up the block and the whenua calling the owners home. In my view, the owners, Ngāti Te Au and the block itself will be better for having someone of Mr Adlam's talent and passion living on ancestral land.

[61] Having regard to the opinion of the owners I am satisfied that the application has merit.

Effect of the proposal on the interests of the owners of the block – Section 329(1)(b)

[62] No owner raised fundamental concerns that their individual or collective interests would be compromised in any material way by granting the application. It was all about timing and getting things in order with regards to the block, as opposed to specific issues that the occupation order would have a material effect on the use and development of the block, including their ability to realise economic returns from the current lease.

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[32] 446 Aotea MB 265-312 (446 AOT 265-312) at 302.

[63] Out of an abundance of caution, I directed that the land use report be commissioned to provide the owners and the Court with an objective assessment as to current and future land use options and the impact, if any, on the owners by granting this application. The land use report was discussed by the owners at the March hui and during the second hearing.

[64] The land use report highlighted some significant zoning issues, which, on its face, would restrict multiple owners from building on the block. There were also issues about whether Waka Kotahi would approve of vehicular access off SH1 for any future housing. In reality, these are issues that all owners will face, including Mr Adlam, if they want to build houses on the block.

[65] I find that by granting this application, it will not have a major effect on the highest and best use option, at least in the opinion of the author of the land use report, being "rural lifestyle" as this option would not fit with current zoning rules. Therefore, the best use option (in economic terms) is an unlikely option at this time, and having one extra house on the block is unlikely to have an impact on that option, if realised in the future via a zoning change or a papakainga scheme.

[66] If "rural lifestyle" is immediately unachievable, it brings into the mix the second-best use option, which in effect is the status quo option of using the block as a diary run off and/or a stock fattening unit. I cannot see how having one further dwelling on the block will interfere with the current lease arrangements and the income to be enjoyed by the owners from that lease. In fact, the evidence suggests that the neighbouring farmer would continue to lease the block "ad infintum" if possible.[33]

[67] It was acknowledged that the lease is likely to be adjusted to cater for the occupation site and any new access, and in normal circumstances, this will have a financial impact on the owners. Generally, the owners acknowledged that the impact would not be significant and because of the importance of the block to the neighbouring farmer, there may be leverage to negotiate a position where there is no change to the rent paid. I will address the issue of Mr Adlam paying a ground rental when I address the terms of the order to be made.

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[33] Above n 16, at 4.

[68] I find that the location of the site would not interfere with access to the back of the block. Based on my site visit and explanations by those that know the block well, it seems that there will be adequate access to the back of the block.

[69] The desire by some owners to build a Marae complex on the block will not be impacted by granting this application. In fact, the Marae option may well increase the housing opportunities, if the owners decide to set aside a part of the block as a reservation for a Marae and/or a papakainga under the Act. Many of the owners and wider whānau members supported the papakainga idea at the March hui and the second hearing.[34]

[70] On its face, the location and length of the proposed access way could provide some impediments to the current and future use of the block, given it that it traverses an area close to the middle of the front part of the block. Based on the fact that the current leasing is the most likely medium-term option for the block, it is hard to see how this access way would have a major impact on the owners. This is on the basis that;

(a) Mr Adlam indicated that he would not fence the access way allowing stock to roam free; and

(b) Mr Adlam will construct the accessway at his cost and allow use by all owners. That is, the owners in fact get a direct benefit.

[71] That all said, I am not convinced yet by the access proposal and will outline my views when I set the terms of the order below.

[72] Overall, having regard to the impact on the owner's interests, by granting this application, I find that the application has merit.

The best overall use and development of the land – Section 329(1)(c)

[73] Having already traversed the findings of the land use report above, I only need to make the following further general remarks.

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[34] 446 Aotea MB 265-312 (446 AOT 265-312).

[74] The owners took no major issue with the findings in the land use report and I therefore find that it does set out the best use and development options for the block, certainly from an economic perspective. The granting of this application will have no material effect on the various use options, as set out in the land use report.

[75] The land use report, of course, did not provide a cultural or tikanga assessment. This type of assessment is important as Mr Adlam, Mr Kawana and others pitched their responses to many of my questions about the use of the block in tikanga terms. In fact, Mr Adlam had this say about the land use report:[35]

> The key take away for me in terms of economic wellbeing, it seemed farming continues to be the best option but I feel that the report doesn't cover the best use to improve our environmental, our social and cultural wellbeing. I feel that our whare, building houses would be the way to address that best use part of our wellbeing. That's just my opinion. Others might have a different view.

[76] I agree, but I must consider both the economic and the customary/tikanga aspects of land use, in order to assess the best options to meet the interests of all owners, if both have been raised by the owners, which is the case here.

[77] On this issue, Manu Kawana offered the following perspective:[36]

> Tēnā kia ora anō. Ko tā te tikanga e ai ki a Ngāti Te Au koira te tohu o te tino rangatiratanga. So, putting it from a Māori perspective, it wouldn't be right to put the economic development of the land ahead of tikanga Māori. Māori kaupapa, Māori take should always come first. Where economic development can fit in, then it needs to be put in around tikanga Māori and not vice versa.

[78] I think what Mr Kawana is saying is that there is a balance to strike, between the two, but ensuring that tikanga and kaupapa Māori is never compromised. Mr Kawana did agree that both approaches could be catered for:[37]

> So, the two of them go side by side, as has already been mentioned, that becomes the unity part that we can do both of these together side by side. It will only strengthen our whānau the more we become involved in our land whether it's from the economic perspective or whether it's from upholding tikanga perspective and how we develop our whānau in regards to our hapū as Ngāti Te Au and playing our role alongside our other relatives who live nearby. That's a key part to play in regards to attaining that unity within the whānau, within the land owners.

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35 446 Aotea MB 265-312 (446 AOT 265-312), at 279.
36 446 Aotea MB 265-312 (446 AOT 265-312), at 274
37 446 Aotea MB 265-312 (446 AOT 265-312), at 286.

[79] I agree that tikanga should never be unduly compromised, but there seems no reason why both economic and tikanga aspirations cannot co-exist when assessing the best way to use and develop Māori land and, as Mr Kawana noted, if it will attain unity. That balanced approach would seem to protect rangatiratanga and maintain whanaungatanga.

[80] The occupation order itself exemplifies this balance, because it will give one owner the right to build a home to live in, on land that does not need to be purchased, at the same time fulfilling the tikanga of ahi kaa and all that flows from that obligation.

[81] Having regard to the best use and development options for the block, both from an economic and tikanga perspective, I find that the application has merit.

Sufficient notice and opportunity to discuss and consider the application – Section 329(2)(a)

[82] I must be satisfied that the owners had sufficient notice of the application and had a sufficient opportunity to discuss and consider it. This requires two separate, but related sufficiency assessments.

[83] Through a combination of emails, hui, and a newspaper advertisement, as set out above in the *Horopaki* section, I find that most of the owners were aware of the proposal that formed the basis of the application. I am therefore satisfied that the owners had sufficient notice of the application. There is not a lot more Mr Adlam could have done to inform the owners of his proposal, in fact he did a very commendable job in this respect.

[84] I note that not all owners attended the July hui, or had been notified about the proposal at that time. However, through the course of these proceedings, all owners have responded to the proposal and therefore there are no issues regarding notice, given the fact that there was the further March hui and the second hearing.

[85] On the question of whether the owners had sufficient opportunity to discuss and consider the application, I find that a number of the owners were aware of Mr Adlam's intention from as early as April 2021, some six months before the application was filed with the Court. I also find that the July hui gave sufficient opportunity for the 16 owners present to have their say. Between April 2021 until December 2021, a number of the owners had more than enough time and opportunity to consider what was being proposed before I heard

the application for the first time. Most owners had the opportunity to contact Mr Adlam to discuss any concerns.

[86] The only reservation I had, was whether Mr Adlam should have convened a follow up hui with the owners before lodging his formal application. However, my concern is now remedied by the additional March hui.

[87] I therefore find that the owners have had a sufficient opportunity to discuss and consider the proposal that formed the basis of the application. In the absence of the second hui, I may have come to a different view.

The order may pass by succession – Section 329(2)(aa)

[88] I am satisfied that the owners understand that the occupation order may pass by succession and may be for a specified term or until the occurrence of a defined event. Mr Adlam advised the owners present at the July hui that he wanted a lifetime occupation order that could pass by succession. This fact was recorded in the minutes of the July hui and clearly set out in the application that was subsequently filed. It was also discussed in open Court.

[89] I specifically address the term of the occupation order below.

Sufficient owner support – Section 329(2)(b)

[90] The third sufficiency assessment requires me to be satisfied that Mr Adlam has sufficient support from the owners, having regard to the nature and importance of the application.

[91] Based on the evidence before me, the nature of the application includes matters of tikanga, such as the desire to exercise ahi kaa, coupled with the fact that an owner wishes to build a home for his whānau on ancestral land. The importance of the application goes to the heart of what the block is to be used for and the fact that this is the first major decision for an alternative use of the block for some years.

[92] Not one owner opposed the desire of Mr Adlam to exercise ahi kaa or the desire of any owner to live on the block. My assessment is that the owners want to see the block

"warmed up", with some supporting the establishment of a Marae complex and a papakāinga.

[93] However, in this context, the likelihood of multiple owners being able to live on the block in the near future, unless a papakāinga is developed, is remote.[38] Given this, the level of support required should probably be at the higher level, as Mr Adlam may be the only other owner to be able to live on the block unless a papakāinga is developed. This higher support threshold is consistent with the principles set down by the High Court in the *Brown* decision.

[94] Given the late change in views by some of those initially in opposition, changes the support percentages. Whilst the numbers are important, they are not determinative on their own. They must be assessed in context, that is, assessing as well, the reasons for the opposition. I have already assessed that the remaining opposition is conditional and together with the fact that now 64 per cent in share terms being 19 out of 33 living owners support the application, I am satisfied, having regard to the nature and importance of the matter, that Mr Adlam has sufficient owner support for the application.

[95] I address the conditional nature of the support by some of the owners when I address below the terms of the order to be made.

[96] For completeness, I note that a number of non-owners, being uri of deceased owners and neighbourhood hapū/iwi leaders have offered views on this application, many in support. Although in a tikanga sense their views are important and have helped me assess other issues, I have not factored their support or otherwise into this specific sufficiency assessment.

Sufficient shares – Section 329(2)(c)

[97] Thirdly, Mr Adlam has sufficient shares in the block to justify the entire area sought in his application justifying the occupation order. He will not have sufficient shares to cover the access way, but I will address that when setting the terms of the order below.

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[38] Above n 16, at 19.

The principles and purposes of the Act

[98] I made the point that the assessments I am required to make about the merits of this application are not formulaic and whilst I have worked through the matters in s 329 of the Act in a systematic manner, I must now assess whether granting the application achieves the principles of the Act.

[99] Rangatiratanga as protected by Te Tiriti is achieved by the granting of this application, because the "two birds with one stone" approach will best maintain whanaungatanga. That is, the owners now have a roadmap to sort future use and governance arrangements, as well as fulfilling tikanga aspirations of ahi kaa.

[100] Mana is not compromised. In fact, the mana of the block is enhanced by the return of one its uri to his whenua and the complete owner engagement to work towards a long-term vision for the block.

[101] The block as a taonga to be handed down through the generations is not compromised. In fact, it is strengthened by the desire of an owner to live on his whenua and to have any future uri also enjoy the cultural and spiritual benefits of this same experience. Further, it does not materially affect the tuku iho process for any of the other owners. Even the opposing views of Ted Devonshire acknowledged the importance of the block as a taonga tuku iho:

> …We definitely view this land as taonga tuku iho. The old kāuta first and then into the wharenui. We definitely viewed this land taonga tuku iho. For me I do because I only had one childhood and it was there.

[102] In reality Mr Adlam is trying to replicate these same childhood experiences for his future uri. An experience that has not been experienced by most owners for many years, if at all.

[103] An occupation order is not an alienation of land under the Act, but in reality, other owners will have suspended use rights over a portion of the block for the duration of the occupation order. The granting of this application does not impinge upon the principle of retention of Māori land in Māori hands, in fact it furthers that principle, by having another owner live on the block.

[104] An occupation order is by its very nature an example of the facilitation of the use and development of land by owners, but of course, in this context it is use for only one of 33 living owners. When assessing the fairness as between co-owners, the Court must always be mindful of the "first up best dressed" reality or where majority shareholders dominate unreasonably minority shareholders or vice versa. I am of the view that fairness is achieved by granting the application, primarily because I find that no owner will be unreasonably prejudiced as a result.

[105] Finally, Part 15 of the Act is all about building houses on Māori land and invariably these houses are going to be for individual owners. This is what Parliament intended and because of the current climate of home affordability, for many, it makes sense that the Court, all things being equal, support the use of Māori land in this way.

[106] I find that the principles of the Act have been furthered by granting this application.

Kupu whakatau
Decision and Directions

[107] I grant Mr Adlam an occupation order per s 328(1) of the Act in respect of the block, vesting in him exclusive use and occupation of that part of the block described below. This is for the specific purposes of building a house.

[108] This order will not include the right to a second dwelling at this time. That is something that can be explored as part of the wider discussions about future use plans for the block.

[109] The making of this order is conditional on specific terms of the order being determined.

[110] To be clear, I have made my decision to grant the occupation order, this fact will not change, regardless of where matters land in terms of the shape of the final order.

[111] Once the final order is made and on completion of Mr Adlam's house, I invite Mr Adlam to make a separate application under s 18(1)(a) of the Act to determine ownership of the physical house so as to avoid any future uncertainty.

Location and size

[112] The site will be 2,023 square metres, excluding the access way.

[113] The site will be in the general vicinity as set out in the application filed by Mr Adlam. The final site area will be included and depicted in the final order. There may need to be a discussion about whether a survey is required, so as avoid any future issues, if the block is developed. This can be discussed by the owners as part of negotiating the terms of the final order.

Term of the occupation order

[114] I grant the occupation order for the term of 35 years from the date of the order, once finalised, with the option of extension for a further term of 35 years as set out in the **attached** template. This is intended to cover the lifetime of the applicant and allow for succession to the occupation order.

[115] I was mindful of the request by Ted Devonshire to limit the term of the order until matters had been resolved on the block. I am also aware of the Courts ability to limit the term if it is in the interests of the owners. Because I have found that this order will not have a major impact on use options for the block and because, many of the owners fundamentally do not oppose owners living on the block, including Mr Adlam, I do not believe limiting the term of the order is justified.

[116] I believe that Mr Adlam and the owners need certainty. This is provided for by granting the term above.

Access

[117] I am not convinced by the access proposal at this time. Therefore, I do not make any determination as to access to the site at this time, but direct that Mr Adlam undertakes further work in this respect as noted below.

[118] I encourage Mr Adlam to engage with Waka Kotahi immediately, because their views will be critical to any final access arrangements.

[119] There is also the issue of whether a formal access easement is required. This can also be discussed and considered by the owners.

Other occupation order terms

[120] My final order is conditional upon Mr Adlam and the owners engaging on other more specific terms of the occupation order. This reflects those owners who sought this outcome. The final order will be in line with the **attached** template.

[121] Any final terms of the occupation order are subject to approval and confirmation by the Court in accordance with the Act, taking into account any agreements reached by the owners.

[122] I am mindful of the concerns raised by Mr Adlam at the second hearing, about managing multiple owners to get a consensus within a reasonable timeframe. Those concerns are fair, and therefore I propose the following approach as a practical way forward:

(a) The opposing owners (including those that now support conditionally) are to nominate up to three individuals to meet with Mr Adlam about the terms and conditions of the draft order;

(b) All other owners can nominate up to two individuals to also participate if they so wish;

(c) These representatives will be obligated to seek the views of their fellow owners within their category of owners and to brief them on any agreements and issues arising;

(d) To help facilitate these discussions the Court offers the services of Caroline Green;

(e) The hui should be held online and convened within three weeks of the date of this judgment. This can be set and organised by Mr Pereka as the Pae Tukutuku;

(f) After this hui, the Court will circulate a summary of where matters landed, inviting all owners to make comment;

(g) After that, and subject to the nature of the issues yet to be resolved, I will make final orders as to the terms and conditions of the occupation order.

[123] The above approach is the Court's suggested approach, but it does not preclude the owners coming up with their own approach nor does it restrict any owner from being involved if they wish. However, in order to ensure progress and finalisation of all matters in a timely manner, I will schedule a Judicial Conference per s 67 of the Act in early May 2022.

[124] To avoid confusion, agreement of the terms of the order in the attached template does not include the need for the owners to discuss and agree on the location, size, and term of the occupation order as these are already determined. Of course, if the owners choose to engage on those maters and there are agreed variations, then I will take those into account in the final orders to be made. These are the matters the owners need to engage on and agree if possible:

(a) Access (location and whether there is a need for a formal easement or not);

(b) The level of the ground rental to be paid by Mr Adlam and who he is to pay it to;

(c) Whether a survey is required;

(d) The specific matters outlined in the draft order template, other than those matters already determined in this judgment; and

(e) Any additional terms the owners feel need to be included in the final order.

[125] On that basis, I adjourn the application per r 6.9 of the Māori Land Court Rules 2011 to allow the final terms of the occupation order to be determined.

Amendment to the Minutes

[126] I invite all owners to make contact with the Pae Tukutuku if they have any changes (such as typographic errors or spelling errors) to make to the two sets of Court Minutes that have been circulated to date. I am aware that there were some errors identified already and I agree that it is important to get the spelling of names and places recorded accurately.

[127] I direct that any obvious errors in those Minutes be identified and sent to the Pae Tukutuku by the end of April 2022. I will then review them and make all appropriate changes per s 86 of the Act.

Mauri ora

I whakapuaki i te 3:00pm i Kirikiriroa te 8 o ngā rā o Paengawhāwhā i te tau 2022.
Pronounced at 3:00pm in Hamilton on this 8th day of April 2022.

A H C Warren
JUDGE