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

A20210006987

WĀHANGA *Under*	Section 18(1)(a), Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Awanui Haparapara No 2B No 1B Sec 2
I WAENGA I A *Between*	RARUA INSLEY(deceased), CHRISTOPHER KARAMEA INSLEY, ANTHONY INSLEY, PETER INSLEY, TERE INSLEY, AND JACQUELINE INSLEY Ngā Kaitono *Applicants*
ME *And*	WHAREHAUA BUTLER, MICHAEL INSLEY, BRONWYN NGATAI, GAYLE NGATAI AND SHANNON PAYNE AS TRUSTEES OF THE AWANUI HAPARAPARA 2B1B2 AHU WHENUA TRUST Ngā Kaiurupare *Respondents*

Nohoanga: *Hearing*	23 November 2021, 265 Waiariki MB 1-27 (Heard at Rotorua)
Kanohi kitea: *Appearances*	J Kahukiwa for Applicants L Hemi for Respondents
Whakataunga: *Judgment date*	16 June 2022

TE WHAKATAUNGA Ā KAIWHAKAWĀ C T COXHEAD
Judgment of Judge C T Coxhead

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Hei tīmatanga kōrero
Introduction

[1] In 1945 a house was built on the Awanui Haparapara 2B1B2 block. Ownership of that house has been the subject of a number of Court decisions. Court orders have now settled ownership of the house.

[2] Exclusive use of the area around the house has also been the subject of Court decisions. The applicants seek a declaration of their right to exclusive possession of that part of the land underneath and around the house, comprising an area of 1,381 square metres ("the curtilage"). The claim being that the applicants have a right to exclusive possession of the curtilage arising from owners' consent given in 1945 and the area is held on trust, such as a constructive or resulting trust.

[3] The application is opposed by the trustees of Awanui Haparapara 2B1B2 Ahu Whenua Trust, who claim the grounds for a constructive trust are not made out. Instead, they say any right conferred on the Butlers is better described as a bare licence, which has now either expired or been extinguished.

[4] The issue for determination is whether the applicants are entitled to an order pursuant to s 18(1)(a) of Te Ture Whenua Māori Act 1993 ("the Act").

Kōrero whānui
Background

[5] Awanui Haparapara No 2B No 1B Sec 2 is Māori freehold land with an area of 3.283 hectares. It was created by partition order dated 18 May 1927.[1] There are currently 54 owners holding a total of 8.1125 shares.

[6] The Awanui Haparapara 2B1B2 Ahu Whenua Trust was created on 10 August 2017.[2] The current trustees are Bronwyn Ngatai, Gayle Ngatai, Michael Insley, Shannon Payne and Wharehaua Butler.[3]

Agreed facts

[7] The parties provided a statement of agreed facts with regard to the background to this application. These are summarised below.[4]

[8] In 1942, Te Ao Butler and Tom Butler ("the Butlers") came on to the land to farm it (and other additional land) under a licence to occupy from the other owners. They replaced Te Ao's father (Parekura Huritu) who it appears was on the land for seven years immediately prior.

[9] The Butlers were married and had one daughter, Rarua Alice Insley, an original applicant in this application (now deceased). Rarua in turn had children and some of those children are the other named applicants.

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1 26 Opotiki MB 160 (26 OPO 160).
2 *Insley v Insley – Awanui Haparapara 2B1B2* (2017) 167 Waiariki MB 183 (167 WAR 183).
3 167 Waiariki MB 183-193 (167 WAR 183-193); 169 Waiariki MB 63 (169 WAR 63).
4 Agreed statement of facts dated 22 November 2021.

[10] In 1945, the Butlers obtained the agreement of the other owners to build on the land. No objections were recorded.[5] Both Te Ao and Tom each held shares in the land as tenants in common with the other owners. To fund the build, a loan was obtained from the Board of Māori Affairs ("BMA"). As security, the BMA took a charge on the cream cheques earned by the farming of the land and the house loan was repaid in that way. The Butlers did not pay rent to the other owners.

[11] The Butlers erected the house on the land and lived in it with their whānau. There is no evidence to suggest that Te Ao and Tom contributed to the cost of their home other than jointly and equally. There is also no evidence that the Butlers defaulted on their loan with BMA.

[12] In 1954, a meeting of owners was held. As a result of that meeting, it appears the following was agreed, with no objections recorded:[6]

(a) The house (and the Butlers) would enjoy a curtilage area of 1 rood and 14.6 perches (equivalent to 1,381 square metres), which was shown on a plan presented to the meeting;[7]

(b) The Butlers would receive a formal lease of the land (exclusive of the curtilage) for a term of 21 years;

(c) The Butlers would take on the liability of the balance of the BMA loan (or the development debt owing); and

(d) On satisfaction of the development debt owing, the Butlers would own the house outright.

[13] However, the resulting 21-year lease did not exclude the curtilage area and instead pertained to the total area of the land plus adjoining lands.

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5 No minutes of this meeting appear to be available.
6 No minutes of this meeting appear to be available.
7 A copy of the plan has not been provided.

[14] There is no evidence to suggest that, by the beginning of 1971, the Butlers had not satisfied the balance of the development debt in relation to the financing of the house build.

[15] On 17 June 1971, the Court made an order vesting all of Tom Butler's interests in the land to his wife, Te Ao Butler by way of gift.[8]

[16] In 1975, the Butlers' formal leases expired and were not renewed.

[17] On 25 February 1976, Te Ao Butler applied to the Court for an order under s 30(1)(a) of the Māori Affairs Act 1953 for a determination that:[9]

> …the house and curtilages on the said land occupied and used for many years by us, belongs to us by right of possession and use and that before the house was built the owners at the time agreed to such right and possession.

[18] The application documentation held with the Court shows a memorandum with the subject recorded as "s 30(1)(a)/53 to determine ownership of house and curtilage".

[19] On 12 May 1976, the s 30 application was heard and determined ("the 1976 order"). Te Ao attended along with two of the other three owners. The Court minute records that the Butlers "…want to be sure that the house is kept for them and they won't be put out if it is leased". [10] No objections were filed and notices went to all owners. The minute further records:

> COURT then explains position to owners present and points out that in circumstances, they would have good grounds for opposing if they wished to. All keenly support. Court explains that if Te Ao Butler were to buy their shares, value of house would be excluded. They all still agree that she should own the house.
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> COURT: Order s.30(1)(a) determining that Te Ao Butler and Tom Butler are jointly the owners of the house on the property.

[20] On 15 August 1976, Te Ao died intestate. She was living in the house at the time. Te Ao's estate included her rights in the subject land. Succession to Te Ao was completed on 21 January 1983 and her interests vested in Rarua solely.[11]

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8 46 Opotiki MB 124 (46 OPO 124).
9 Application of Te Ao Butler dated 25 February 1976, Common Bundle of Documents dated 22 November 2021 at Document Number 3.
10 49 Opotiki MB 505-506 (49 OPO 505-506).
11 199 Rotorua MB 289 (199 ROT 289).

[21] Tom continued to live in the house until about 1979, including with one of Rarua's daughters, Jeanette. After that, some of Rarua's children lived in the house.

[22] In 1982, the owners, including Rarua, granted a lease of this land to Michael Insley and Geoffrey Insley. It is unclear whether the curtilage and the house were included in that lease.

[23] On 20 November 1984, Tom Butler died testate. His will left the residue of his estate to his grandchildren.

[24] In 1997, Rarua transferred some of her shares in this land to her son Michael. Later, she transferred other shares to her other children. All Rarua's surviving children now have shares in this land.

[25] In 2007, Michael applied to the Court to determine the ownership of the house. Rarua also applied by way of counter claim. Judge Clark heard the applications and dismissed both by way of decision dated 17 June 2009.[12] In that decision, Judge Clark referred to the 1976 order and found that "[a]s the order was made jointly, by survivorship the house became the sole property of Tom Butler on the death of Te Ao Butler on 15 August 1976".[13]

[26] In 2016, Christopher Karamea Insley applied to the Court for determination of the ownership of the house, relying on the will of Tom Butler. The Court heard the application on 8 March 2016 and issued an oral decision vesting ownership of the house in the grandchildren of Tom Butler in accordance with his will.[14]

[27] In 2017, an application was made to constitute an ahu whenua trust over the land and, by decision dated 10 August 2017, the Awanui Haparapara 2B1B2 Ahu Whenua Trust was constituted.[15] The decision also directed the trustees to meet with the Insley siblings to "resolve access issues" and to "seek to formalise the occupation arrangements regarding the site the dwelling is situated on".[16]

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12 *Insley v Insley – Awanui Haparapara 2B1B2* (2009) 108 Opotiki MB 255 (108 OPO 255).
13 At [39].
14 137 Waiariki MB 40-44 (137 WAR 40-44).
15 *Insley v Insley – Awanui Haparapara No 2B1B2* (2017) 167 Waiariki MB 183 (167 WAR 183).
16 At [44].

[28] On 4 May 2017, Rarua applied to the Court for an occupation order under s 328 of the Act. Eventually, the trustees did not give their consent to her request and the application was dismissed by decision dated 5 December 2018 on that basis.[17]

[29] For various reasons, the house has not been occupied since 2007.

Ko te hātepe ture o te tono nei
Procedural history

[30] The application was filed on 23 April 2021 by Rarua Insley together with some of her children. Sadly, Rarua Insley has since passed away.[18]

[31] Directions were issued on 21 June 2021 and a joint memorandum of counsel then filed on 25 June 2021 regarding timetabling of the matter to a hearing. Due to the availability of counsel, the matter was subsequently set down for hearing in November 2021.

[32] A formal notice of intention to appear in opposition to the application was filed by the trustees of the Awanui Haparapara 2B1B2 Ahu Whenua Trust on 19 November 2021. Submissions were then filed by counsel for the applicants on 22 November 2021 together with an agreed statement of facts and common bundle of documents.

[33] The hearing was held on 23 November 2021.[19] At that hearing, counsel for the applicants advised of the withdrawal of Bronwyn Insley and Carolyn Insley as applicants. At the conclusion of the hearing, I granted leave for the parties to file further submissions, after which time a decision would issue.

[34] Submissions for the respondents were filed on 5 December 2021, followed by a memorandum on 17 December 2021. Final submissions of the applicants in reply were then filed on 20 December 2021.

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17 *Insley v Insley – Awanui Haparapara No 2B No 1B Sec 2* (2018) 202 Waiariki MB 187 (202 WAR 187).
18 Rarua Insley left a will dated 4 December 2017. The will appoints her son Peter Insley as sole executor and trustee but does not deal with her interest in Awanui Haparapara 2B1B2.
19 265 Waiariki MB 1-27 (265 WAR 1-27).

Ngā kōrero a ngā kaitono
Submissions of the applicants

[35] Mr Kahukiwa appeared for the applicants. He submitted that the applicants are entitled to an order under s 18(1)(a) of the Act recognising they hold an equitable title in relation to the curtilage of the house.

[36] Mr Kahukiwa submitted that when the owners agreed in 1945 to the Butlers going on to the land and building "their marital home" this implied that the house and the Butlers' occupation would be for their exclusive use and enjoyment. He says there was "undoubtedly a common intention in this regard" and, at that point, a trust arose in favour of the Butlers in relation to the curtilage, either constructive or resulting.

[37] Counsel contended that an area of curtilage land is a natural and incidental right that is acquired by an owner who builds with approval on multiply owned ancestral land. He referred to the decision of this Court in *Sadlier – Proprietors of Anaura* as authority for that proposition, noting the decision states that such a co-owner "acquires in practice exclusive possession of that part of the land on which the house stands".[20] Counsel submitted that such acquisition follows common sense, as an owner who builds needs land underneath the house for it to be erected on and land around the house to enjoy it. The house also needs to be accessible to and from the public road. Mr Kahukiwa submitted that these rights were reasonably implied when the consent of the other owners was given and in turn became corresponding obligations on the owners to protect those rights via an equitable trust. Because the rights exist in equity, they do not need to be formalised to be enforceable.

[38] Mr Kahukiwa made lengthy submissions regarding the effect of the subsequent events and Court orders (referred to in the agreed statement of facts). He submitted that none of those events or orders extinguished the trust over the curtilage.

[39] Mr Kahukiwa submitted that, in reliance on the owners' approval, the Butlers arranged for the house to be built on the agreed site and "within the agreed curtilage", and he says there is no question the house was intended to be anything other than permanent. Relying on the decision *Elitestone v Morris*, the house became part and parcel of the land

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[20] *Sadlier – Proprietors of Anaura* (1987) 25 Ruatoria MB 61 (25 RUA 61) at 62.

and was initially owned by all the owners, including the Butlers.[21] The Butlers obtained finance from BMA to fund the build, which they committed to repaying through revenue earned from their dairy farming. Accordingly, their repayments of the BMA loan made them holders of an equitable charge against the value of the house, the quantum of which likely increased as each repayment was made and the outstanding amount of the BMA loan reduced.

[40] It was submitted that the subsequent agreement flowing from the owners meeting in 1954 had the effect of affirming the equitable trust formed in 1945, whereby the curtilage remained exclusive to the Butlers. It also provided that the other owners relinquished any ownership of the house in favour of the Butlers, subject only to the condition that the Butlers repay the BMA loan (or development loan). The house was added to the property of the equitable trust and once the loan debt was repaid the house belonged to the Butlers unencumbered. When Tom Butler gifted his shares in the land to Te Ao in 1971, Tom relinquished his rights in the land, including the curtilage, which vested in Te Ao, and Tom became an equitable charge holder against the land for half the value of the house.

[41] With regard to the application by Te Ao in 1976 for determination of ownership of the house and curtilage, Mr Kahukiwa submitted that the effect of the resulting order is a matter of interpretation. The 1976 order stated "Te Ao Butler and Tom Butler are jointly the owners of the house on the property". Mr Kahukiwa contended that the words "Te Ao Butler and Tom Butler are jointly owners of the house" can only mean that Te Ao was the beneficial owner of the house and that Tom owned an equitable charge in relation to a half value. In that sense, they were both "owners" but of certain kinds of interests. He further submitted that the words "the house on the property" must have been intended to describe the house *and* curtilage. He noted several reasons for his view, including that this was what the application specifically sought and was how the Court registry treated the application; that the curtilage area was referred to in the narrative contained in the Court minutes; that the Court did not explicitly exclude the curtilage land; and that the Court made the order that was sought. Accordingly, he submitted the 1976 order merely declared the existence of the arrangements made as a matter of equity and affirmed the trust.

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[21] *Elitestone v Morris* [1997] 2 All ER 513.

[42] When Te Ao passed away in 1976, Mr Kahukiwa says the sole ownership in equity of the curtilage vested in Rarua, together with ownership of the house, subject to Tom's equitable charge. He says there is no record that Rarua discharged the equitable trust or that it was effected by the lease to Michael and Geoffrey Insley in 1982. When Tom passed away in 1984, his equitable charge for half the value of the house vested in his grandchildren in accordance with his will.

[43] As to the decision of Judge Clark in 2009, counsel submitted that it had no real effect on the ownership of the house, given it dismissed both applications. He argued that Judge Clark's determination the house was held by the Butlers under a joint tenancy was not consistent with the facts. He says the Butlers held their shares in the land as tenants in common and this flowed through to ownership of the house. When Tom transferred his shares in the land, he could no longer hold an ownership share in the house and his position transformed into that of an equitable charge holder. Further, Judge Clark's determination that the effect of the 1976 order was to sever the house from the land to be treated as a chattel, was not reconcilable with subsequent case law, such as *Stock v Morris*, where the Court found a s 18(1)(a) order can be simply recognised as determining the separate equitable ownership of a fixture from the legal ownership of the land.[22]

[44] Regarding the constitution of the ahu whenua trust over the land in 2017, Mr Kahukiwa also argued that this had no effect, as the property of the equitable trust belonged to Rarua and not the other owners, and the equitable trust continued unchanged. He claimed that position was reinforced by the Court's decision, which directed the trustees to meet with the Insleys to resolve access issues and formalise occupation arrangements.

[45] Overall, Mr Kahukiwa submitted that, due to these events, the applicants and those named in the schedule to the application are entitled to call the house and its curtilage their own. They are therefore entitled to an order under s 18(1)(a) of the Act that recognises they hold an equitable title to the curtilage.

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22 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [36] – [58].

Ngā kōrero a ngā kaiurupare
Submissions of the respondents

[46] Mr Hemi appeared for the respondents, being the trustees of the Awanui Haparapara 2B1B2 Ahu Whenua Trust. The trustees opposed the application and sought its dismissal.

[47] One of the initial grounds of opposition by the trustees was the issue of granting an interest in land to non-owners, given that, at the time the application was filed, four owners of the house were not owners in the land. With the passing of Rarua Insley and the recent provision of her will, that issue has been resolved. The will does not deal with her interests in this land and therefore creates an intestacy whereby Rarua's shares will be divided equally between her surviving children, with substitution of any grandchildren for the deceased children.

[48] Mr Hemi submitted that, with regard to the ownership of a building on Māori freehold land, the Court has intervened and imposed a constructive trust on multiple occasions to create or protect property interests, endorsing the reasonable expectation approach set out in *Lankow v Rose*.[23] Counsel referred to the recent decision of the Māori Appellate Court in *Nicholas v Te Amo – Te Whaiti-Nui-a-Toi*, which considered the issue of a constructive trust and its application to both an improvement on the land (such as a house) and the land itself.[24] The Māori Appellate Court found that the reasonable expectation test must be applied with respect to both the improvement and the land if the claim is to succeed. The claimant must satisfy the Court that he or she has a reasonable expectation to own or possess the improvement and that he or she also has a reasonable expectation to own or possess at least that portion of the land on which the fixture is located. Mr Hemi submitted that not all the criteria to establish a constructive trust are satisfied in the present case, as the applicants have failed to establish the first two elements, being: contributions, direct or indirect, to the property in question; and the expectation of an interest therein.

[49] Counsel submitted that there is no evidence of any contributions by the Butlers, direct or indirect, to the subject land or curtilage. While it was accepted the Court minutes of the 1976 hearing recorded that a plan had been prepared at the earlier meeting in 1945 showing

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23 *Lankow v Rose* [1995] 1 NZLR 277. See *Tipene v Tipene – Motatau 2 Section 49A 4F* (2014) 85 Taitokerau MB 2 (85 TTK 2).

24 *Nicholas v Te Amo – Te Whaiti-Nui-A-Toi* [2021] Māori Appellate Court MB 273 (2021 APPEAL 273).

an area of 1r.14.6p (or 1,381 m^2) to be excluded from the lease, this was never given legal effect. Instead, the lease signed in 1954 was for the total block plus adjoining lands. The applicants are unable to show the area of the curtilage agreed to by pointing to any area in which a direct or indirect contribution has been made. In fact, the applicants themselves admit that the area identified on their Exhibit "A" merely shows an area *equivalent* to the original area of 1,381 m^2.

[50] Mr Hemi submitted that the requirement for proof of contributions made to the property in order for a constructive trust to be declared, relates back to the key rationale behind why the law recognises constructive trusts. That being, to avoid the unconscionability of the legal owner retaining property others have made contributions to, in essence an unjust enrichment. Due to the lack of any contribution to the subject land and curtilage in the present case, there can be no claim of constructive trust, there being a total absence of unconscionable conduct on behalf of the legal owners.

[51] As to the expectation of an interest in the property, Mr Hemi noted that at various times the Butlers held a legal interest in the land. When they first came on to the land, their right of possession was via a licence to occupy. From 1954, their right of possession was via a formal lease of the block for 21 years. Importantly, the area of 1,381 m^2 was not excluded from the lease, despite the opportunity for this to occur. Accordingly, the Butlers' legal interest in the entire block (including the subject land once the house was erected) was always via a legally enforceable agreement. In such circumstances, there could be no reasonable expectation of an interest in the property beyond those provided to them, initially pursuant to the licence to occupy and then the formal lease in force from 1954 to 1975.

[52] Counsel also noted there was an opportunity on two occasions to formalise and confirm the Butlers' legal interest in the land and curtilage. The first was in 1954 when there was the option to exclude the curtilage from the lease, which would have shown an intention that the area was not occupied and possessed via the legal rights conveyed by the lease. That was never given legal effect and from that time Te Ao and Tom's expectations of an interest in the land could only have been via the formal lease. The second occasion was in 1976 when Te Ao applied for a determination pursuant to s 30(1)(a) of the Māori Affairs Act 1953 that the house and curtilage on the land belonged to her and Tom. The order made by the Court reads "[o]rder s.30(1)(a) determining that Te Ao Butler and Tom Butler are jointly the

owners of the house on the property." The order made by the Court specifically excludes the curtilage. From that time, Te Ao and Tom's expectation of an interest in the land could not be sustained, the Court having effectively determined that their interest was limited to ownership of the house.

[53] Mr Hemi submitted that a further obstacle to the applicants' claim that the 1976 order by inference must have included the land and curtilage, is that the specific issue has already been determined by Judge Clark in his 2009 decision.[25] In that decision, the Court specifically addressed the 1976 order and stated:[26]

> …the Court when making the order was careful to indicate that Te Ao Butler and Tom Butler were the joint owners of the house "on the property". No mention is made of any interests in the land itself.

[54] Counsel argued that the present application is attempting to overturn a determination of the Court. The usual process for this is an appeal, rehearing, or application pursuant to s 45 of the Act. Instead, the applicants are attempting to set aside the determination on the basis that "it appears that not all relevant material …was before His Honour". While that may be correct, that is not sufficient reason in law for the Court to now effectively overturn a previous decision of this Court.

[55] Mr Hemi says the determination by the Court that the 1976 order did not include any interest in the land had a direct impact on the outcome of the case. Had the Court determined that the 1976 order did include an interest in the land, then Rarua would, by virtue of s 146 of the Māori Affairs Act 1953 and her succession to the interests of Te Ao, have been determined to be the legal owner of the house. It was accepted that Judge Clark would have also had to correct his error made in relation to the repealing of s 146, but an appeal could have been filed. No appeal was filed and the Court cannot now redetermine the issue.

[56] Counsel submitted that, tied to the failure of the applicants to exercise their rights of appeal, is also the issue of the delay in exercising their equitable rights by now claiming an equitable interest in the land and curtilage. Equity aids the vigilant, not those who slumber on their rights. Mr Hemi argued the applicants had at least from 2016, when Christopher Karamea Insley made the application for declaration as to the ownership of the house, to

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25 *Insley v Insley – Awanui Haparapara 2B1B2* (2009) 108 Opotiki MB 255 (108 OPO 255).
26 At [38].

also advance an equitable claim to the land and curtilage. Subsequent to that, the land was vested in the Awanui Haparapara No 2B1B2 Ahu Whenua Trust and the present application is now prejudicing an application for an occupation order by another beneficial owner, as part of that application relates to the now-claimed curtilage.

[57] Mr Hemi submitted that from 1976, the Butlers' rights of ownership were limited to the house and their legal right to occupy the land had expired at the end of the lease. Their rights of occupation and possession were then in the nature of a bare licence. Counsel referred to the decision of this Court in *Paraire v Paraire – Part Mangatawa 10* and noted the Court has often determined the existence of a bare licence in situations where owners have built on Māori land with permission but without any concurrent written licence to occupy, occupation order, or successful equitable claim to rights of possession.[27] Counsel submitted that the Butlers' continued occupation of the land was at the will of the owners and during their lifetime the bare licence was never revoked. It could be argued that on the death of Tom Butler the bare licence expired, given that licences are generally personal to the holder, however, there are also a number of subsequent acts by the owners that are inconsistent with the continued existence of the bare licence. Those are as follows:

(a) The land was leased by the owners to Michael and Geoffrey Insley. While there is no copy of the lease, Michael occupied the house from the date of the lease until its expiry in 2007. That fact is consistent with the house being included in the lease, given there is also no other evidence of the right to occupy the house, such as a tenancy agreement or other right.

(b) The application in 2016 by Christopher Karamea Insley for a determination of the ownership of the house. The application only referred to the house and not the subject land and curtilage.

(c) The vesting of the block into the ahu whenua trust in 2017. The Court directed the trustees meet with the Insley siblings to formalise the occupation arrangements. The occupation arrangements were formalised into an application by Rarua for an occupation order. The Trust did not consent to

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

the application and it was dismissed by the Court. This acted in essence as a revoking of the bare licence.

[58] Counsel says the actual facts in relation to the use and occupation of the house also bear out the extinguishment of any bare licence as the house has remained unoccupied since expiry of the lease to Michael and Geoffrey in 2007 and needs significant repairs in order to be habitable.

[59] Mr Hemi further submitted that the law does provide for situations where a house or structure has been erected on Māori land and there is no accompanying legal interest in the subject land or curtilage. That is through the provisions of the Act relating to occupation orders and partitions. That opportunity has been taken up by the applicants but the trustees have declined to approve it. The decision has been reviewed by the Court. Counsels says it is important that this process remains the primary vehicle for determining rights of occupation as the best interests of both the block and its owners can be managed and advanced.

[60] In summary, the trustees say there can be no determination of a constructive trust due to there being no proof of any direct or indirect contributions to the subject land and curtilage. There could also not have been any expectation of an interest in the land beyond the rights provided to the Butlers under the original licence to occupy and the subsequent lease. The 1976 order determined the Butlers' interest was limited to the house only and their rights of occupation and possession were then in the nature of a bare licence, which has now been extinguished.

[61] Counsel sought the dismissal of the application. In the alternative, counsel submitted that if the Court was to determine the existence of a constructive trust or any other equitable remedy, then the Court must ensure equity is done between the owners. He advised that the house is in need of significant repairs and there are also a number of owners of the house, including deceased estates, and other complexities requiring co-ordination between the owners. There is a likelihood that if the Court granted an equitable interest in the block it would not be utilised, rendering it essentially locked up. Counsel submitted that some finite term, such as a period of up to three years, should be added to any equitable interest in a similar vein to that often added to occupation orders. There should also be some ability for

the Trust and the applicant to better determine the area to be allocated as the curtilage, to minimise impact on other owners.

Ngā kōrero urupare a ngā kaitono
Submissions of the applicants in reply

[62] The applicants made submissions with regard to two matters in reply. Firstly, that any constructive trust fails because there is no evidence of contribution to the land nor an expectation of an interest in the land. Secondly, that after 1976, when the Butlers' lease of the land had expired, their occupancy of the house defaulted to a bare licence, which was subsequently extinguished by one or more acts of the owners.

[63] On the first matter, Mr Kahukiwa submitted that, although a constructive trust was initially contended for, the applicants do not now limit their case in such a way and simply contend for a "trust". The kind of trust being contended for is not as important as the primary contention that *a trust* is being contended for, and whether it is a constructive trust or resulting trust is not essential. Counsel reiterated that the evidence supports a trust established out of the owners' initial agreement of 1945.

[64] Counsel also submitted:

(a) The decision of the Māori Appellate Court in *Nicholas v Te Amo* cannot be said to be on all fours with the present case and there are key distinguishing factors which reduce the strength of its relevance. Those factors include that the structures did not have the inherent characteristic of being a residential home and possessive of any sense of permanence; that a s 438 trust was in place prior to the occupations at issue and the trustees held the right of possession when the occupations occurred; and the agreement the claimant occupiers sought to assert was found to be equivocal.

(b) Te Ao was either an owner in the land or an owner in waiting through her mother at all material times. When an equitable interest in the land is already present, "contribution" to justify an interest in the land must be unnecessary.

(c) The presence of an "expectation" must have naturally been part of the agreements reached in 1945. It is reasonably inferred from the nature of the structure erected, being a primary residence importing permanence. It is implausible to think the Butlers would have agreed to go to the effort of building a house for them if another owner could simply walk into the house or on to the curtilage and share it with them. Further, the expectation was that the Butlers would *prima facie* shoulder the burden of the debt and it was their effort in generating the cream cheques that was being committed to the repayment plan. Other relevant factors include the specification of the curtilage area and the relinquishment of ownership by the other owners, and the wording of Te Ao's application in 1976 for ownership of the house and curtilage.

(d) It was not accepted that Judge Clark's decision in 2009 determined that the effect of the 1976 order was that the Butlers had no interest in the curtilage land. Such a reading places too much weight on the statement by Judge Clark that "[n]o mention is made of any interests in the land itself", which was a mere statement, more observational in nature and extent, which on a plain reading lacks a proper analysis of the legal position. It was also made in the context of misstatements of the law, rendering the decision unsafe.

[65] On the second matter, counsel submitted that the respondents have misconceived the effect of the 1954 lease. He says it is wrong to assert the Butlers' right to the house and curtilage merely derived from the 1954 lease, as it derives from the agreements made by the owners in 1945. In 1954, when the owners met and the lease was made, it was clear that the agreements and intentions would be preserved and not affected by the lease. Counsel submitted that, while it is true that the form of the lease did not appear to follow through with showing the house and curtilage area as being excluded, neither did it appear to expressly extinguish the pre-1954 agreements and cause a merger in the leasehold estate. He says the better conclusion to draw is that the lease was more about the farming activity and security for the Butlers' income than it was about the house and curtilage, and it is not inconsistent with the preservation of the earlier agreements.

[66] Mr Kahukiwa submitted that subsequent events corroborate this conclusion, including that the Butlers continued to live in the house and on the curtilage with no interruption, and that the 1976 application by Te Ao was explicit in seeking determination of the ownership of the house and curtilage. The owners all keenly supported the 1976 application and there is no hint in the reasoning of the Court that the order would in any way depart from that which was sought. Counsel argued that, logically, the order must be taken to have put into effect what was asked for. The Court declared that Te Ao and Tom were jointly owners of the house on the property and, in doing so, must have declared that they continued to exercise the exclusive right of possession to the curtilage. Accordingly, there was no default to a bare licence, as the lease did not disturb the 1945 prior right of exclusive possession of the curtilage. There is no need to consider whether any bare licence was revoked by subsequent events.

Te Ture
The Law

[67] Section 18(1)(a) provides the Court with jurisdiction to hear and determine any claim, whether at law or in equity, as to the ownership or possession of Māori freehold land. It states:

> **18 General jurisdiction of court**
>
> (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:

[68] The jurisdiction is declaratory in nature and is often used to determine the ownership of a house or other building on Māori freehold land.[28] The Māori Appellate Court recently summarised the law relating to ownership of a house on Māori land in *Tihi v Nuku*, as follows:[29]

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[28] *Ngā Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223).

[29] *Tihi v Nuku – Ruatoki B Sections 23, 25, 26B, 27, 31, 32, 33B2C2, 38 and 79 and Ruatoki C Sections 11, 12, 15, 17, 18B2, 21, 22B, 23 (Aggregated)* [2019] Māori Appellate Court MB 531 (2019 APPEAL 531) at [25].

(a) The Court cannot create new ownership rights, only declare those that already exist at law or in equity. [30]

(b) It may be found that a building is not a part of the land and that the owners of the land are not the owners of a building; an owner in the land may separately own an improvement.[31]

(c) The starting point for the Court is that a house is a fixture and ownership runs with the land. On application of the test, the Court may find that the house is a chattel or that it is owned separately from the land it sits on.[32]

[69] The Court has equitable jurisdiction per s 18(1)(a) to determine ownership of a house as distinct from ownership of the underlying land. When considering such claims, the Court can recognise constructive trusts.[33]

[70] The Court has previously found that unconscionability and unjust enrichment are two potential triggers to the exercise of the Court's discretion to grant a constructive trust.[34] In *Tipene v Tipene,* the Court applied the principles set out in *Lankow v Rose* for recognition of a constructive trust.[35] In that decision, the Court of Appeal identified four features, which, if demonstrated, would mean it was unconscionable for the legal owner to deny the applicant an interest.[36] The applicant must show:

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30 *Ngā Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223).

31 *Tohu - Te Horo 2B2B2B Residue* (2007) 7 Taitokerau Appellate MB 34 (7 APWH 34).

32 See *Skipper v Skipper – Awanui Haparapara 9* (2017) 159 Waiariki MB 3 (159 WAR 3). See also *Auckland City Council v Ports of Auckland* [2000] 3 NZLR 614 (CA), adopting the approach set out by the House of Lords in *Elitestone Ltd v Morris* [1997] 2 All ER 513, regarding the test for whether a house is a fixture or a chattel. For a recent discussion of this law, see *Ratana v Tihi – Ruatoki B Sections 23* [2021] Māori Appellate Court MB 290 (2021 APPEAL 290).

33 See *Tohu – Te Horo 2B2B2B Residue* (2006) 109 Whangārei MB 234 (109 WH 234); *Bidois – Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 AP 102); *Ngā Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223); *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121); *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206); *Keepa – Te Touwai B16A* (2019) 207 Taitokerau MB 109 (207 TTK 109); *Pickering v Reihana – Motatua 2 Section 21B2E* (2021) 231 Taitokerau MB 103 (231 TTK 103); *Nicholas v Te Amo - Te Whaiti-Nui-A-Toi Block* [2021] Māori Appellate Court MB 273 (2021 APPEAL 273)

34 *Matenga - Parish of Tahawai Lot 18C-F and 18I* (2003) 73 Tauranga MB 150 (73 T 150; *Morrison v Trustees of the Trevor and Dina Maxwell Whānau Trust* [2013] Māori Appellate Court MB 189 (2013 APPEAL 189); and *Broad v Massey – Otarihau 2B1C* (2018) 169 Taitokerau MB 138 (169 TTK 138).

35 *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2).

36 *Lankow v Rose* [1995] 1 NZLR 277 (CA).

(a) Contributions, direct or indirect, to the property in question;

(b) The expectation of an interest therein;

(c) That such expectation is a reasonable one; and

(d) That the defendant would reasonably expect to yield the claimant an interest.

[71] I adopt the principles set out in the above decisions.

Kōrerorero
Discussion

[72] As noted, the ownership of the house has already been determined and the applicants seek a determination that they have an accompanying right of exclusive possession of the curtilage underneath and around the house. They submit that the right is held for them by the respondents pursuant to a trust, such as a constructive or resulting trust.

[73] There are similarities between constructive trusts and resulting trusts, which can both arise by operation of law and do not need to be in writing.[37] A resulting trust arises when the legal title has been transferred to another and the person who provided it did not intend to pass the whole beneficial interest to the recipient or the whole beneficial interest is not exhausted by the transfer.[38] Traditionally, a resulting trust arose from the presumed intention of the parties, whereas a constructive trust did not. A resulting trust returns beneficial ownership of the trust property to a person who owned the property before it reached the trustee's hands. It is not immediately clear on what basis a resulting trust could be found in this case. Constructive trusts, on the other hand, generally respond to unconscionability and arise in a variety of circumstances where equity recognises it would be unconscionable for the person with title to property to retain a beneficial interest in that property.[39]

[74] Mr Kahukiwa asserted that when a co-owner builds on multiply owned Māori land with the consent of the other owners, the curtilage land goes with the house. That is because

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37 Chris Kelly, Greg Kelly, Colette Mackenzie and Kimberly Lawrence *Garrow and Kelly Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2022) at [14.4].
38 At [14.5] – [14.6].
39 At [15.4] – [15.5].

that co-owner acquires in practice exclusive possession. Counsel relied on the decision in *Sadlier* as support for this proposition, in particular the following passage:[40]

> If one co-owner with the acquiescence of his or her co-owners, builds a house on the land then **that co-owner acquires in practice exclusive possession of that part of the land on which the house stands.** The right of that owner and his or her licensees to travel between the house and the public road is a right enjoyed in common with his or her co-owners and their licensees. The right to occupy the house itself is a right enjoyed by the person who built it in his or her capacity as an owner of the land.
>
> (Emphasis added)

[75] Mr Kahukiwa says the effect of *Sadlier* is that possession of the curtilage area is a natural and incidental "right" that is acquired by the building owner. I consider that decision as simply stating the reality that the other owners cannot possess the land underneath the house due to its physical presence on the land. The owner of the house acquires exclusive possession in that sense. Without some other occupation right, the right of possession of the surrounding land and access to the house is the same as the other co-owners and is not exclusive. This is evident in the later statements of the Court in *Sadlier*, as follows:[41]

> After a s.30(1)(a)/53 order has been made, if the owner were for example to make a will leaving the house to one person and the interest in the land on which the house stood to another person, if the Court could give effect to the will, it would need to make an order under s.30(1)(a)/53 determining that the successor to the house was the owner of the house and another order under s.30(1)(a)/53 determining the successor to the house was entitled to possession of both the house and of the area fenced off with the house and an order under s.30(1)(a)/53 giving the successor to the house a right of access to the house.
>
> The nature of a s.30(1)(a)/53 order is illustrated by the situation that would arise if a s.30(1)(a)/53 order was made in respect of a house and a meeting of assembled owners of the land under Pt XXIII/53 were to pass a resolution to sell or lease the land.
> …
> Signing a lease would give the lessee exclusive possession of the whole of the land, including the house. The owner of the house under the s.30(1)(a)/53 order would still be the owner of the house but would have lost the right to possession.
>
> Signing a Memorandum of Transfer would make the purchaser of the land the owner of the house and the owner of the house under the s.30(1)(a)/53 order would have no more than a right to apply for a s.32/53 order for payment of that part of the purchase money that represented the value of the house.
>
> I think that a s.30(1)(a)/53 order determining ownership of a house is no more than an order determining the right to possession of the house as against the other co-

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40 *Sadlier – Proprietors of Anaura* (1987) 25 Ruatoria MB 61 (25 RUA 61) at 62.
41 At 63-64.

> owners and recognising that on an application by that owner to partition out an area of land on which the house stands, the value of the house is not to be taken into account.
> …
> Until the land is partitioned the list of owners and their relative shareholdings in the Court records is not affected by a s.30(1)(a)/53 order. The values of the shares are, however, affected by such an order. The value of the house owner's shares are increased, and the value of the other owners' shares diminished, by the value of the house. This difference in value diminishes and finally disappears as the house deteriorates and is eventually demolished, Because houses are relatively temporary features of the landscape a s 30.(1)(a)/53 order is preferable to an order altering for all time the relative values of the shareholders.
>
> Both Mr & Mrs Kirikiri, and not just Mr Kirikiri, may have built the house on Mr Kirikiri's land. Just as the other owners would have recognised they had no interest in the house, Mr & Mrs Kirikiri and the other owners would have not seen a contribution by Mrs Kirikiri to the cost as giving Mrs Kirikiri an interest in the land which would pass on her death to her children by a former union.

[76] In the recent decision of *Nicholas v Te Amo – Te Whaiti-Nui-A-Toi*, the Māori Appellate Court considered the extent of the appellant's rights under a s 18(1)(a) order and their claim for a right of possession and occupation of the building *and* its surrounding land on the basis of a constructive trust.[42] The Court noted that, while it was possible for the Court to determine both ownership of a building on the land and rights to occupy the same, that was not the same as accepting the appellant had occupation rights *because* she had been recognised as the owner of the building. The Court found:

> [36] Given that the approach in our jurisdiction is to separate the ownership of the improvement from the ownership of the land, it follows that the reasonable expectation test must be applied with respect to both the improvement and the land if the claim is to succeed. The claimant must satisfy the Court that he or she has a reasonable expectation to own or possess the improvement, *and* that he or she also has a reasonable expectation to own or possess at least that portion of the land on which the fixture is located. Where land is vested in trustees, the trustees are the legal owners of all of the land rather than those with shares in the land owning a portion according to their share.
>
> [37] If we accept the submission of counsel for the appellant that a constructive trust ought to be imposed on the basis of a reasonable expectation, the subject matter of the constructive trust is limited to the property to which the appellant made a direct contribution. The lower Court considered the appellant's financial contributions to the shed and recognised these contributions by granting an order determining ownership of the shed in the appellant's favour. In our view the appellant's contributions have been recognised. There is no evidence that the appellant made any direct contributions to the land that would give rise to a reasonable expectation of an interest in the land.

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42 *Nicholas v Te Amo – Te Whaiti-Nui-A-Toi* [2021] Māori Appellate Court MB 273 (2021 APPEAL 273).

[77] Mr Kahukiwa submitted that this decision cannot be said to be on all fours with the present case and argued there were key distinguishing factors which reduced the strength of its relevance to the present case. I disagree. I consider the principles and approach of the Māori Appellate Court are directly applicable in the present case. For the imposition of a constructive trust, the applicants must satisfy the reasonable expectation test as set out in *Lankow v Rose* with regard to the curtilage land, as distinct from the house.

[78] In terms of contributions, the applicants did not provide any evidence of contributions made by the Butlers, either directly or indirectly, to the curtilage land. Instead, Mr Kahukiwa contended that "contribution" was impossible to ascribe to a person who is already an owner in the land as contributions in the *Lankow v Rose* sense are assessed for the purpose of evidencing the creation of an equitable interest. He says that when an equitable interest in the land is already present then "contribution" must be unnecessary. In the present case, the Butlers were at the relevant times co-owners in the land together with the other owners as tenants in common. There was therefore unity of possession, that is, an equal entitlement of all the owners to use, occupy and enjoy all of the land. As Mr Hemi pointed out, the requirement for proof of contributions is to avoid the unconscionability of a legal owner retaining ownership of property another had made contributions to, in essence an unjust enrichment. Evidence of contributions by the Butlers to the curtilage could therefore point to the expectation of an interest in that land over and above the equal entitlement of all the co-owners. While the Butlers farmed the land, this was originally pursuant to a licence to occupy and then a lease. The evidence records that, at least initially, the Butlers did not pay rent and the revenue from the land was used to repay the loan for their house. At the hearing, the applicants claimed that separate rates were being paid in relation to the curtilage land by Rarua.[43] However, advice from the Opotiki District Council was that only those areas with current occupation orders are being separately rated and the balance of the land has not been rated since 2015.[44] There is no evidence of contributions by the Butlers or their successors to the curtilage land that would indicate unconscionability or an unjust enrichment.

[79] As to expectation, the applicants claim the trust arose from the agreement of the owners in 1945. Their position is that when the owners agreed for the Butlers to build on

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43 265 Waiariki MB 1-27 (265 WAR 1-27) at 19.
44 Memorandum of Counsel for the Respondent dated 17 December 2021.

the land, this carried with it an implied consent and expectation for the house to be permanent and for exclusive possession of the curtilage land, to the extent that the other owners waived their respective entitlements. The applicants say this was a common intention and was unequivocal. Further, this was affirmed both at the owners' hui in 1954, where a curtilage area to be separated out from their lease was specified and where the other owners agreed to relinquish their rights to the house, and by the 1976 order, which determined the Butlers as owners of the "house on the property". They say an expectation must have naturally been part of the agreements reached.

[80] There appear to be no minutes from either of the owners' hui held in 1945 and 1954 and the applicants rely on the Court minutes from the 1976 hearing, where details from those earlier hui are recorded. The minutes state:[45]

> Awanui Haparapara 2B1B2
>
> Section 30(1)(a) Application by Te Ao Butler
>
> Deputy Registrar Patrick to assist the Court
>
> Also present: Te Ao Butler
> Hema Parekura
> Wharepapa Ngatai
>
> There is only one other owner, Mei Wharepapa, who is in Maternity Hospital. Te Ao Butler was her trustee until recently when she reached her majority.
>
> This land first came under development by Board of Māori Affairs in 1935 when they put P. Huritau there as occupier. Tom and Te Ao Butler took over in 1942 and was able to bring in additional land. They came on only with licence to occupy. B.M.A made advance to enable a house to be built for them. This was in 1945. B.M.A took a charge on cream cheques and house repaid in that way. But since no rent was paid it might be said that house belonged to all owners provided the house was completely repaid. However in 1954 there was a meeting of owners when Butlers received a formal lease of 21 years and also took over the Development debt owing. Figures cannot show, but it may be that in effect they took ownership of at least part of the house. No record kept because at the meeting in 1954 the owners agreed that Tom and Te Ao Butler could own the house and a plan was prepared to show that 1r.14.6p was to be excluded from the lease and including the house which belonged to the Butlers. However, this wasn't followed through and given legal effect. Instead the lease was for total block plus adjoining lands. The leases expired in 1975 and have not been renewed. Butlers don't seek renewal but want to be sure that house is kept for them and they won't be put out if it is leased. No objections have been filed. Notices went to all owners.
>
> MRS BUTLER confirms.

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[45] 48 Opotiki MB 505-506 (48 OPO 505-506).

> COURT then explains position to owners present and points out that in circumstances, they would have good grounds for opposing if they wished to. All keenly support. Court explains that if Te Ao Butler were to buy their shares, value of house would be excluded. They all still agree that she should own the house.
>
> COURT: Order s.30(1)(a) determining that Te Ao Butler and Tom Butler are jointly the owners of the house on the property.

[81] Mr Kahukiwa characterised the consent of the owners as consent for the Butlers to build their "marital home" on the land as their "permanent residence", a right which extended to the Butlers and their successors. I am not convinced that such an interpretation is borne out in the above minutes or the evidence. The minutes record that the Butlers came on to the land with a licence to occupy and later were granted a lease for 21 years. Neither of those arrangements imply permanent occupation of the land. While the owners agreed for a house to be built for the Butlers and later for them to have ownership of the house and for an area of curtilage to be excluded from the lease, the exclusion of the curtilage was never given legal effect. The applicants argued that the intentions of the owners were clear and the better conclusion to be drawn is that the lease was more about the farming activity than the house and curtilage. My view is that this was the first opportunity to provide for exclusive possession to the curtilage, which was not taken up and formalised.

[82] Mr Kahukiwa also argued that the right to the house and curtilage did not merely derive from the 1954 lease but from the 1945 agreements. I note the above minutes record that the Butlers "took over the Development debt" when they received the formal lease, which was also when it was agreed the Butlers could own the house. The implication there is that, prior to that, the development debt was being serviced by all the owners (from the cream cheques revenue) and since no rent was being paid by the Butlers the house would belong to all the owners when the debt was repaid. This does not support the existence of an original expectation for permanent occupation by the Butlers as it could also be argued that the house was intended for whoever was occupying and developing the land from time to time and this changed when the Butlers took over the development debt.

[83] Then there is the fact that when the lease expired and Te Ao applied in 1976 for an order determining ownership of both the house and curtilage in favour of her and Tom, the Court only determined them as joint owners of the house. I agree that the application is clear that Te Ao was seeking ownership of both the house and curtilage. I cannot agree with Mr Kahukiwa's assertion that the words "the house on the property" can be taken to mean the

house and curtilage. The minutes state " Court explains that if Te Ao Butler were to buy their shares, value of house would be excluded. They all still agree that she should own the house". There is no mention here or in the order made of the curtilage and certainly no reference to a specified curtilage area.

[84] Another factor is the decision of Judge Clark in 2009, which dealt with the competing applications of Rarua Insley and Michael Insley for determination of ownership of the house.[46] In dismissing the applications, Judge Clark referred to the 1976 order and found that it determined that the Butlers jointly owned the house and the house became the sole property of Tom Butler when Te Ao passed away. He also stated:

> [38] I also note that the Court when making the order was careful to indicate that Te Ao Butler and Tom Butler were the joint owners of the house "on the property". No mention is made of any interests in the land itself.

[85] The respondents submitted that Judge Clark's decision determined that the Butlers did not have an interest in the curtilage and the present application is attempting to overturn a determination of the Court. This was not accepted by the applicants who argued the above statement was more observational in nature and extent and lacked a proper analysis of the legal position. They further submitted that the decision of Judge Clark also misstated the law on at least two counts and the subsequent review of the decision in *Stock v Morris* rendered it unsafe as a correct declaration of the law, which meant an appeal was not necessary. I consider the relevant point to be that the comments of Judge Clark in the 2009 decision support the view that the 1976 order determined the Butlers as the owners of the house and did not include the curtilage. Neither of those decisions have been appealed and, in the absence of an order overturning those decisions, they stand.

[86] With regard to the expectation of an interest in the curtilage, I find that there were opportunities to formalise and confirm any right of the Butlers to exclusive possession of the curtilage, firstly through exclusion of that area from the formal lease in 1954, then via the application of Te Ao in 1976 to determine ownership of the house and curtilage. Neither of those opportunities resulted in the formal provision of an interest and that fact would have significantly impacted on the expectations of the Butlers. I consider that any expectation of an interest or exclusive possession of the curtilage land would not then have been reasonable

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46 *Insley v Insley – Awanui Haparapara 2B1B2* (2009) 108 Opotiki MB 255 (108 OPO 255).

and the owners would not have expected to yield such an interest. Added to this is the fact that several subsequent applications were filed to determine ownership of the house or for an occupation order, yet the claim of an equitable interest in the curtilage was never previously raised.

[87] I note that Mr Kahukiwa has also submitted the Butlers were encouraged by the other owners to build, and relied on that encouragement by building on the site, obtaining finance through BMA and committing their revenue earned from farming the land to repay the loan. He argued there has been no challenge to the consent in more than 76 years and the owners are estopped from denying the agreements. To the extent that Mr Kahukiwa is claiming an equitable estoppel, I do not consider, based on those matters already referred to, that a belief or expectation was created that the Butlers would have permanent occupation or exclusive possession of the curtilage land.[47] I also note that, while the Butlers did take over the development debt in relation to the building of the house, they also received ownership of the house. There was no evidence of contributions made to the curtilage land and therefore no evidence of any detriment suffered or resulting unconscionability. I agree with Mr Hemi that the ongoing occupation and possession of the Butlers from 1976 was in the nature of a bare licence, which was not revoked during their lifetime.[48] Given that a bare licence is generally personal to the holder, it could be argued that the bare licence was revoked on the death of Tom in 1984. I do note there was continued occupation by the Insley whānau until 2007, however, the application for an occupation order filed by Rarua in 2017 and the refusal of consent by the trustees is evidence that any such bare licence has now been revoked.

Whakataunga
Decision

[88] In the absence of any contributions or reasonable expectation of an interest or right to exclusive possession of the curtilage, I consider there is no evidence of unconscionability on the part of the trustees and the claim for a constructive trust is not made out.

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47 See D W McMorland *Hinde McMorland & Sim Land Law in New Zealand* (online ed, LexisNexis) at [18.007].

48 See D W McMorland *Hinde McMorland & Sim Land Law in New Zealand* (online ed, LexisNexis) at [18.004] for discussion of a bare licence. See also *Paraire v Paraire – Part Mangatawa 10* (2015) 105 Waikato Maniapoto MB 67 (105 WMN 67);*Tau v Tahere – Rangihamama X3A and Omapere Taraire E (Aggregated)* (2016) 137 Taitokerau MB 68 (137 TTK 68); and *Owen v Hauiti – Kiwinui A* (2016) 57 Tairawhiti MB 70 (57 TRW 70).

[89] The application is dismissed.

I whakapuaki i te 10.00am i Rotorua te 16th o ngā rā o Hune i te tau 2022.
Pronounced at 10.00am in Rotorua on this 16th day of June 2022.

C T Coxhead
JUDGE