IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20150002252

UNDER	Section 18(1)(a), Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Te Touwai B16A
BETWEEN	MAKI KEEPA, TE AROHA KEEPA, WHARE KEEPA and HINEWHATA KEEPA Applicant

A20120007107
A20120007108

UNDER	Sections 18(1)(a) and 328, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Touwai B16A
AND BETWEEN	ISABELLA URLICH Applicant

Hearing: 22 October 2019, 205 Taitokerau MB 129-169
(Heard at Whangārei)

Appearances: Wayne Coutts, for Isabella Urlich
Tavake Afeaki, for the Keepa whānau

Judgment: 20 December 2019

JUDGMENT OF JUDGE M P ARMSTRONG

Copies to:
W Coutts, Thomson Wilson Law, P O Box 1042, Whangārei 0140 wmc@thomsonwilson.co.nz
T Afeaki, Afeaki Chambers, P O Box 13-397, Onehunga, Auckland 1643 tavake@afeakichambers.co.nz

Introduction

[1] Matangirau Māori School was a native school established at the turn of the 19th century on what became known as Te Touwai B16A. The school itself was relocated but the old school house remained on the land and was converted into a residential home. Competing applications have now been filed seeking to determine ownership of that house. An ancillary application also seeks an occupation order for the house site.

[2] This judgment determines these issues.

Background

[3] In 1899, part of the Te Touwai block was gifted by the owners as a site for a native school. This occurred before the Court investigated the title to the block. On 27 July 1899, a notice was published in the New Zealand Gazette declaring the land as a school site.[1] This land became known as Part Te Touwai block (Matangirau Māori School Site).

[4] The school operated until 1952 when the Minister of Education sought to exchange the school site with Part Te Touwai B9A. An order exchanging the land was granted on 30 July 1952.[2]

[5] The owners of Te Touwai B9A at the time of the exchange were Hoterene Whare Keepa who held a 2/3 share, and four minors who together held the remaining 1/3 share. The trustee for the minors agreed that the Court could sell the minors' interests. These were vested in Hoterene Keepa who became the sole owner of the block.[3]

[6] Part Te Touwai block (Matangirau Māori School Site) was renamed Te Touwai B16A and was vested in Hoterene Keepa solely. When this order was confirmed, Hoterene was ordered to pay £595.00 to the Ministry of Education for the exchange value. It appears this payment largely related to the value of the house on the land.[4]

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1 NZ Gazette, 27 July 1899, at 1367.
2 80 Northern MB 282-283 (80 N 282-283).
3 80 Northern MB 132-133 (80 N 132-133) and 80 Northern MB 271 (80 N 271).
4 Ibid at 282-283.

[7] Following the exchange Hoterene Keepa lived in the house with his children. He passed away on 4 November 1956. His children moved to Moerewa where they were raised by their uncle. On 26 January 1957, Hoterene's interests in Te Touwai B16A were vested in his eight children equally:[5]

(a) Ihapera Keepa;

(b) Maki Keepa;

(c) Te Aroha Keepa;

(d) Rima Keepa;

(e) Kereihi Keepa;

(f) Whare Keepa;

(g) Hinewhata Keepa; and

(h) Te Mahia Keepa.

[8] Between 1968 and 1969 Clem Urlich purchased the shares in Te Touwai B16A from:[6]

(a) Kereihi;

(b) Te Mahia;

(c) Rima;

(d) Ihapera; and

(e) Maki.

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5 31 Bay of Islands MB 94-95 (31 BI 94-95).
6 5 Kaitaia MB 202 (5 KI 202), 5 Kaitaia MB 318 (5 KI 318) and 6 Kaitaia MB 82 (6 KI 82).

[9] Clem Urlich died on 1 April 1988. On 16 August 1996, his daughter, Isabella Urlich succeeded solely to his interests in B16A.[7]

[10] The land is now owned by:

(a) Isabella Urlich – 0.625 shares;

(b) Hinewhata Keepa – 0.125 shares;

(c) Te Aroha Keepa – 0.125 shares; and

(d) Whare Keepa – 0.125 shares.

[11] Isabella Urlich claims that she undertook extensive renovations to the house. She asserts that, as a result, she owns the house solely.

[12] Hinewhata, Te Aroha and Whare Keepa argue:

(a) Their father acquired the land and the house through the exchange with the Ministry of Education;

(b) He paid for the house through the exchange value;

(c) They never relinquished their rights to the house even though some of their siblings sold shares in the land; and

(d) They still own the house.

Legal principles

[13] I have jurisdiction to determine who owns the house per s 18(1)(a) of Te Ture Whenua Māori Act 1993 (the Act). This jurisdiction is declaratory in nature. I may declare existing ownership rights at law, or in equity, but I cannot create new ownership rights.[8]

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7 81 Whangarei MB 157 (81 WH 157).

8 *Ngā Uri o Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato

[14] Conventional common law provides that a fixture belongs to all of the owners of the land according to their respective interests. However, I have equitable jurisdiction per s 18(1)(a) of the Act to determine ownership of the house as distinct to ownership of the underlying land.[9] When considering such claims, I may recognise constructive trusts.[10]

Issues

[15] The following issues arise:

(a) Is the house a chattel or a fixture?

(b) Who owns the house?

(c) Are there any equitable claims to the house?

(d) What relief should be granted?

(e) Should I grant an occupation order?

Is the house a chattel or a fixture?

[16] The main indicators that an improvement is a fixture are the degree and purpose of annexation.[11]

[17] The house was originally fixed to the land using tōtara piles. As part of her renovations, Ms Urlich replaced the tōtara piles with concrete piles. Both before and after this work, the house was fixed to the land. There is no dispute that the house was established as a permanent dwelling.

[18] I find that this house is a fixture.

Maniapoto MB 223 (49 WMN 223).

9 *Tohu – Te Horo 2B2B2B Residue* (2007) 7 Taitokerau Appellate Court MB 34 (7 APWH 34), *Bidois – Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 AP 102), *Ngā Uri o 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) and *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206).

10 Ibid.

11 *Auckland City Council v Ports of Auckland* [2000] NZCA 190 at [72]-[76].

Who owns the house?

[19] As noted, conventional common law provides that a fixture belongs to all of the owners of the land according to their respective interests.

[20] Upon the exchange with the Ministry of Education, Te Touwai B16A was vested in Hoterene Keepa solely. As the sole owner of the land, Mr Keepa became the sole owner of the house.

[21] When Mr Keepa passed away his interests in the land were vested in his eight children equally. Upon the grant of that vesting order, those eight children would have also owned the house in equal shares.[12]

[22] Clem Urlich then purchased shares in the land from five out of the eight Keepa children. In doing so he became the largest shareholder in the block. The Keepa whānau challenge the legitimacy of those purchases. They argue that Mr Urlich coerced those who sold into signing the sale documents and they did not understand the effect of those documents. The orders vesting those interests in Mr Urlich were granted more than 10 years ago. Those orders are now conclusive and cannot be challenged for want of jurisdiction or on any other ground, unless the Keepa whānau file an application with the Chief Judge.[13]

[23] For the purpose of this proceeding, I can only consider the effect of the purchase not its validity. There is nothing in the applications filed, or in the minutes of the hearing before the Court, to indicate whether the purchase of the interests in the land included the relative interests in the house. In the absence of evidence to the contrary, conventional principles apply and Mr Urlich acquired a 5/8 share in the house. Ms Urlich succeeded solely to her father's interests in the land. Adopting the same approach, she would have also received his interests in the house.

[24] As such, the legal owners of the house are the legal owners of the land being Isabella Urlich, Hinewhata Keepa, Te Aroha Keepa and Whare Keepa, as tenants in common, relative to their interests in the land.

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12 See Māori Affairs Act 1953, s 146.
13 See Te Ture Whenua Māori Act 1993, ss 44, 45 and 77.

Are there any equitable claims to the house?

[25] Ms Urlich argues she undertook extensive renovations, repairs and improvements to the house between 1974 to the present day. This included adding further bedrooms, re-piling the house, re-roofing the house, painting the interior and exterior, landscaping and further restoration work. Ms Urlich contends that, as a result of this work, I should grant an order determining that she is the sole owner of the house in equity.

[26] The Keepa whānau accept that Ms Urlich has undertaken these renovations. They argue that they were not informed of, or consulted about, the renovations, and they never agreed to the renovations taking place. They contend that, in these circumstances, it would be inequitable to award sole ownership to Ms Urlich. They reiterate that it was their father who acquired the land and the house through the exchange order and this was their family home.

[27] In *Lankow v Rose*, the Court of Appeal held that, in order to recognise a constructive trust, the claimant must show: [14]

(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.

[28] Judge Doogan adopted this approach in *Tipene v Tipene*.[15]

[29] There is no dispute that the renovations have taken place. The photographic evidence, and the evidence from Ms Urlich, indicate that these renovations were extensive. Ms Urlich has shown that she made a contribution to the property. The remaining questions are more difficult to assess.

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14 *Lankow v Rose* [1995] 1 NZLR 277.
15 *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2).

[30] Ms Urlich may well have expected to receive an interest in the house as a result of the renovations, but what interest? She seeks sole ownership of the house, but is that a reasonable expectation in this case?

[31] In *Tipene,* Judge Doogan found that the person who carried out the works there had a reasonable expectation of an interest in the house.[16] However, the expectation was that she could remain in the house rent free while she chose to make it the family home. It was also significant that she carried out the works in good faith at the invitation of the owner.

[32] In *Rautangata v Rautangata*, Judge Milroy also upheld a constructive trust due to renovations carried out by the occupier.[17] Once again, Judge Milroy placed weight on the fact that the occupier carried out those renovations in good faith and with the full consent of the land owner.

[33] In the present case, I accept the evidence from the Keepa whānau, that Ms Urlich did not inform or consult them about the renovations she undertook. Mr Coutts, for Ms Urlich, argues consultation was not necessary as Ms Urlich is an owner in the land and she was entitled to use and occupy the land and the house. That may be so, however, those who seek equity must do equity. If a person is seeking equitable relief, they must have acted equitably themselves. The conduct of the parties is highly relevant in a case such as this. The fact that Ms Urlich did not notify the other owners of the renovations is relevant to:

(a) Whether her expectation of an interest in the house is reasonable; and

(b) Whether the Keepa whānau should reasonably yield an interest.

[34] Against that, there has been a long delay between the Keepa whānau learning of the renovations and then taking any steps to assert their rights. I address these issues in more detail below.

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16 Ibid at [62].

17 *Rautangata v Rautangata – Opuatia No 6D No 2D* (2013) 63 Waikato Maniapoto MB 132 (63 WMN 132) at [17].

[35] In weighing these factors, I consider that Ms Urlich's contribution, through these renovations, should be recognised by way of a constructive trust. Viewed objectively, there is a reasonable expectation that she should receive an interest as a result of her contributions, and the Keepa whānau should reasonably yield such an interest. In saying that, I do not accept the position, or the outcome sought, from either side. The appropriate answer lies somewhere in between. I consider this should be reflected in the relief granted.

What relief should be granted?

[36] When deciding what orders are appropriate, I have to consider what the justice of the case requires.[18] In doing so, I first look at the conduct of the parties.

[37] Clem Urlich purchased the shares in the land between 1968 and 1969. In 1972, Te Aroha Keepa moved back into the house. She says two days after moving in, Mr Urlich told her to get out and that it was no longer her property. Sometime later, Mr Urlich moved in to the house and lived there till his death in 1988. Various members of the Urlich family then lived in the house. In 2002, Ms Urlich moved in and has lived there since. As noted, she carried out extensive renovations but did not consult or advise the Keepa whānau.

[38] Mr Afeaki argues that, after acquiring shares from the majority of the Keepa whānau, the Urlich whānau asserted and exercised exclusive use and possession of the house and the land. This started with Mr Urlich telling Te Aroha Keepa to leave in 1972, and continued with him, and then Ms Urlich, exercising exclusive use ever since. Mr Coutts contends that Ms Urlich is not responsible for the actions of her parents, and there is no evidence to show that Ms Urlich has excluded the Keepa whanau from the land.

[39] I accept that the evidence does not show that Mr Urlich has personally, and actively, excluded the Keepa whanau from the land. However, she has effectively ignored them and used and developed the house as if she was the sole owner. Ms Urlich knew she was not the sole owner of the land, and she knew this house was originally the Keepa whānau home. Her father told her the Keepa whānau still retained interests in the land and she participated in a hearing in 1996 to change the status of the land where the Keepa whānau

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

were present.[19] Despite that, at no time did she attempt to inform them about the renovations that were taking place.

[40] On the other hand, there has been a significant delay by the Keepa whānau to assert their rights.

[41] The Keepa whānau said they were not aware that they had succeeded to their father at the time the order was granted in 1957. Their uncle applied to succeed to the interests on their behalf, but he never spoke to them about the application. Despite that, they later learnt of these interests in the 1970s.

[42] The Keepa whānau were also aware of the renovations taking place. Te Aroha first learnt of the renovations in around 1976. Hinewhata first learnt of the renovations in the 1980s. Whare Keepa did not give evidence.

[43] Despite learning of their own interest in the land, and of the renovations taking place, there was a long delay before the Keepa whānau asserted their rights in the house. According to Hinewhata, she visited the land in 2007, and saw renovations being undertaken. She states she asked Ms Urlich:[20]

> What have you done to our father's whare?… Why didn't you let us know that you were going to make these changes?... My dad still owns this house.

[44] Ms Urlich did not recall this conversation taking place. In February 2012, Hinewhata's son sent a letter to Ms Urlich:[21]

> …giving you notice of our intention to acquire the old Matangirau School back into the rightful owners that being the tamariki of Hotorene Whare Keepa. [sic]

[45] According to Ms Urlich, this was the first time the Keepa whānau asserted an interest in the house. The Keepa whānau filed their current application in 2015. Whether starting from the alleged confrontation in 2007, or the letter in 2012, the Keepa whānau did not object to the renovations, nor did they assert their own rights in the house, until 20 to 30 years after first learning of the works. That is a significant delay in any assessment.

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19 24 Kaikohe MB 153 (24 KH 153).
20 205 Taitokerau MB 143 (205 TTK 143).
21 Affidavit of Isabella Urlich sworn 15 May 2012, exhibit "B".

[46] The Keepa whānau explained that they did not act earlier as they are not familiar with Māori land law or the process to enforce their rights. However, Hinewhata advised that in around 1989, she spoke to a kuia in the area who told her that the Keepa whānau could pursue their rights in the Māori Land Court. Hinewhata said she discussed this with her siblings but applications were never filed.

[47] Accordingly, while Ms Urlich did not consult the Keepa whānau about the renovations she was undertaking, at the same time, they were aware of the renovations and they took no steps, until relatively recently, to assert their rights.

[48] Mr Coutts surprisingly argued that the failure by Ms Urlich to consult with the Keepa whānau is not relevant. The conduct of the parties in a case such as this will always be relevant. The fact that she failed to consult with them about the renovations, or enter into an agreement about what impact that would have on ownership of the house, undermines her claim to sole ownership of the house. It is not reasonable for one owner to undertake renovations to a communally owned house, without discussing it with the other owners, and without informing them, and then expect to receive sole ownership. Such an approach would encourage owners to act unilaterally, and in secret, and be rewarded for doing so.

[49] At the same time, I do not consider it is equitable for the Keepa whanau to be the sole owners of the house, nor is it equitable to simply recognise ownership of the house based on the current ownership of the land. By doing so, the Keepa whānau would be unjustly enriched having the benefit of the improvements without having to pay for them. This inequity is amplified as the Keepa whānau knew of the works being undertaken and sat on their hands.

[50] Ms Urlich's contribution could be recognised through awarding her a greater interest in the house. However, there is no evidence before me as to the amount of money Ms Urlich spent on the renovations, there is no current valuation for the house, nor is there any cogent evidence of the increase in the value of the house as a result of the improvements.

[51] When the exchange occurred in 1952, Hoterene Keepa paid £595.00 to the Ministry of Education for the exchange value. While this related to the exchange value of the land, it appears this difference in value largely related to the school house. The Minister of Education mistakenly signed an exchange for £95.00 instead of £595.00. When the matter came back before the Court, it held:

> The Court believes that no one has been misled by mistake in that Hoterene must realise that he cannot get such valuable buildings for £95.00.

[52] This provides some indication that the house was valued at £595.00 in 1952, though there is no evidence of how much that is worth today with inflation.

[53] In 1966, a valuer from the Government Valuation Department attended the property and recorded that the house was of "Demolition value only". Mr Coutts argues this shows that in 1966 the house had zero value and any value that it currently has can only be attributed to Ms Urlich's renovations. I do not accept this evidence is sufficiently cogent to make such a finding.

[54] Ashton Gibbard, a registered valuer for Quotable Value Ltd, filed an affidavit exhibiting the file note from the 1966 inspection. However, Mr Gibbard did not carry out the inspection, he did not give evidence in person, he did not explain what is meant by the term 'demolition value only', nor did he explain how such an assessment is made. Mr Coutts also conceded that he does not know what 'demolition value' means.

[55] The file note itself is very brief. It does not record the basis of this assessment, or what the valuer was relying on. Even if I was to accept that the only viable option in 1966 was to demolish the house, this is a historic house made of native wood. There may well have been value in salvaging that wood or other fixtures and fittings from the house. There is no assessment of that value. Also, the fact that the house has since been renovated to a high standard, goes against the argument that demolition was the only viable option.

[56] I have already found that Ms Urlich is not entitled to sole ownership of the house. In order to recognise her contribution by awarding a greater interest in the house I would need evidence of the amount spent on the renovations, and evidence of the increase in value as a result of the renovations. The 1966 file note does not do this and there is no

other evidence available. Mr Coutts accepted that the onus was on his client to file such evidence. She has not done so.

[57] I could also recognise Ms Urlich's contribution by ordering the Keepa whānau to compensate Ms Urlich for the improvements made or for the increase in the value of the house. Once again, there is no evidence of these values to determine the amount of compensation payable.

[58] In *Stock v Morris*, the late Judge Ambler expressed reservations about whether a non-owner can be granted a right of possession per s 18(1)(a).[22] I share those reservations, but that does not arise in this case as Ms Urlich is an owner.

[59] Taking these factors into account, I consider that, in order to do justice in this case, Ms Urlich should receive the ongoing, and exclusive, use of the house during her lifetime. When viewed objectively, Ms Urlich would have had a reasonable expectation of exclusive use of the house as a result of the renovations she undertook. The Keepa whānau should also reasonably expect to yield such exclusive use given the work carried out, and their delay in asserting their rights.

[60] Granting Ms Urlich the ongoing exclusive use of the house for her lifetime will recognise the contribution she has made to improving the house. This also recognises the Keepa whānau's interests in the house. They will remain as legal owners of the house, along with Ms Urlich, relative to their shares. Once Ms Urlich passes away, any ongoing rights of use or occupation will need to be considered by the then owners, or if necessary, determined by the Court, taking into account the conventional rights of tenants in common.[23]

[61] Ms Urlich's ongoing right to exclusive use of the house does not include exclusive use of the land. The land is still owned by all of the owners as tenants in common. They are all entitled to unity of possession. There is nothing preventing the other owners from utilising or exercising their rights concerning the balance of the land.

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22 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121).

23 This is subject to any later developments such as a change in ownership, a change in the nature of the ownership, the constitution of administration structures, further orders or developments in the law.

Should I grant an occupation order?

[62] Ms Urlich seeks a permanent occupation order in her favour over the whole of Te Touwai B16A.

[63] I cannot grant an occupation order unless I am satisfied that:[24]

(a) The owners of the land have had sufficient notice of the application and sufficient opportunity to discuss and consider it;

(b) The owners understand that the occupation order may pass by succession;

(c) There is a sufficient degree of support for the application among the owners having regard to the nature and importance of the matter; and

(d) In the circumstances the extent of Ms Urlich's beneficial interest in the land justifies the occupation order.

[64] None of these statutory requirements have been met. Even if they were, the effect of the occupation order sought would exclude the Keepa whānau, and their successors, from ever exercising their rights to use and occupy the land. This is inconsistent with the Preamble and the overall kaupapa of the Act. I would not exercise my discretion to grant such an occupation order in these circumstances.

[65] I have also determined that Ms Urlich will have exclusive use and occupation of the house during her lifetime, and so an occupation order is no longer necessary.

Decision

[66] I grant the following orders per s 18(1)(a) of Te Ture Whenua Māori Act 1993:

(a) The house on Te Touwai B16A is owned by Isabella Kathleen Urlich, Hinewhata Hoterene Keepa, Te Aroha Hoterene Keepa and Whare Hoterene Keepa, as tenants in common, relative to their interests in the land;

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[24] Te Ture Whenua Māori Act 1993, s 329(2). This is in addition to the other factors I have to take into account per s 328 and 329(1) of that Act.

(b) Isabella Kathleen Urlich has the right to exclusive use and occupation of the house on Te Touwai B16A for her lifetime.

[67] The application for an occupation order is dismissed.

Pronounced at 11:00am in Whangārei on Friday this 20th day of December 2019.

M P Armstrong
JUDGE