

**I TE KOOTI WHENUA MĀORI O AOTEAROA**  
**I TE ROHE O TE TAIRĀWHITI**  
*In the Māori Land Court of New Zealand*  
*Tairāwhiti District*

**A20210010331**

**A20210010332**

|                                       |   |
|---------------------------------------|---|
| WĀHANGA<br><i>Under</i>               | Sections 18(1)(a) & 328, Te Ture Whenua Māori<br>Act 1993       |
| MŌ TE TAKE<br><i>In the matter of</i> | Tuahu 6   |
| I WAENGA I A<br><i>Between</i>        | IRA JOSEPHINE YUILE<br>Te Kaitono<br><i>Applicant</i>           |
| ME<br><i>And</i>                      | ARCHIBALD MCROBERTS SMITH<br>Te Kaiurupare<br><i>Respondent</i> |

Nohoanga: 13 December 2021, 110 Tairāwhiti MB 75-85  
*Hearing* (Heard at Gisborne)

Kanohi kitea: P Harman for Respondent  
*Appearances*

Whakataunga: 23 June 2022  
*Judgment date*

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**TE WHAKATAUNGA Ā KAIWHAKAWĀ D H STONE**  
*Judgment of Judge D H Stone*

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## Ngā kōrero tīmatanga

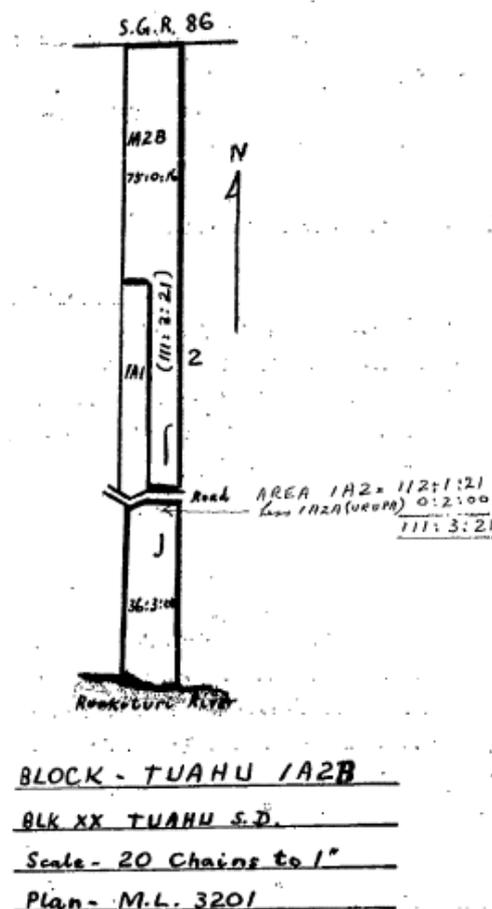
### Introduction

[1] Tuahu 6 is a block of Māori freehold land that adjoins the Ruakituri River in the picturesque Ruakituri Valley. It is currently owned by the descendants of George and Ira Smith. George and Ira Smith have long since passed. The homestead they lived in on the block remains. Their daughter, Ira Josephine Yuile (“the applicant”), seeks a declaration that her and her sister, Ella Catherine McLean, own the homestead. She also seeks an occupation order over an area surrounding the homestead that reflects her shareholding in the Tuahu 6 block, being approximately 3.416 hectares.

## Kōrero whānui

### Background

[2] The Tuahu 6 block was formerly part of the Tuahu 1A2B block. The southern boundary of that historical block is the Ruakituri River. The block was bisected by Ruakituri Road, as depicted in the diagram below:



[3] Originally there were three shares in the Tuahu 1A2B block. During the lifetime of George and Ira Smith and through the acquisition of other interests in the block, George Smith came to own two shares and Ira Smith came to own one share in the block. Between them, they came to own the entire block.

[4] George and Ira Smith lived in the homestead located on the Tuahu 1A2B block. They raised their 13 children in it.

[5] George Smith passed away on 26 October 1969. His will left his residual estate to his 13 children. The will provided for three of his children to receive half the interests of the other 10 children.<sup>1</sup> On 13 September 1996, George Smith's children succeeded to his two shares in the Tuahu 1A2B block. In accordance with the will, three children each received 1/23<sup>rd</sup> of a share and the other 10 children each received 2/23<sup>rd</sup> of a share in that block.<sup>2</sup>

[6] Ira Smith passed away on 16 May 1990. Relevantly, her will left "Tuahu No. 1A2B Block lying between the Ruakituri Road and the Ruakituri River" to the applicant and Ella McLean as tenants in common in equal shares. Probate was granted on 19 December 1990, with Brian Yuile and Murray Renner appointed as executors. They applied per s 81A of the Māori Affairs Amendment Act 1967 for Ira Smith's Māori land interests to be vested in them as executors. In doing so, they identified an anomaly in the Court records.

[7] A search undertaken at the Māori Land Court shortly after Ira Smith's passing indicated that she owned all three shares in Tuahu 1A2B. However, a later title search in February 1991 showed Ira Smith as owning only one share in that block. This anomaly was raised with the Court by the lawyers for the executors on 16 June 1993. The Deputy Registrar responded on 29 June 1993 to confirm that the Court records showed that George Smith owned two shares in Tuahu 1A2B and Ira Smith owned one share. On 23 July 1993, the one share in the Tuahu 1A2B block owned by Ira Smith was vested in the executors of her estate.<sup>3</sup>

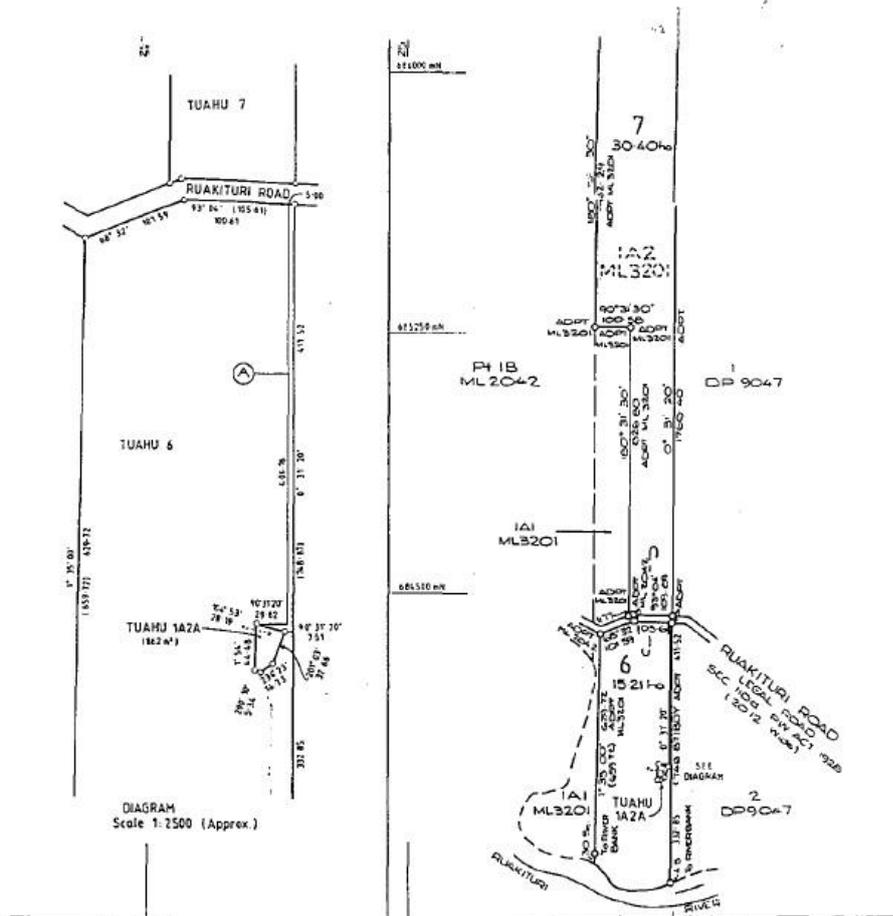
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<sup>1</sup> The three children who received half the interests of the other 10 children are George Paul Smith, John Alexander Smith and Helen Isabel Renner: see clause 5(b) of the will of George Phillip Smith dated 7 September 1967. Probate for the will was granted on 8 December 1969.

<sup>2</sup> 22 Registrar's MB 180-181 (22 RGTA 180-181).

<sup>3</sup> 20 Registrar's MB 66 (20 RGTA 66).

[8] In 1996, an application was filed to partition the Tuahu 1A2B block. As referenced in Ira Smith's will, the Tuahu 1A2B block was intersected by Ruakituri Road. The application sought to partition the Tuahu 1A2B block into two parcels, separated by Ruakituri Road. The Court approved the partition on 1 September 1997 and named the portion below Ruakituri Road as Tuahu 6 and the portion above the road as Tuahu 7. A diagram showing the original Tuahu 1A2B block after being partitioned into Tuahu 6 and Tuahu 7 is set out below:



[9] On partition, the Tuahu 6 block was vested in the 13 children of George and Ira Smith. To calculate the children's respective interests, the Court relied on its records showing that Ira Smith had owned one share in the Tuahu 1A2B block (which was vested in the executors of her estate on 23 July 1993) and George Smith had owned two shares (which were succeeded to by his 13 children on 13 September 1996). Accordingly, on partition of the Tuahu 1A2B block, 10 of their children (including the applicant and Ella McLean) received

0.0579710 shares in Tuahu 6, with the remaining three children receiving 0.0289856 shares, representing the two shares in the block derived through George Smith in accordance with his will. The applicant and Ella McLean received an additional 0.1666667 shares in Tuahu 6, representing the one share they derived through Ira Smith in accordance with her will. This resulted in the applicant and Ella McLean each holding 0.2246376 shares in Tuahu 6.

[10] The homestead is located on the Tuahu 6 block. It is accepted that, for over 30 years, the homestead has been occupied by one of George and Ira Smith's sons, Charles Kingford Smith, and his whānau.

### **I ahatia?**

*What has happened here?*

[11] The applicant now seeks to occupy the homestead. She seeks a determination that the homestead is owned by her and her sister, Ella McLean. She also seeks an occupation order for the land surrounding the homestead. She called a meeting of owners of the Tuahu 6 block to discuss her proposals. Notice of the meeting was published in the Wairoa Star on 30 March, 15 April, 4 May and 11 May 2021. The meeting was held on 18 May 2021. Four of the 17 owners were present at the meeting.<sup>4</sup> Two children of one of the deceased owners were also present.<sup>5</sup>

[12] The minutes record that all those present at the meeting voted against the application for an occupation order in favour of the applicant.<sup>6</sup> The minutes also record that another owner, David Smith, did not consent to the occupation order. The file also records that David Smith confirmed by phone to the applicant that he did not support the occupation order. The minutes of the 18 May 2021 meeting do not reference the application to seek a declaration that the homestead is owned by the applicant and Ella McLean.

[13] In addition to the results of the 18 May 2021 meeting, the file also contains a document signed by various owners to indicate whether they agree or object to the applicant occupying the homestead and having use of the Tuahu 6 block. Those owners who have

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<sup>4</sup> The owners present were the applicant, Archibald McRoberts Smith (recorded as Archie Smith in the minutes), Charles Kingford Smith (recorded as Charlie Smith in the minutes) and Ira Elizabeth Anne Wallace (recorded as Beth Wallace in the minutes).

<sup>5</sup> Joyce Isobel Lloyd and William McRoberts Smith, as children of George Paul Takahuri Smith.

<sup>6</sup> It is assumed that the applicant herself did not vote, as she would have been in support of the application.

signed in agreement are Paul Renner, Victoria Mary Smith (who holds a life interest with remainder to Sebastian Smith and Oscar Smith), Richard James Smith and Ella McLean. Those owners who have signed in opposition are A Smith (being Archie Smith) and C K Smith (being Charlie Smith).

**He aha ngā kōrero a te kaitono?**

*What does the applicant say?*

[14] The applicant says that the homestead is owned by her and her sister, Ella McLean, in accordance with Ira Smith's will. She says that the Tuahu 1A2B block was owned absolutely by Ira Smith, and the will left the portion of the block below Ruakituri Road to her and Ella McLean. She says that Ira Smith had always thought that she owned all of the shares in the original Tuahu 1A2B block and indeed the Māori Land Court records indicated that at a point in time. Ira Smith passed in 1990, and it was not until 1993 that the Māori Land Court advised that the Court's records were erroneous. By letter from the Deputy Registrar dated 29 June 1993, the Court advised the solicitor for the estate of Ira Smith that the Court records erroneously recorded Ira Smith as owning all three shares in Tuahu 1A2B, when in fact two of those shares were held by George Smith. Ultimately, however, when Ira Smith dealt with the Tuahu 1A2B block in her will, she left the part lying below Ruakituri Road to her and Ella McLean. This is where the homestead is located.

[15] The applicant further says that the homestead was matrimonial property of her parents. Although the relevance of this point was not clear in the application, the submission appears to be that, as the surviving spouse, Ira Smith became the sole owner of the homestead on George Smith's passing, which she then left by will to the applicant and Ella McLean. Accordingly, it is submitted that the homestead is now owned by the applicant and Ella McLean.

[16] In terms of the occupation order, the applicant considers that the owners have had sufficient notice of the application and they have had sufficient opportunity to discuss and consider it. She further says that there is a sufficient degree of support among the owners, having regard to the nature and importance of the matter. She seeks an area of 3.416 hectares, which represents her proportionate shareholding in the Tuahu 6 block. In this regard, she says her beneficial interests in the block justify the occupation order.

[17] The applicant acknowledges that the effect of the occupation order will be to exclude other owners from the homestead and the area surrounding it. She also acknowledges that the current occupants of the homestead will be required to vacate it. She says this should not create any difficulties because the homestead is currently occupied by third parties (being managers of Kokotea Station). She says that her occupation of the homestead should be prioritised over third parties.

[18] In support of the applicant and after the hearing, Brian Yuile submitted on 21 December 2021 that the Court should treat Ira Smith as the sole owner of the Tuahu 1A2B block. He says that it is evident from Ira Smith's will that she believed she was the sole owner of the Tuahu 1A2B block. He proposes that the Court should therefore consider the applicant and Ella McLean as the owners of Tuahu 6 (equally) and Archibald, Charles, David and Philip Smith as the owners of Tuahu 7 (equally).

### **He aha ngā kōrero a ngā kaiurupare?**

*What do the respondents say?*

[19] The applications are opposed by Charles Kingsford Smith, Ira Elizabeth Wallace, William Vandy Smith (also known as William Vande Smith or Bill Smith), Archibald McRoberts Smith and David Cowan Smith. Many of the owners who oppose the applications attended the hearing on 13 December 2021. In summary:

- (a) Mr Harman appeared for Archibald Smith (Archie) and his whānau.<sup>7</sup> He argued that, because the 1997 partition of the Tuahu 1A2B block included a restriction under s 304 of Te Ture Whenua Māori Act 1993 ("the Act"), the granting of an occupation order is prohibited because it is a disposition that is prevented by s 304 of the Act. In any event, he submitted that, as a result of the 1997 partition of the Tuahu 1A2B block, the ownership of Tuahu 6 clearly includes all of George and Ira Smith's children (or their successors). Tuahu 6 is not owned solely by the applicant and Ella McLean.

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<sup>7</sup> Jessica Harris, Archie Smith's eldest daughter, also appeared at the hearing in opposition to the application.

- (b) David Smith submitted that, because all of the children of George and Ira Smith own shares “below Ruakituri Road” in Tuahu 6, they must all have interests in the homestead.
- (c) George Smith, being the son of George Paul Takahuri Smith, noted that the applicant currently grazes part of the Tuahu 6 block. He also noted that Richard James Smith had signed powers of attorney in favour of his two daughters, so it would be difficult to say that Richard Smith is in support of the application unless his daughters also say so. He indicated that the homestead should remain available for Archie, Charles and David Smith.

**Te Ture**  
*The Law*

[20] Sections 328 and 329 of the Act give the Court a discretion to grant occupation orders. The key aspects of those sections that are relevant to this application are:

- (a) An occupation order can be granted over Māori freehold land.<sup>8</sup> The Tuahu 6 block is Māori freehold land.
- (b) An occupation order can be vested in an owner of any beneficial interest in that land.<sup>9</sup> The applicant is such an owner.
- (c) An occupation order grants exclusive use and occupation of the relevant area as a site for a house, including a house that has already been built and is located on the land when the occupation order is made.<sup>10</sup> The homestead is an existing house and an occupation order can be granted over it.
- (d) An occupation order is not a partition, development or subdivision.<sup>11</sup>

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<sup>8</sup> Te Ture Whenua Māori Act 1993, s 328(1).

<sup>9</sup> Te Ture Whenua Māori Act 1993, s 328(1)(a).

<sup>10</sup> Te Ture Whenua Māori Act 1993, s 328(1).

<sup>11</sup> Te Ture Whenua Māori Act 1993, s 328(3).

- (e) The Court may specify that an occupation is for a specified period or that it ends on the occurrence of a defined event.<sup>12</sup> The occupation order sought by the applicant is indefinite, but the Court may limit its duration.
- (f) The Court must be satisfied that the following requirements are met:
- (i) The owners of the land have had sufficient notice of the application and sufficient opportunity to discuss and consider it.<sup>13</sup>
  - (ii) The owners of the land understand that the occupation order may pass by succession and may be for a specified term or until the occurrence of a defined event.<sup>14</sup>
  - (iii) There is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.<sup>15</sup> What constitutes sufficient support is assessed on a case-by-case basis.<sup>16</sup> The Māori Appellate Court has previously endorsed an occupation order that was supported by just over 2% of the owners (by number) holding just over 10% of the shares in the land, although this circumstance was unusual.<sup>17</sup>
  - (iv) In the circumstances, the extent of the beneficial interests held or entitled to be held by the person who seeks the occupation order justifies the order.<sup>18</sup> This does not require an “ownership match”, such that a person who seeks an occupation order does not need to own enough shares to justify it.<sup>19</sup>

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<sup>12</sup> Te Ture Whenua Māori Act 1993, s 328(4).

<sup>13</sup> Te Ture Whenua Māori Act 1993, s 329(2)(a).

<sup>14</sup> Te Ture Whenua Māori Act 1993, s 329(2)(aa).

<sup>15</sup> Te Ture Whenua Māori Act 1993, s 329(2)(b).

<sup>16</sup> *Brown v Māori Appellate Court* [2001] 1 NZLR 87.

<sup>17</sup> *Whaanga - Anewa Block* [2013] Māori Appellate Court MB 45 (2013 APPEAL 45), at [38].

<sup>18</sup> Te Ture Whenua Māori Act 1993, s 329(2)(c).

<sup>19</sup> *Bidois - Te Puna 154D3B2B* (2008) 12 Waiariki Appellate MB 102 (12 AP 102), and *Sione - Te Hapua 24* (2000) 4 Taitokerau Appellate MB 275 (4 APWH 275).

- (g) The Court must have regard to the opinions of the owners as a whole, the effect of the occupation order on the interests of the owners of the land and the best overall use and development of the land.<sup>20</sup>
- (h) Because the granting of an occupation order is discretionary, the Preamble and s 17 of the Act are relevant.

**Ngā take**

*Issues*

[21] Having regard to the facts of this application and the relevant law, the issues to determine are:

- (a) Who are the owners of the Tuahu 6 block?
- (b) Who owns the homestead?
- (c) Have the owners of the Tuahu 6 block had sufficient notice of the application and sufficient opportunity to discuss and consider it?
- (d) Do the owners of the Tuahu 6 block understand that the occupation order may pass by succession and may be for a specified term or until the occurrence of a defined event?
- (e) Is there a sufficient degree of support among the owners of the Tuahu 6 block, having regard to the nature and importance of the matter?
- (f) Does the applicant hold sufficient beneficial interests in the Tuahu 6 block to justify the occupation order?
- (g) What are the opinions of the owners as a whole, the effects on their interests, and the best overall use and development of the land?

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<sup>20</sup> Te Ture Whenua Māori Act 1993, s 329(1).

- (h) Is the outcome consistent with the Preamble and s 17 of the Act?

### **Kōrerorero**

#### *Discussion*

#### *Who are the owners of the Tuahu 6 block?*

[22] The applicant and Brian Yuile encouraged me to treat the Tuahu 6 block as owned by the applicant and Ella McLean, as that was the intent of Ira Smith's will. I cannot do that. The Court records set out the owners of the Tuahu 6 block as a result of the 1997 partition. There are 17 such owners. The partition order is over 10 years old. Section 77(1) of the Act prevents me from declaring that partition order to be invalid. I must therefore rely on the current ownership details for the Tuahu 6 block, as set out in the Court records. This means that all of the children of Ira and George Smith (or their successors) are owners in the Tuahu 6 block.

[23] I note that the partition of the Tuahu 1A2B was sought in 1996 by the executors of Ira Smith's estate, being Brian Yuile and Murray Renner. They put a proposal to the Court as part of this partition application that, on its face, acknowledged that Ira Smith owned only one share in the Tuahu 1A2B block. The exchange between Judge Isaac (as he was then) and Brian Yuile at the partition hearing on 30 April 1996 confirmed that the partition calculations were based on Ira Smith's estate holding one share in the Tuahu 1A2B block and George Smith's estate holding two shares.<sup>21</sup>

#### *Who owns the homestead?*

[24] The applicant says that she and her sister, Ella McLean, own the homestead because it was left to them in Ira Smith's will. For these reasons, I do not agree:

- (a) Ira Smith's will did not refer to the homestead specifically.
- (b) Ira Smith's will left that part of the Tuahu 1A2B block between Ruakituri Road and the Ruakituri River to the applicant and Ella McLean. Ira Smith

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<sup>21</sup> 95 Wairoa MB 99-103 (95 WR 99-103).

could only leave what she owned, which was one share in the Tuahu 1A2B block. This was given effect to through the partition in 1997. As noted, this partition effectively resulted in the applicant and Ella McLean receiving Ira Smith's one share in the parent Tuahu 1A2B block. They also received a share of George Smith's two shares in the parent block, together with their other 11 siblings. As a result, all of the siblings became owners in the Tuahu 6 block.

- (c) There was no determination, either on succession to Ira Smith or during the 1997 partition, that the homestead was owned only by the applicant and Ella McLean. Instead, the partition resulted in all of the siblings becoming owners of the land on which the homestead sits.
- (d) Although the applicant argued that the homestead was matrimonial property and therefore was owned absolutely by Ira Smith upon her passing, no detailed submissions were made as to the relevant law at the time of her passing. Moreover, if the homestead was matrimonial property that should have been dealt with separately from the associated land, the executors of Ira Smith's estate did not take those steps. Instead, they sought and obtained a partition that created a new land parcel for the homestead, with all 13 children of Ira and George Smith as owners.

[25] It is not clear why the homestead was not dealt with separately when succession to Ira and George Smith occurred between 1991 and 1996. It seems to have been dealt with as part of the underlying land (the Tuahu 6 block), in which all 13 children obtained interests. The inference is that all 13 children also obtained interests in the homestead, but that too is not clear. Ultimately, there is insufficient evidence at this stage for the Court to make a declaration as to the ownership of the homestead in favour of the applicant and Ella McLean.

[26] That application is therefore dismissed. That said, it is important that ownership of the homestead is determined. I encourage the owners of the Tuahu 6 block to reach an agreement on this point. Mediation is available should that be of assistance. If agreement cannot be reached, a further application per s 18(1)(a) of the Act should be filed, together with sufficient evidence to enable the Court to determine ownership of the homestead.

*Have the owners of the Tuahu 6 block had sufficient notice of the application and sufficient opportunity to discuss and consider it?*

[27] I consider that the owners of the Tuahu 6 block have had sufficient notice of the occupation order application and sufficient opportunity to discuss it. It was discussed at the 18 May 2021 meeting, which was advertised four times in the Wairoa Star. Although the first two of these public notices did not expressly refer to the occupation order application, the public notices on 4 and 11 May 2021 referred solely to that application. The 18 May 2021 meeting was reasonably well attended. All persons present had an opportunity to discuss the application. None of the persons in opposition to the application argued that there was insufficient notice of the application or insufficient opportunity to discuss and consider it.

*Do the owners of the Tuahu 6 block understand that the occupation order may pass by succession and may be for a specified term or until the occurrence of a defined event?*

[28] There is no indication in the minutes of the 18 May 2021 hui, or on the file generally, that the owners were expressly made aware that the occupation order may pass by succession. However, the application sought an unlimited term for the occupation order. On that basis, the parties were aware that the occupation order was sought for an indefinite term.

*Is there a sufficient degree of support among the owners of the Tuahu 6 block, having regard to the nature and importance of the matter?*

[29] Five owners (representing approximately 30% of the owners by number) holding approximately 58% of the shares support the occupation order in favour of the applicant.<sup>22</sup> Five owners (representing approximately 30% of the owners by number) holding approximately 25% of the shares oppose the occupation order. Two children of one of the deceased owners also oppose the occupation order, which if taken into account would mean those in opposition represent approximately 30% of the shares. A minority of the owners of the Tuahu 6 block support the application but they hold a majority of the shares.

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<sup>22</sup> If the shares of Richard James Smith are not included, the level of shareholding in support reduces to approximately 52%.

[30] Determining whether there is sufficient support is not based on pure arithmetic.<sup>23</sup> Section 329(2)(b) of the Act speaks of sufficiency of support and is further qualified by an assessment of the nature and importance of the matter in issue. This requires a case by case assessment. In this case, there is reasonably significant opposition. Those in opposition represent 30% of the shares. There is also majority support for the application in terms of shareholding. Matters are finely balanced.

[31] I must assess support having regard to the nature and importance of the matter. The following matters are relevant to this assessment:

- (a) There is an existing homestead on the Tuahu 6 block. There is no determination of ownership of that homestead.
- (b) The area sought by the applicant for the occupation order includes that homestead. If the occupation order is granted, by default she will obtain exclusive use and occupation of the homestead as well.
- (c) Although I have determined that there is insufficient evidence to determine ownership of the homestead at this stage, the inference is that it is owned by all of the owners in the Tuahu 6 block as per their respective proportions. If this is correct, then the granting of an occupation order in favour of one owner will effectively deny the rights of the other owners.
- (d) The homestead has been occupied by Charles Smith and his whānau for many years, although the evidence before the Court is that they no longer occupy the homestead and instead it is being occupied by third parties.

[32] I consider these factors require a high level of support for the occupation order, particularly given my conclusion that there is insufficient evidence at this stage to say that the applicant and Ella McLean own the homestead. The granting of an occupation order over the area on which the homestead sits will in many ways constitute a *de facto* determination of ownership of the homestead in favour of the applicant. In these

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<sup>23</sup> *Neal–Taiharuru 4C3C* (2016) 132 Taitokerau MB 97 (132 TTK 97), at [30], in relation to s 288(2)(b) of the Act.

circumstances, the Court should be wary of effectively determining ownership of the homestead (or at least possession of it) through a side door. Requiring a high level of support among the owners for the occupation order mitigates this risk. Exactly what level of support is required cannot be set by hard and fast rules. A case-by-case assessment is required. In the present case, a simple majority, or something close to it, would not be enough.

[33] The level of opposition is also relevant. When the court is required to assess levels of support among landowners, it is almost always the case that the views of some owners are not known. In some cases where there is no opposition, the Court has accepted relatively low levels of owner support for occupation orders. But where there is opposition, it is proper for the Court to take that level of opposition into account, having regard to the nature and importance of the matter. In these circumstances, the opposing owners represent approximately 25-30% of the shares. That is not insignificant.

[34] Having regard to the nature and importance of this matter, I consider that there is insufficient support for the occupation order. Only four of 17 owners support it. Although they hold approximately 58% of the shares in the Tuahu 6 block, something just in excess of a simple majority, in the face of relatively significant opposition, is not enough in these particular circumstances.

[35] Because there is insufficient support for the occupation order, the application must be declined. However, if I am wrong in my assessment that there is insufficient support, I now consider the remaining requirements of ss 328 and 329.

*Does the applicant hold sufficient beneficial interests in the Tuahu 6 block to justify the occupation order?*

[36] The applicant owns 22.46% of the shares in the Tuahu 6 block. The Tuahu 6 block comprises 15.21 hectares. On a pure mathematical calculation based on an “ownership match” approach, the applicant’s shares would justify an occupation area of approximately 3.416 hectares. She seeks this area. Her shares would appear to justify it.

[37] However, occupation orders must be granted as a site for a house. 3.416 hectares is usually more than is required as a site for a house. Indeed, 3.416 hectares would represent

the applicant's general shareholding entitlement if the Tuahu 6 block was partitioned. An occupation order is not a partition. If an occupation order were to be granted in favour of the applicant, it should only be for an area for a house site and appropriate yards. That would be far less than 3.416 hectares.

*What are the opinions of the owners as a whole, the effects on their interests, and the best overall use and development of the land?*

[38] I have had regard to the opinions of the owners as a whole in my assessment of whether there is sufficient support among the owners for the occupation order. In that context I have also had regard to the effects on their interests, particularly any interests they may have in the homestead. The best overall use and development of the land surrounding the homestead would be for residential purposes. The granting of an occupation order (of a suitable area) for the homestead would seem to be consistent with the best overall use and development of that part of the Tuahu 6 block. There is limited information about how the remainder of the Tuahu 6 block would be used or developed if an occupation order were granted. The evidence is that the block is currently grazed. The granting of an occupation order would not prevent the remainder of the block from continuing to be used for that purpose.

*The Preamble and s 17 of the Act*

[39] The granting of an occupation order over the Tuahu 6 block in favour of the applicant would generally be consistent with the Preamble, as it would facilitate the occupation, development, and utilisation of that land for the benefit of one of its owners. It would also be consistent with s 17(1), particularly because it would promote and assist in the effective use, management, and development, by or on behalf of the owners, of the block. If there was sufficient support for the occupation order, granting it would not be inconsistent with the Preamble and s 17 of the Act.

[40] Finally, given my finding that there is insufficient support for the application having regard to the nature and importance of the matter, I need not consider the argument put forward by Mr Harman that the s 304 restriction imposed when the Tuahu 1A2B block was partitioned in 1997 means the Court cannot grant an occupation order over the Tuahu 6 or 7

blocks, as to do so would constitute an alienation. However, I simply note that the restriction in s 304(2) only applies if the partitioned land is to be sold (which is not the case here) and s 328(3) expressly states that an occupation order is not a partition, development or subdivision.

### **Te Whakataunga**

#### *Decision*

[41] It is clear that the applicant considers that she and Ella McLean are the rightful owners of the Tuahu 6 block. The problem is that there are various court orders, arising from the initial purchase by Ira Smith of interests in the Tuahu 1A2B block in the 1960s, the succession to Ira Smith, the succession to George Smith, and the partition of the Tuahu 1A2B block (all in the 1990s) that say otherwise. All of these orders are over 10 years old. They are conclusive for my purposes. If the applicant wishes to challenge these historical orders, the proper approach is to make an application to the Chief Judge per s 45 of the Act.

[42] For the reasons set out above, the applications are dismissed.

### **Ngā ōta**

#### *Orders*

[43] The application for an occupation order over part of the Tuahu 6 block in favour of the applicant is dismissed.

[44] The application to determine ownership of the homestead located on the Tuahu 6 block is dismissed.

[45] Archie Smith was represented by counsel. Counsel is to file any memoranda as to costs by 15 July 2022. The applicant is to file any response by 29 July 2022.

I whakapuaki i te 4.00 pm i Te Whanganui-a-Tara, rua tekau mā toru o ngā rā o Pipiri i te tau 2022.

D H Stone  
**JUDGE**