

**IN THE MĀORI LAND COURT OF NEW ZEALAND  
WAIKATO-MANIAPOTO DISTRICT**

**A20190002993**

UNDER Section 67 and 328, Te Ture Whenua Māori Act  
1993

IN THE MATTER OF Ohuki 1C Sec 2 Block

DOUGLAS FAULKNER, TAMATI WIRINGI  
AND MARGARET BAILEY AS TRUSTEES OF  
THE WIRINGI FAULKNER WHĀNAU TRUST  
Applicants

Hearing: 24 June 2019, 183 Waikato Maniapoto MB 27 - 44  
(Heard at Tauranga)

Judgment: 16 July 2019

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**JUDGMENT OF JUDGE D H STONE**

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## Introduction

[1] The trustees of the Wiringi Faulkner Whānau Trust have filed an application under s 328 of Te Ture Whenua Māori Act 1993 (the Act) seeking an occupation order over 0.4532 hectares of Ohuki No.1C Sec 2 block (the block).

[2] The issue to determine is whether the occupation order should be granted as sought.

## Background

[3] The block is Māori freehold land located in Tauranga, comprising approximately 12.5351 hectares. There are 45 owners who together hold 4,926 shares in the block. It is vested in the trustees of the Matapihi-Ohuki Trust, an ahu whenua trust for which Tio Faulkner, Hayden James Henry, Enid Ratahi-Pryor, Christopher George Stokes and Titihuia Carolyn Ririnui are the trustees.

[4] The Wiringi Faulkner Whānau Trust (the whānau trust) holds 178.1111 shares in the block. The trustees of the whānau trust are Douglas Faulkner/Wiringi, Margaret Bailey and Tamati Wiringi. They are also the applicants. They seek an occupation order in their favour, as trustees of the whānau trust, for a specified term ceasing on the death of Douglas Faulkner's last surviving grandchild.

[5] The application was heard on 24 June 2019 in Tauranga.<sup>1</sup> At the conclusion of the hearing I reserved my decision.

## The law

[6] The Court is empowered to grant occupation orders per s 328 of the Act. Section 329 directs the Court to the matters it must take into account in deciding whether or not to grant an occupation order. It provides:

### 329 Matters to be considered

- (1) In deciding whether or not to exercise its jurisdiction to make any occupation order, the Maori Land Court shall have regard to—
  - (a) the opinions of the owners as a whole; and

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<sup>1</sup> 183 Waikato Maniapoto MB 27-44 (183 WMN 27-44).

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

[7] The Court must also take into account the matters set out in the Preamble and ss 2 and 17 of the Act.

### **Discussion**

[8] To grant the occupation order as sought, I must be satisfied that:

- (a) the owners of the block have had sufficient notice of the application and sufficient opportunity to discuss and consider it;
- (b) the owners of the block understand that it may pass by succession and is for a specified term;
- (c) there is a sufficient degree of support for it among the owners of the block, having regard to the nature and importance of the matter; and
- (d) the interests in the block held by the whānau trust justify it;

[9] I must also have regard to:

- (a) the opinions of the owners as a whole;
- (b) the effect of it on the interests of the owners in the block; and
- (c) the best overall use and development of the block; and

[10] Finally, any decision I reach should take into account the matters set out in the Preamble and ss 2 and 17 of the Act.

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

[11] A meeting of owners of the block was held on 28 July 2018. Notice for the meeting was placed in the New Zealand Herald and the Bay of Plenty Times on 7 July 2018. The notice expressly advised that the purpose of the meeting was to consider the whānau trust's wish to seek an occupation order over the block. The notice also indicated that a secondary purpose of the hui was to seek written consent from all other owners to erect a dwelling on the whānau trust's "allotment". Similar notice was also given by Facebook on 23 July 2019.

[12] Six owners, holding 40.29% of the shares in the block, attended the 28 July 2018 meeting. The minutes clearly record that the whānau trust's application for an occupation order was distributed to those present. Two resolutions were passed. The first proposed that the area for the occupation order should be adjacent or parallel to the area subject to an existing occupation order in favour of Te Ata Bagnall.<sup>2</sup> The second proposed that the term of the occupation order should be until Douglas Faulkner's great granddaughter passes away. Both resolutions were passed unanimously. A specific resolution seeking support for the occupation order was not passed, but I consider that the resolutions that were passed inherently constitute support for the order.

[13] Not content with the level of support obtained at the meeting, the whānau trustees continued to seek written support from other owners in the block. They visited some owners at their residential addresses during August 2018. They searched Facebook and other social

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<sup>2</sup> 38 Waikato Maniapoto MB 74-82 (38 WMN 74-82).

media sites such as Linked-In, the White Pages, and contact lists for the Ngāi Tukairangi hapū to attempt to locate owners. They sent copies of the application to owners who they managed to find through these searches. As a result, they obtained a further 12 written consent forms from owners holding approximately 23% of the shares. Together with the shares held by those owners who attended the 28 July 2018 meeting, the trustees of the whānau trust consider they have support from owners who hold approximately 63% of the shares in the block.

[14] At this point I note that the terms of the written consents differ from the resolutions passed at the 28 July 2018 meeting. While the meeting passed two resolutions (regarding the location of the occupation order area and the term of the order), the written consents simply grant approval to the shareholders of the whānau trust to “proceed with an Occupational Order Application to develop their allotment of Ohuki 1C Sec2 for the purposes of building a dwelling”. The differences are immediately obvious. The written consents do not, on their face, indicate the location of the proposed area for the occupation order. Nor do they indicate support for the term of the order.

[15] In response to questioning, the applicants confirmed that those owners who provided written consent received:

- (a) A copy of the newspaper advertisement for the 28 July 2018 owners meeting;
- (b) A copy of the minutes of the owners meeting held on 28 July 2018;
- (c) A copy of the signed attendance sheet of the owners who attended the 28 July 2018 meeting;
- (d) A Consent Form for each owner to complete;
- (e) A copy of the application to this Court for an occupation order in favour of the Wiringi Faulkner Whānau Trust; and
- (f) A sketch plan of the proposed site for the occupation order.

[16] Relevantly, the owners who signed the written consents did so in the knowledge of the resolutions passed unanimously at the 28 July 2018 meeting, because they were provided with copies of those minutes. As noted above, those resolutions support both the location of the occupation order area and the term. These details were also supported by the information set out in the copy of the application and the sketch plan that were sent to owners who have signed written consents. Accordingly, for the purposes of assessing whether the owners have had sufficient notice of the application and sufficient opportunity to discuss and consider it, I am satisfied that the differences between the resolutions passed at the 28 July 2018 meeting and the wording of the written consents are immaterial.

[17] Finally, I note that there is a group of owners who do not support the application. They refer to themselves as the Cotter shareholders and together they hold approximately 16.29% of the shares in the block. In assessing notice and opportunity to consider the application, owners holding approximately 79.29% of the shares in the block have responded, either positively or negatively. That is a high response rate. It could not have been achieved without sufficient notice and sufficient opportunity for the owners to discuss and consider the application.

[18] Based on the notice for, discussion at, and resolutions arising from the 28 July 2018 meeting, together with the subsequent efforts by the trustees of the whānau trust to seek written consents from owners, I am satisfied that the owners of the block have had sufficient notice of the application and sufficient opportunity to discuss and consider it.

*Do the owners understand that the occupation order can pass by succession and will be for a specified term?*

[19] Those owners present at the 28 July 2018 meeting passed a resolution that the term of the occupation order would be until the passing of Douglas Faulkner's great granddaughter. The resolution does not specify a particular granddaughter, although it appears to relate to a particular person, rather than being generational in nature. This point is moot, however, because the trustees of the whānau trust no longer seek that term. Instead, they seek a term that expires on the passing of Douglas Faulkner's last surviving grandchild. In theory, the term now sought by the trustees is a generation in length less than what the owners at the 28 July 2018 meeting agreed to.

[20] In any event, the owners present at the meeting clearly understood that the occupation order would be for a specified term that would extend beyond Douglas Faulkner's lifetime, such that it would likely pass by succession. I am therefore satisfied that the owners at the 28 July 2018 meeting understood that the occupation order would pass by succession and would be for a specified term.

[21] In relation to those owners who have provided written consents and the Cotter shareholders, they were all provided with the minutes of the 28 July 2018 meeting and the application. Although there is an anomaly between the term stated in the minutes and the term actually sought in the application, both necessarily involve succession and a specified term (albeit different terms). On that basis, I am satisfied that the owners who have provided written consents and the Cotter whānau understood that the occupation order would pass by succession and would be for a specified term.

*Is there a sufficient degree of support for the application among the owners having regard to the nature and importance of the matter?*

[22] What constitutes a sufficient degree of support for the purposes of s 329(2)(b) of the Act was considered by Judge Ambler in *Bhana v Paniora*.<sup>3</sup> He held:

[46] I therefore proceed on the basis that I must assess whether there is a sufficient degree of support having regard to the "nature and importance" of the proposal; that this requires an assessment of the factual context; that the Act does not prescribe a minimum threshold of support in terms of percentage of ownership; and that the Act does not necessarily require a majority of owners or ownership to support a partition or occupation order.

[23] In *Whaanga v Niania – Anewa Block* the Māori Appellate Court held that support from a minority of ownership may amount to sufficient support depending on the circumstances of the case.<sup>4</sup>

[24] As noted above, 18 owners holding approximately 63% of the shares in the block support the application. There are 45 owners in the block. In terms of absolute numbers, this means about 40% of the owners support the application.

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<sup>3</sup> *Bhana v Paniora – Wairau North 1B2C* (2013) 69 Taitokerau MB 139 (39 TTK 139).

<sup>4</sup> *Whaanga v Niania – Anewa Block* (2011) 2011 Māori Appellate Court MB 428 (2011 APPEAL 428). Although this case concerned an application for partition under s 288(2)(b), the relevant statutory language is identical to s 329(2)(b).

[25] Not all owners who responded support the occupation order, however. By correspondence to the whānau trust dated 28 October 2018, the Cotter shareholders, who together hold approximately 16.29% of the shares in the block, indicated that they were not prepared to support the application. Nor did they indicate that they oppose it.

[26] Interestingly, in their response to the whānau trust the Cotter shareholders indicated a preparedness to enter into negotiations to sell their shares to the whānau trust. An inference could be drawn that the only reason they do not support the application is because they would prefer for the whānau trust to purchase their shares. If that were the case, then s 17(2)(d) may be relevant to protect majority interests in land from an unreasonable minority. That said, I need not decide that point if I am satisfied that there is a sufficient degree of support for the application notwithstanding the position of the Cotter shareholders.

[27] Owners who hold a majority of the shares in the block support the application. Although those owners do not represent a majority of owners by absolute number, only the Cotter shareholders do not support the application. Moreover, they have indicated that they are prepared to sell their shares in the block to the whānau trust. They did not raise any other particular reason as to why they do not support the application.

[28] I also note that a majority of the trustees of the Matapihi-Ohuki Trust, as the administrative structure responsible for the block, have signed written consents for the application. The only trustee of that trust that has not signed a consent is Enid Ratahi-Pryor.

[29] I must consider the nature and importance of the application in assessing support. I am mindful that, if the application is granted, the whānau trust will have exclusive rights over the occupation order area, to the exclusion of other owners. These rights will exist for a relatively significant period of time. Other owners may desire to occupy the area, although there is no evidence of any such desire based on the information provided to the Court to date. The owners themselves were well placed to assess the nature and importance of this application, and a majority of them (by shareholding) support it.

[30] Having regard to the nature and importance of the matter, I consider that there is a sufficient degree of support for the application.

*Does the extent of the beneficial interest held justify the order?*

[31] The proposed site of the occupation order is 0.4532 hectares in size. The whānau trust holds 178.1111 shares in the block, which proportionately equates in area to 0.4532 hectares.

[32] I have not conducted a site visit of the block. However, the trustees of the whānau trust have confirmed that access to the site is through the existing driveway that accesses the area subject to an existing occupation order in favour of Te Ata Bagnall. The aerial photographs supplied by the applicants clearly show this existing accessway. Te Ata Bagnall has signed a consent to the application order sought by the whānau trust, so I assume that access is agreed.

[33] At the hearing on 24 June 2019, I queried the applicants as to how much of the block is available for residential purposes. They indicated that approximately 75% of the area of the block could be used for that purpose, as the remainder is swamp. I raised the potential issue that, if only 75% of the block is habitable, would an occupation area calculated by reference to 100% of the area of the block result in an area that does not truly reflect the interests of the whānau trust. In response, the applicants advised that the trustees of the Matapihi-Ohuki Trust have determined that only another 6 occupation orders will be granted over the block, such that my query would become moot. The minutes of the meeting of the Matapihi-Ohuki Trust held on 20 October 2018 filed with the application confirm that the intention of those trustees is to create “6 more sections”, although it is not clear whether that is all they will create.

[34] I am also mindful that, although based on the same number of shares in the block as held by the whānau trust, the existing and adjacent occupation order in favour of Te Ata Bagnall is for an area of 0.3000 ha. This is less than the area that could have been justified based on a straight conversion of percentage shareholding to area.

[35] I am generally satisfied the area sought by the applicants is justified based on their interests. However, I have some reservations as to whether the area sought properly reflects the useable area of the block. I will come back to this point when assessing the best overall use and development of the block.

*What is the overall opinion of the owners as a whole?*

[36] Section 329(1)(a) requires me to have regard to the opinions of the owners as a whole. Much of this ground is covered already. It is sufficient to state again that a majority of owners support the application, no owner outright opposes it, and members of the Cotter whānau do not support it but are prepared to sell their shares in the block to the whānau trust. I have had regard to these opinions.

[37] I record also that no opposition was expressed at the 24 June 2019 hearing.

*What is the effect on the interests of the owners of the block?*

[38] The applicants advise that the block is not utilised other than for residential purposes and that the particular area proposed for the occupation order is not currently used but is contiguous with an area over which there is an existing occupation order. Obviously, granting an occupation order as proposed will mean that the other owners of the block will not have the right to utilise that area but that is the natural consequence of an occupation order. I consider that there are no other detrimental effects on the remaining owners of the block.

*What is the best overall use and development of the block?*

[39] As stated, the block is already used for residential purposes and there is an existing occupation order over it. The trustees of the Matapihi-Ohuki Trust have determined to permit further occupation orders to be sought over the block. The location of the block within the city boundaries of Tauranga along with the above factors point to residential purposes being the best overall use and development of parts, if not all, of this land. The application gives effect to that use and development.

[40] The applicants confirmed at the hearing that they will need to apply for a resource consent to establish another dwelling on the block. They are prepared to seek that consent, but say there is no point in doing so unless they have an occupation order. The logic is compelling. I do not consider the requirement for resource consent means that residential use is not the best overall use and development of the block. However, it does give rise to a risk that, despite best intentions, the establishment of a house on the site may prove illusive.

I therefore consider it appropriate to provide for the cancellation of the order if a dwelling is not established on the site within a specific period. I consider 5 years should be sufficient.

[41] Although the size of the occupation area may be justified based on the whānau trust's interests in the block, its location is another issue. The owners who support the application are aware of the proposed location of the occupation order, as they were provided with the sketch plan submitted with the application. A copy of that sketch plan is attached as *Appendix A*. Clearly there is support for the proposed location.

[42] However, it is not clear to me why the proposed occupation area does not align with the southern boundary of the block. The result is an area of land between the proposed occupation area and the southern boundary of the block that is potentially unusable for future occupation by other owners. Such a result does not accord with the best overall use and development of the block.

[43] As noted already, the minutes of a meeting of the block trustees held on 20 October 2018 indicate that further occupation orders over the block are proposed. It would be helpful to have a rough sketch plan showing where those orders are likely to be situated, to be satisfied that the proposed area for the whānau trust's occupation order aligns with the broader strategy of the block trustees. I acknowledge that such a sketch plan will necessarily be indicative only, because the location and size of future occupation orders may depend on the number of block shares held by those who seek them. But it is important that, in granting the occupation order sought by the trustees, I do not render part of the block unusable.

[44] I am also mindful that the applicants should not be unnecessarily delayed. They reasonably desire some certainty to proceed to the next step of applying for the necessary resource consents to build on the block. Indeed, it is possible that information relating to the indicative size and location of future occupation orders over the block will need to be prepared and considered as part of the resource consent process anyway. There is, for example, evidence of exchanges between the applicants and the Tauranga City Council in which officers of the Council indicate that it may be best to apply for a resource consent over the entire block, rather than just the area of the proposed occupation order for the whānau trust. Accordingly, I propose to make any order conditional on the whānau trustees obtaining from the block trustees and filing with the Court, and the Court being satisfied with, an

indicative sketch plan of the size and location of future occupation orders over the block. I would expect such a sketch plan to avoid any parts of the block suitable for residential occupation being rendered unusable.

[45] As foreshadowed, my reservations regarding the size of the proposed occupation area are also relevant to the best overall use and development of the block. It is likely that, in seeking resource consent, the applicants will need an occupation order that complies with the minimum lot size. No evidence was presented on what is the minimum lot size, although there is evidence that the applicants have engaged with the Tauranga City Council to understand what will be required to obtain the necessary resource consents. In any event, in my view there is a range for the area of the proposed occupation order – at the lower end will be the minimum lot size and the higher end is 0.4352 ha.

[46] With this in mind, in finalising the indicative sketch plan for the entire block, some flexibility may be required in terms of the area of any occupation order granted in favour of the whānau trust. It may well be the case that the area granted in favour of the whānau trust should be less than 0.4352 ha, but equal to or greater than the minimum lot size, to fit within the broader scheme within the block. I consider it prudent to provide this flexibility. Doing so will give some certainty to the applicants that they have the right to occupy part of the block, while also giving flexibility to the block trustees to make sure that part is appropriate in the broader scheme.

*Preamble and objectives of the Act*

[47] The application facilitates the retention of Māori land in the hands of its owners, as well as its use and development. As Douglas Faulkner said so passionately at the hearing, the whānau will have a place to connect to the land and each other, a place to watch the mokopuna grow up. That is a vision that embodies the principles as set out in the Preamble and ss 2 and 17 of the Act.

*Can the occupation order be vested in the trustees of the whānau trust?*

[48] It is common, if not usual, for occupation orders to be granted in favour of a named person. When that person's land interests have been vested in a whānau trust, often the whānau trust is partially terminated in respect of those interests, so that the person holds a

direct interest in the land. This is due to a drafting oversight in the Act which leaves beneficiaries of a whānau trust ineligible to seek an occupation order because of the way their shares are held.<sup>5</sup> Occupation orders can only be granted to individuals who hold interests in the block.

[49] The trustees of the whānau trust are adamant that the occupation order should be granted in their favour, rather than any particular owner. They are reticent to partially terminate the whānau trust, and for good reason. They say that the original intent behind the establishment of the whānau trust was to ensure that the land interests of Kahurangi Wirangi were not fragmented. Partial termination of the whānau trust is contradictory to this purpose.

[50] It is often necessary to make an occupation order in favour of an individual because he or she intends to build on the area and requires a degree of security of tenure. This can often be a driver requiring, where necessary, the partial termination of a whānau trust. That is not the case here, because the whānau trust (through the trustees) intends to build on the area.

[51] The trustees of the whānau trust explained at the hearing that it is proposed that the whānau trust would be responsible for erecting (and would therefore own) any dwelling on the occupation order area. They say that this will enable the whānau to return home, at any given time, to attend whānau, hapū and iwi events. The proposed whānau dwelling will also continue to build intergenerational relationships within the whānau. They say that they plan to select a kaitiaki to reside long-term on the block, but anticipate that all of the whānau will be welcome.

[52] I am satisfied the trustees of the whānau trust understand the implications of the law and have planned accordingly. They hold the shares in the block, and equally, it is clear that I can make an occupation order in their favour.<sup>6</sup> I consider it is appropriate to do so.

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<sup>5</sup> *McCarthy – Utakura No.9* (2008) 124 Whangarei MB 84 (124 WH 84).

<sup>6</sup> For decisions involving occupation orders granted in favour of trustees of whānau trusts, see above n. 5, *Larkin – Wairau North 2F1* (2008) 124 Whangarei MB 90 (124 Wh 90) and *Milner – Takahiwai* (2008) 124 Whangarei MB 95 (124 Wh 95).

**Decision**

[53] Pursuant to s 328 of Te Ture Whenua Māori Act 1993, I make an order vesting exclusive use and occupation of an area of no less than the minimum lot size under any relevant planning instruments applicable to the block and no more than 0.4532 hectares, generally shown on the sketch plan attached as *Appendix 1*, within Ohuki No. 1C Sec 2 block in favour of the trustees from time to time of the Wiringi Faulkner Whānau Trust, with effect from the date of this judgment, on terms that:

- (a) The order is conditional on:
  - (i) the trustees of the Wiringi Faulkner Whānau Trust obtaining from the trustees of the Matapihi-Ohuki Trust and filing with the Court within 6 months of the date of this order an indicative sketch plan of the size and location of future occupation orders over the Ohuki No.1C Sec 2 block; and
  - (ii) the Court being satisfied with that sketch plan in all respects, including the location and size of the occupation order in favour of the trustees of the Wiringi Faulkner Whānau Trust save that the size must be no less than the minimum lot size as applicable to the block under any relevant planning instruments and no more than 0.4532 ha;
- (b) The trustees of the Wiringi Faulkner Whānau Trust, their invitees, agents and workers have a right of access over the balance of the block as detailed generally in the sketch plan filed with the application for the purpose of access to the said area;
- (c) The trustees of the Wiringi Faulkner Whānau Trust shall meet any rates or other charges levied in respect of the said area;
- (d) The order shall end and be cancelled by the Court in the event that the trustees of the Wiringi Faulkner Whānau Trust alienate any of the beneficial interests in the block which they hold at the date of this order;

- (e) The order shall end and be cancelled if the trustees of the Wirangi Faulkner Whānau Trust do not establish, or procure the establishment of, a dwelling within the said area within 5 years of the date of this order; and
- (f) The order shall otherwise end and be cancelled on the death of the last surviving grandchild of Douglas Faulkner.

Pronounced at 5:00 pm at Wellington on Tuesday this 16<sup>th</sup> day of July 2019.

D H Stone  
**JUDGE**