

**IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIARIKI DISTRICT**

**I TE KOOTI WHENUA MĀORI O AOTEAROA
TE ROHE O TE WAIARIKI**

A20170003413

UNDER Section 328, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Awanui Haparapara No 2B No 1B Section 2

BETWEEN RARUA ALICE INSLEY
Applicant

AND MICHAEL INSLEY
First Respondent

AND WHAREHAUA BUTLER, GAYLE NGATAI
AND BRONWYN NGATAI AS TRUSTEES OF
THE AWANUI HAPARAPARA 2B1B2 TRUST
Second Respondents

Hearing: 12 September 2017, 169 Waiariki MB 121-128
9 February 2018, 183 Waiariki MB 157-162
24 July 2018, 193 Waiariki MB 99-116
(Heard at Ōpōtiki)

Appearances: T Wara for Applicant
L Hemi for Respondents

Judgment: 5 December 2019

JUDGMENT OF JUDGE C T COXHEAD

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He hōnore, he kororia ki te Atua, he maungārongo ki te whenua, he whakaaro pai ki ngā tāngata katoa tētahi ki tētahi

E tangi tikapa ana te kanohi ora mō rātou kua hoki ki te marinotanga, ki te urunga tē taka, tāoki mai rā koutou. Heoi, me pēnei noa te whakatau, ko rātou ngā mate ki a rātou, ko tātou te kanohi ora ki a tātou.

Hei tīmatanga korero - Introduction

[1] This block and its owners have been the subject of a number of previous Court proceedings, particularly relating to occupation of the land. In 2017, an application was made to constitute an ahu whenua trust to better facilitate the use and administration of the land.¹ Following my reserved judgment dated 10 August 2017, the Awanui Haparapara 2B1B2 Trust was constituted and the land vested in Wharehau Butler, Michael Insley, Bronwyn Ngatai, Gayle Ngatai and Shannon Payne as responsible trustees.² In that decision, I also directed the trustees to meet with the Insley siblings to resolve access issues and to seek to formalise occupation arrangements regarding the site of the existing dwelling.

[2] The present application arises following the constitution of the trust. Rarua Insley applies for an occupation order on Awanui Haparapara No 2B No 1B Section 2 in favour of her and seven of her children. She seeks to occupy an area of 3,860 square metres, which includes the existing whānau home, for a term enduring for the lifetime of the last surviving child. The whānau has plans to renovate the house and provide a turangawaewae for future generations.

[3] The application is now opposed by Michael Insley, a son of the applicant, and the other trustees of the Awanui Haparapara 2B1B2 Trust. Mr Insley claims that, as an owner of the house, the proposed occupation excludes him and given the state of the whānau dynamics, the occupation order should not be granted. The trustees also note their concern with the ongoing disputes between the Insley whānau and now wish for the remainder of the block to be left for use by other owners.

[4] The issue for the Court to determine is whether the occupation order can be granted or whether the lack of consent from the trustees is fatal to the application.

¹ A20170002607.

² *Insley v Insley – Awanui Haparapara No 2B1B2* (2017) 167 Waiariki MB 183 (167 WAR 183).

Kōrero whānui - Background

[5] Awanui Haparapara No 2B No 1B Section 2 is Māori freehold land, 3.283 hectares in area. The land was created by partition order dated 18 May 1927.³ There are currently 45 owners in the land with a total shareholding of 8.1125 shares.

[6] There are two occupation orders in existence in relation to this land. The first was granted in 2010 in favour of Michael Insley for an area of 8,094 square metres.⁴ The second was granted in 2013, and later amended in 2014, in favour of Mei Payne and her successors for an area of 4,130 square metres.⁵

[7] In 2016, an order was made determining ownership of the existing house on the land, in favour of the grandchildren of Tom Butler, in accordance with his Will.⁶ The house was formerly owned by Te Ao Butler and Tom Butler jointly.⁷ The current owners of the house were determined as Geoffrey Insley, Michael Insley, Christopher Karamea Insley, Anthony Insley, Peter Insley, Tere Insley, Jeanette Insley, Bronwyn Insley, Carolyn Insley and Jacqueline Insley. These are the children of Rarua Insley.

Ngā kōrero tikanga - Procedural History

[8] Rarua Insley filed the application for an occupation order on 4 May 2017, together with an application to transfer shares in the land to seven of her children.

[9] The applications were both heard initially on 12 September 2017 and orders were granted in relation to the transfer of shares application.⁸ In relation to the occupation application, Michael Insley appeared in opposition and submitted that a meeting should be held in accordance with my reserved decision of 10 August 2017 to discuss his own issues, before the application progressed further. At the conclusion of the hearing, I adjourned the application for a meeting to take place and indicated that a facilitator would be engaged by the Court.⁹

³ 26 Ōpōtiki MB 160 (28 OPO 160).

⁴ 12 Waiariki MB 267 (12 WAR 267).

⁵ 77 Waiariki MB 141-150 (77 WAR 141-150); 106 Waiariki MB 258-264 (106 WAR 258-264).

⁶ 137 Waiariki MB 40-44 (137 WAR 40-44).

⁷ 48 Ōpōtiki MB 505 (48 OPO 505).

⁸ 170 Waiariki MB 1-3 (170 WAR 1-3).

⁹ 169 Waiariki MB 121-128 (169 WAR 121-128).

[10] Shane Gibbons was subsequently engaged by the Court to facilitate the meeting with the parties.¹⁰ The meeting was held on 28 October 2017 and a meeting report filed with the Court by Mr Gibbons on 17 November 2017. The report recorded unanimous agreement to the occupation order and the terms agreed to.

[11] A further hearing was held on 9 February 2018 and evidence taken by the Deputy Registrar.¹¹ The evidence was referred to the Court and a further hearing set down. Following adjournment requests, a special hearing was subsequently set down, which included the hearing of related applications involving these same parties.¹²

[12] The special hearing was held on 24 July 2018.¹³ After hearing from the parties, I directed applicant counsel to clarify for the Court the exact area of the proposed occupation. At the conclusion of the hearing, I reserved my decision pending confirmation of the proposed area. A proposed plan was subsequently filed with the Court.

Ngā kōrero a te Kaitono - The applicant's submissions

[13] The applicant submitted that she seeks an occupation order in favour of her and seven of her children for the area that the existing house is situated on, the ownership of which has already been determined. The application records that Michael Insley has not been included as he was previously gifted half of the applicant's shares in the land and already occupies an area of the land pursuant to an occupation order.

[14] Applicant counsel noted that the Insley siblings have previously spoken of their desire to develop and renovate their existing house to provide a homestead with a connection to their turangawaewae for themselves and future generations. The grant of the occupation order would allow them to proceed with renovations and would give the whānau exclusive access to that area surrounding the house, which could not be rescinded by any trespass notices issued by the trustees.

¹⁰ 173 Waiariki MB 92-93 (173 WAR 92-93).

¹¹ 183 Waiariki MB 157-162 (183 WAR 157-162).

¹² 186 Waiariki MB 28-30 (186 WAR 28-30).

¹³ 193 Waiariki MB 99-116 (193 WAR 99-116).

[15] It was also noted that, while the area proposed for the occupation order was the balance of the seaside land, there was other land remaining in the block which is currently planted with seedling pines.

Ngā kōrero a te Kaiurupare - The respondents' submissions

[16] The application was opposed by Michael Insley and the trustees of the Awanui Haparapara 2B1B Trust. Both initially supported the occupation order following the facilitated hui in October 2017, however, at the hearing it was advised that both respondents had changed their positions.

[17] Michael Insley noted that in 2016 the Court determined he and his siblings as the owners of the house. His mother, Rarua Insley, is not an owner in the house. He submitted that as the occupation order is sought for his mother and siblings, this effectively excludes him and will adversely restrict his rights as an owner in the house. He argued that while he did not want to be included in the occupation order, he also did not want his share of the house included in the occupation order. His view was that the internal issues between he and his family regarding the house should be resolved in the first instance. Regarding Mr Insley's change of mind, it was submitted that due to the constant disagreements between he, his mother and siblings, and given the further applications filed against him, he does not now support the application.

[18] The trustees of the Awanui Haparapara 2B1B submitted that their present concerns arise from the ongoing issues surrounding the Insley siblings and the tensions they bring to the whenua. The trustees are constantly being dragged into these issues and that is one of the reasons they are opposed to the occupation order being granted at the present time. The trustees noted that all the Insley whanau who are proposed as beneficiaries of the occupation order already have their own homes or have occupation in and around the area. Therefore, there is no apparent need for the occupation order. Further, as the Insley whānau only make up approximately one-third of the ownership, the trustees' view is that this area of land, as the balance of the usable land, should be left vacant and available for other owners to make their own occupation applications.

[19] Bronwyn Ngatai and Gayle Ngatai, both trustees and owners, together with Margaret Butler on behalf of her husband Max, also appeared at the hearing in opposition to the

application. All three spoke of the ongoing disagreements between the Insley siblings and its negative effects, and also expressed their desire for the land to be made available for other owners to be able to occupy.

Te Ture - The Law

[20] The Court has jurisdiction to make occupation orders pursuant to s 328 of Te Ture Whenua Māori Act 1993, which provides:

328 Occupation orders

(1) The Maori Land Court may, in its discretion, make, in relation to any Maori freehold land or any General land owned by Maori, an order vesting in—

- (a) the owner of any beneficial interest in that land; or
- (b) any person who is entitled to succeed to the beneficial interests of any deceased person, in that land,—

exclusive use and occupation of the whole or any part of that land as a site for a house (including a house that has already been built and is located on that land when the order is made).

(2) Where the land that will be affected by the order is—

- (a) land in respect of which a trust is constituted under Part 12; or
- (b) land vested in a Maori incorporation,—

the court shall not make the order without the consent of the trustees or of the management committee of the incorporation, as the case may require.

(3) Notwithstanding any rule of law, an order under subsection (1) shall not be deemed to be a partition, development, or subdivision of the land to which the order relates.

(4) In making an order under subsection (1), the Maori Land Court may specify—

- (a) that the occupation order is for a specified period; or
- (b) that the occupation order ends on the occurrence of a defined event.

[21] The Court's jurisdiction to grant an occupation order is discretionary and it must have regard to the opinion of the owners as a whole, the effect of the proposal on the interests of

the owners and the best overall use and development of the land.¹⁴ The Court must also be satisfied under s 329 of the Act that:¹⁵

- (a) The owners have had sufficient notice of the application and sufficient opportunity to discuss and consider it;
- (b) The owners understand the occupation order may pass by succession or may be for a specified term or until the occurrence of a defined event;
- (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) The extent of the applicant's beneficial interest in the land justifies the occupation order.

Kōrerorero - Discussion

[22] I find that the lack of trustee consent prevents the Court from being able to grant the occupation order. Section 328(2)(a) is clear that where a trust is constituted in respect of land, the Court shall not make an order of occupation without the trustees' consent.

[23] In *Howell v Jaram – Omaio 43 Section*, the Māori Appellate Court referred to the importance of this prerequisite and stated:¹⁶

[34] The second prerequisite is that if the land in question is vested in trustees constituted under Part 12 of the Act or an incorporation then the Court cannot make an order without the consent of the trustees or the management committee of the incorporation. We have considered the wording of s 328(2)(a) and (b) of the Act and consider that the consent of the trustees or committee of management is mandatory. If consent is not forthcoming, then the Court cannot then consider those factors referred to under s 329 of the Act. It is only once those two mandatory prerequisites under s 328 of the Act are satisfied that the Court can then move on to consider those matters set out in s 329 of the Act.

[24] This approach was also recently followed in *Malcolm – Waione Y Block*.¹⁷

¹⁴ Te Ture Whenua Māori Act 1993, s 329(1).

¹⁵ Te Ture Whenua Māori Act 1993, s 329(2).

¹⁶ *Howell v Jaram – Omaio 43 Section 4* [2015] Māori Appellate Court 365 (2015 APPEAL 365).

¹⁷ *Malcolm – Waione Y* (2018) 195 Waiariki MB 111 (195 WAR 111).

[25] The Awanui Haparapara 2B1B2 Trust is an ahu whenua trust constituted under Part 12 of the Act and s 328(2)(a) therefore applies. The lack of consent from the trustees is determinative and the Court cannot grant the occupation order.

[26] While the lack of trustee consent is fatal to the application succeeding, even if the trustees did consent to the occupation order, it is difficult to gauge the true levels of support for the application. In terms of sufficiency of support, counsel for the applicant did not put before the Court the specific levels of support for the application beyond the applicant and those whanau members who subsequently received her shares. Counsel did refer to the facilitated meeting held which I note received the unanimous support of those present. However, those in attendance at that meeting were the Insley whānau and the trustees. The meeting held prior to the filing of the application also appears to have been attended only by the Insley whānau and some of the trustees. As noted by the respondents, the Insley whānau only make up approximately one-third of the 45 owners in the land. Beyond the objections noted at the hearing by members of the Ngatai and Butler whanau, the opinions of the other owners remain largely unknown. This is why I say it is therefore difficult to gauge the true levels of support for the application.

[27] The current situation the parties are left with is that the house is owned by the Insley siblings and remains situated on the land. While as owners in the land they have a legal right to access the house, without some formal arrangement for occupation they cannot legally exclude other owners from that area of the land. That situation is less than ideal and creates a level of uncertainty for all parties. This needs to be addressed by the trustees and the Insley whānau.

[28] I do note that both Mr Michael Insley and the trustees present at the facilitated meeting unanimously supported the occupation order and agreed on terms. It was only subsequent to this when further disagreements arose that they withdrew their support. While in other circumstances the withdrawal of support of some owners might not be fatal to an application, the fact that the trustees no longer supported the application was fatal. On this basis, I urge the Insley whānau to put aside their hostilities and work together to find a solution which is acceptable to all parties, including the trustees.

Kupu whakatau - Decision

[29] Pursuant to s 328(2)(b) of the Act, the Court cannot grant an occupation order without the consent of the trustees of the Awanui Haparapara 2B1B2 Trust. The application is therefore dismissed.

Pronounced at 11:00am in Rotorua on this Wednesday the 5th day of December 2018.

C T Coxhead
JUDGE