IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIARIKI DISTRICT

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

A20170006751
A20170006804

UNDER	Sections 19 and 18(1)(a), Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Motuaruhe 5D Block
BETWEEN	JOSEPH KINGSNORTH Applicant
AND	CAROLINE CRAWFORD, JENNIFER CRAWFORD AND COLLEEN HIGGINS AS TRUSTEES OF THE HARIATA KINGSNORTH WHĀNAU TRUST Respondents

Hearings: 20 November 2017, 175 Waiariki MB 10-23 (Teleconference)
14 December 2017, 178 Waiariki MB 56-67 (Teleconference)
12 April 2018, 185 Waiariki MB 73-78 (Teleconference)
15-16 May 2018, 187 Waiariki MB 225-340
(Heard at Ōpōtiki)

Appearances: L Hemi for Applicant
T Wara for Respondents

Judgment: 24 October 2018

JUDGMENT OF JUDGE C T COXHEAD

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Tēnā koutou i ō tātou aituā maha e ngapu nei te whenua i tō rātou hinganga. Hēoi anō, e tāea te aha atu i te tangi, i te maumahara ki a rātou me tā rātou i mahi ai? Nō reira, waiho rātou ki a rātou, ko tātou ki a tatou.

Hei tīmatanga kōrero - Introduction

[1] Hariata Kingsnorth and Joseph Kingsnorth were married in November 1980. They meet in the late 1970s and lived periodically from 1986 in a house on the Motuaruhe 5D land block. From 1992 to 2013 the house was their permanent residence. Sadly, Hariata passed away in 2013. Joseph Kingsnorth had, until recently, continued to live in the house following Hariata's passing.

[2] That house was originally acquired by Hariata and her first husband Kingi Crawford, although the acquisition of the house was never formalised. Hariata and Kingi lived in the house for a number of years and two of their children were born there. Following Kingi Crawford's death in 1965. Hariata moved to Kaitaia, returning to live in the house in about 1970 for approximately four years. As noted above, after Hariata and Joseph were married they lived periodically from 1986 in the house and from 1992 to 2013 the house was their permanent residence.

[3] This decision concerns the determination of ownership of the house on Motuaruhe 5D Block that Hariata and Joseph lived in. The block is Māori freehold land and is administered by the Motuaruhe 5D Ahu Whenua Trust. There are currently 42 owners in the land, including the Hariata Kingsnorth Whānau Trust. No occupation orders have been granted in relation to the area of the land where the house is situated. There has been no previous determination of ownership of the house.

[4] The applicant, Joseph Kingsnorth, claims ownership of the house. He is not an owner in the land but has resided in the house for more than 30 years, with his late wife Hariata. The respondents, the Hariata Kingsnorth Whānau Trust, also claim an interest in the house. Since Hariata's passing in 2013, there have been ongoing tensions between Joseph and his wife's whānau.[1]

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[1] 175 Waiariki MB 10-23 (175 WAR 10-23) - As a result of the tensions, an interim injunction was issued on 20 November 2017, preventing Caroline Crawford, a daughter of Hariata Kingsnorth and a trustee of the Hariata Kingsnorth Whānau Trust, and her son Pararaki Waititi from entering the house and curtilage area, until further order of the Court.

Ngā Kaupapa - The issues

[5] Both parties were represented by counsel. Prior to the hearing, counsel filed a joint memorandum containing an agreed statement of facts and setting out their view of the remaining issues for the Court to determine.

[6] The joint memorandum provides as follows:

> 3. The parties agree that:
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> a. the house is a fixture;
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> b. that a section 18(1)(a) order determining ownership of a dwelling fixed to the land can be made in favour of a non-owner; and
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> c. that the remedy available to a non-owner is equitable relief by way of constructive trust; and
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> d. that an award of compensation is the most appropriate remedy.
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> 4. Accordingly the only issue to be determined is whether the applicant is entitled to equitable relief by way of compensation, and if so, what is the extent of the compensation.

[7] Therefore, the issues for determination include the ownership of the house, whether Joseph is entitled to any equitable relief by way of compensation for his contributions to the house, and if so, what amount of compensation is appropriate.

Ngā tāpaetanga a te Kaitono - Applicant's submissions

[8] Mr Hemi appeared for the applicant. He submitted that a constructive trust existed between the applicant and Hariata Kingsnorth and the applicant is entitled to equitable relief by way of compensation.

[9] Mr Hemi submitted that the understanding between Joseph and Hariata was that through their joint efforts and contributions they would build and create a home for themselves and that each would have an equal interest in the house. It was also understood that both would have a right to live in the property until their deaths. Mr Hemi argued that the constructive trust existed between the applicant and his wife, rather than with the whānau trust.

[10] Further, Counsel argued that the applicant made contributions to the house on the basis that he would have some interest in the house and be able to reside there until his death. However, due to the issues that have developed between the applicant and members of his wife's whānau, the applicant's ability to remain living at the property has been prematurely extinguished and the original agreement remains unfulfilled. Mr Hemi submits it is within this loss, or loss of opportunity, that the equity in this case resides and why compensation should be paid. If compensation is not paid, he says this will amount to an unjust enrichment in favour of the whānau trust.

[11] Mr Hemi argued that the evidence shows Joseph's contributions to the house were significant and, in effect, there was a complete rebuild of the original structure. The structure went from a bach of temporary occupancy to a home of real permanence. This will endure on the land for many years to come. He says that the type and extent of the contributions made by the applicant are consistent with the type and extent of contributions made in similar cases before the Court where compensation was ordered.

[12] In terms of the amount of compensation to be paid, Mr Hemi suggests that the Court adopt the approach taken in *Tipene v Tipene* which calculated the approximate value of the loss to the applicant of continued residence in the house on existing terms.[2] He also submitted that the value of the applicant's contributions should be assessed, not only in terms of monetary value, but also in terms of the intangible value. This includes that the property is now unrecognisable from the property that once stood, and that the value to the whānau trust, in terms of the house being used as a papakainga with the ability to be used as a permanent home or holiday home, has been immensely enhanced.

[13] Mr Hemi submitted that, while it is a difficult matter to assess, the amount of compensation he proposes does not offend against the overall justice of the case. In attempting to "do equity" between the parties, it would not result in any unfairness. He argued that the cost/benefit model suggested by the respondents is not appropriate in this case. The approach he suggests reflects the nature and understanding of the original agreement between the applicant and Hariata, who were married for 33 years. This was not a commercial agreement or a tenant and landlord arrangement. Accordingly, the equity in

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

this case would be satisfied with the payment of compensation to the applicant in the amount of $22,690.00.

Ngā tāpaetanga a te Kaiurupare - Respondents' submissions

[14] Ms Wara appeared for the respondents. She submitted that the house is a whānau house and the respondents' understanding was that the house was their property. She noted the house had been used by the whānau before the applicant took residence there in 1992, and even after 1992 whānau members continued to stay in the house. She says this expectation continued after the passing of Hariata in 2013.

[15] Ms Wara submitted that the respondents never opposed Joseph remaining in the house after the passing of their mother. In fact, the respondents advised Joseph in a letter that he had a right to live in the house until he dies. However, they argue that this right was conditional. He had to ensure the house was available for whānau when they wished to stay, was to refrain from altering the section, and was to clean up all the rubbish around the shed. Ms Wara says the applicant did not comply with those conditions. She further contended that any conditional interest the applicant had in the house terminated when the applicant decided to leave the house in Easter 2017 as he had met a new partner.

[16] Ms Wara submitted that the Court must determine where the equity lies in this case. To do so, the Court needs to determine the nature of the arrangements in relation to the house and the starting point is an assessment of the circumstances. The respondents say the circumstances between the parties were as follows:

(a) The house belonged to the whānau trust;

(b) There was no expectation that the applicant and Hariata would pay rent during their occupation of the house;

(c) There was no expectation that the applicant would be compensated for his maintenance nor his contributions;

(d) That the applicant would pay the rates;

(e) That the applicant could continue to live in the house after Hariata's death as long as he complied with the Trust's conditions; and

(f) The applicant decided to leave the house of his own accord.

[17] Ms Wara submitted that equity requires those who seek equity to do equity, and a person seeking equitable relief must act fairly towards those they seek relief against. She submitted that Joseph has failed to act fairly in his attempts to inflate his contributions to the house and to diminish its original condition. Further, Joseph's conduct towards the whānau has been less than equitable. This includes not allowing the whānau to stay at the house when they want and making them feel unwelcome. Ms Wara submitted that this conduct must be taken into account.

[18] In terms of compensation, Ms Wara submitted that the fairest calculation method is of contributions made minus benefit received. She argued that, contrary to the assertion of the applicant, the house was never derelict. While the respondents do not deny that the applicant has made certain improvements to the house, they rely on the valuer's assessment that the added value arising from the applicant's improvements is $57,000.00, rather than his claimed $100,000.00. Ms Wara noted that Joseph has also received considerable benefit from living in the house permanently since 1992, which has been valued at more than his contributions and leaving him indebted to the whānau trust. The respondents' position therefore is that the contributions made by the applicant are outweighed by the benefits he has received.

Te Ture - The Law

[19] Section 18(1)(a) of the Act provides as follows:

> **18 General jurisdiction of court**
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> (1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:
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> (a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:

[20] It is well-established that the Court's jurisdiction under s 18(1)(a) is declaratory in nature. It enables the Court to declare existing ownership rights at law or in equity but cannot be used to create, transfer or vest rights.[3] Although common law provides that the owners of the land own any fixtures, s 18(1)(a) enables the Court to recognise that improvements, such as houses, may be separately owned. In determining these matters, the Court has equitable jurisdiction and may recognise constructive trusts.[4]

Ngā Kōrerorero - Discussion

[21] The general starting point in determining ownership of a dwelling is to consider whether it is a fixture or a chattel. In this case, the parties have agreed that the house is a fixture and the Court therefore has jurisdiction under s 18(1)(a) to determine the legal and equitable ownership of the house.

[22] In considering the legal ownership of the house, I note that the applicant is not an owner in the land and nor is Hariata. The Hariata Kingsnorth Whānau Trust does hold shares in the block. Hariata is both a beneficiary and the tupuna of that trust.[5] There are no occupation orders in relation to the house. There are no previous determination of ownership. While the whānau trust holds shares in the land, they are not the owners, as the land is administered by the Motuaruhe 5D Ahu Whenua trust. Both parties have acknowledged that the house is a fixture and therefore legal ownership of the house rests with the trustees of the ahu whenua trust.

[23] In these proceedings, there has been no claim by the ahu whenua trustees to ownership of the house. Accordingly, I now consider the equitable interests of the parties.

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3 *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223); *Williams v Williams – Matauri 2F2B* (1999) 3 Taitokerau Appellate MB 20 (3 APWH 20); *McCann – Waipuka 3B1B1 and 3B1B2B1C2A* (1993) 11 Tākitimu Appellate MB 2 (11 ACTK 2) and *Paki – Matauri X Incorporation* (1996) 5 Taitokerau Appellate MB 16 (5 APWH 16).

4 *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223); *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121); *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 18I* (2003) 73 Tauranga MB 150 (73 T 150); *Brokenshaw – Te Kaha B6X2* (2003) 81 Ōpōtiki MB 18 (21 OPO 18).

5 See 92 Ōpōtiki MB 243-248 (92 OPO 243-248); 302 Aotea MB 219-221 (302 AOT 219-221); 302 Aotea MB 222-224 (302 AOT 222-224); 302 Aotea MB 225-227 (302 AOT 225-227) and 302 Aotea MB 228-230 (302 AOT 228-230).

Nō wai te whare nei? - Who owns the house?

[24] In the agreed statement of facts, counsel noted that the house was originally acquired by Hariata and her first husband Kingi Crawford. That acquisition of the house was never formalised. Hariata and Kingi lived in the house for a number of years. Two of their children were born there. Following Kingi Crawford's death in 1965, Hariata entered into a new relationship with Ken Wright. They moved to Kaitaia, returning to live in the house in about 1970 for approximately four years. Late in the 1970s Hariata met Joseph Kingsnorth and they lived in the house periodically from 1986. From 1992 to 2013 the house was their permanent residence. Joseph Kingsnorth has continued to live in the house following Hariata's passing in 2013.

[25] The respondents claim that the house is a whānau house and whānau trust property. The whānau trust was not established until 2006, at which time Hariata had been residing in the house for the better part of 40 years, 14 years of which was together with the applicant as her husband. The respondents have noted that the purpose of the trust was to secure shares for the land on which Hariata's house was located. This was initially mistakenly thought to be Motuaruhe 5E. Later, shares were exchanged to secure shares in the Motuaruhe 5D block. Even so, there is no clear evidence that the whānau trust were intended to have ownership of the house, as opposed to Hariata, and there were certainly no steps taken to formalise ownership in favour of the trust. I note that some renovations were carried out by the whānau, including Hariata's daughter and two son-in-laws, however the tenor of that evidence was that such renovations were carried out as assistance to Hariata, rather than with an expectation of receiving an interest in the house.

[26] From the evidence presented, it seems clear that the house was owned by Hariata. It was agreed that she originally acquired it with her first husband, she continued to live in it, at times periodically, but ultimately from 1992 for the remainder of her life. The fact that the house became a place of shelter for many whānau members, who would stay in the house in the times when Hariata did not live there or who visited on weekends and other occasions, is not inconsistent with the house belonging to Hariata. Nor is the fact that Hariata was heard to comment that the house belonged to her children. As Ms Crawford pointed out, the house was a legacy for Hariata's descendants. Hariata willingly opened her house to her whānau and created a place for the whānau to connect to their turangawaewae. However, the

impression I am left with is, even though the whānau were welcome, everyone understood the house to belong to Hariata.

[27] Despite this, Hariata's position must be considered in light of her marriage to Joseph, their long occupation of the house and his significant contributions.

Kua whai pānga a Mr Kingsnorth mō āna mahi i te whare?
Is Mr Kingsnorth entitled to equitable relief in relation to his contributions to the house?

[28] In terms of Joseph's interest, he claims that a constructive trust existed between himself and Hariata. He says the house was their marital home and it was understood between them that the contributions made to the property were on the basis that the property would become their joint home and each would have an equal interest. As part of that interest, they would both have a right to live in the property for their lifetime. The applicant claims he made significant contributions to the house, effectively rebuilding it and transforming it from a bach to their permanent residence. Counsel argued that if the equitable interest of the applicant is not recognised, this will amount to unjust enrichment in favour of the whānau trust.

[29] The respondents accepted that Joseph made certain improvements to the house and that such improvements were to the value of $57,000.00, although they contend this is outweighed by the benefits he received. The respondents disputed the argument that Hariata wanted the applicant to have a life interest in the house. They say they were happy for the applicant to continue living in the house after Hariata's passing, but on certain conditions. Since those conditions were not met and the applicant has now chosen to leave the house of his own accord, their position is that any conditional interest the applicant had is now at an end.

[30] In response, Joseph argued that the constructive trust existed between him and Hariata, rather than with the whānau trust. Therefore, the whānau trust should not be able to enforce conditions which were not part of the original understanding as between him and Hariata. Counsel also noted that the breakdown in the relationship with Hariata's whānau is the primary reason for the applicant seeking to vacate the property.

[31] The Court has considered the principles of constructive trusts and the rights of non-owners on several occasions. In *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 18I*, Judge Milroy dealt with a claim by a non-owner to ownership of a house, based on her contributions to its construction.[6] Judge Milroy considered the imposition of a constructive trust and referred to the approach of McGechan J in *Stratulatos v Stratulatos*:[7]

> Standing in the shoes of the plaintiff as claimant … would a reasonable person have understood that their efforts would result in an interest in the property? … Testing the situation by converse, would it have been reasonable to suppose they expected no rights in the property? Testing the question more generally, why else would they undertake this major task? …

[32] Judge Milroy noted that the basis of the equitable remedy of constructive trust was unconscionability; that equity intervenes to prevent those with rights at law from enforcing those rights when, in the eyes of equity, it would be unconscionable for them to do so.[8] Judge Milroy found that a reasonable person standing in the applicant's shoes would think they had an interest in the property and it would be against good conscience for the beneficial shareholders to deny them an interest. The shareholders would also have a windfall benefit from the value of the house that far exceeded the amount that might have been due to them by way of rental for the use of the land. The Court concluded that the applicant had an equitable interest in the house.

[33] In *Tipene v Tipene* the Court considered whether a non-owner had an equitable interest in a house to which she and her husband had made substantial improvements.[9] The Court considered the principles of constructive trust and also referred to the Court of Appeal decision in *Lankow v Rose*, which identified the following four features a claimant must show for the imposition of a constructive trust:[10]

1. Contributions, direct or indirect, to the property in question.
2. The expectation of an interest therein.
3. That such expectation is a reasonable one.
4. That the defendant would reasonably expect to yield the claimant an interest.

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6 *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 18I* (2003) 73 Tauranga MB 150 (73 T 150).
7 Āt 157, referring to *Stratulatos v Stratulatos* [1988] 2 NZLR 424 (HC) at 437.
8 At 158, referring to *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh* [1988] 3 NZLR 171 (CA).
9 *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2).
10 *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 294.

[34] In that case, the land was owned by a whānau trust, of which the applicant's husband and children were beneficiaries. The couple were invited by the husband's father to restore the house to be a home for them and their young family. There was no dispute that the couple carried out substantial improvements to the dwelling to make it habitable. There was no evidence that the whānau took issue with their right to reside in the house or ever expected them to pay rent.

[35] The Court found there was an implicit understanding that in return for their investment in restoring and maintaining the house, the couple would be entitled to a life interest or something similar. The Court also considered that the couple would not have undertaken such a major investment of time and energy in restoring the house and then occupying it over a number of years, if they thought they would have no interest in it. The Court concluded that it was appropriate for a constructive trust to be imposed. The four features identified in *Lankow v Rose* had been satisfied and it would be unconscionable for the Trust to have the benefit of the house without acknowledging an interest in favour of the applicant.

[36] In this situation, there is no dispute that Joseph Kingsnorth made substantial contributions to the house. While the respondents refer to the figure of $57,000, this is the value of the applicant's contributions as assessed by the valuer, rather than the true amount spent. The true amount spent is difficult to calculate without more detailed records. As such further difficulty in assessing the value is that contributions would depreciate over time in terms of the value added.

[37] Hariata paid the rates and Joseph Kingsnorth paid the insurance (although there is no documentation of this) and there appears to have been no expectation that the couple would pay rent. If rent was to be paid, this would surely be paid to the ahu whenua trustees, however their position is not known.

[38] The applicant has given evidence of his expectation of an interest, based on the understanding between he and Hariata. This expectation would not seem unreasonable, given the significant amount of his contribution over several years and the fact that he and Hariata were married for more than 30 years. They permanently occupied the house for at

least 21 years. Principles of relationship property would suggest such circumstances convey an interest or expectation of an interest.

[39] If there is no recognition of the applicant's contributions and the house is awarded to the whānau trust, they will receive the full benefit of the house (valued at $132,000.00) including immediate vacant possession. The contributions made by the whānau, based on the evidence before the Court, seems to be the renovations by Colleen and Vern Higgins in the 1970s (before the applicant lived there) and renovations by John Armstrong in 1997. There doesn't appear to have been a valuation of those improvements, however there was no suggestion by the respondents that these renovations were on par with the extent of contributions made by the applicant. Given this, the whānau trust would be unjustly enriched and it would seem unconscionable to ultimately award ownership to the trust without providing for Joseph's interest.

[40] I find that a constructive trust did exist between the applicant and Hariata and that the applicant is entitled to equitable relief for his contributions to the house.

He tika rā te kāpeneheihana? Mēnā he tika - pēhea te nui?
Is compensation an appropriate remedy and, if so, what amount?

[41] The parties agreed that an order under s 18(1)(a) can be made in favour of a non-owner and that the remedy available in such case is equitable relief by way of constructive trust, with an award of compensation the most appropriate remedy.

[42] Both counsel relied on the decision of Judge Ambler in *Stock v Morris*.[11] In that case, Judge Ambler reviewed the authorities which considered the rights of non-owners to an order under s 18(1)(a) and noted the relevant principles:

> [65] Section 18(1)(a) enables the Court to "do equity" in relation to Māori freehold land. While the Preamble and ss 2 and 17 set the kaupapa of the Act and promote the interests of the owners, the Court cannot allow the actions of owners to cause injustice to non-owners. The case law provides helpful guidance on the appropriate remedies where non-owners have contributed to improvements on Māori freehold land.
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> …

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

> [70] The following principles can be distilled from these cases. There is no bar to the Court making a s 18(1)(a) order in favour of a non-owner. However, an order vesting interests in the land or a right to possession of the land (or part of it) in favour of a non-owner will likely offend the kaupapa and provisions of the Act. Although in *Grace* the Court of Appeal did not completely rule out that possibility. Where the Court concludes that a non-owner is entitled to equitable relief, the Court will in the first place look to awarding monetary compensation. If monetary compensation is inappropriate, the Court may award ownership of the house if it can be removed from the land. The Court will take into account the non-owner's free occupation of the land as a factor. Ultimately, each case depends on its own facts.

[43] I am satisfied that an award of compensation is appropriate in the present case.

[44] In terms of the amount of compensation, Ms Wara argued that in striking a balance between the parties, the Court should take into account not only the contributions that each party has made to the house but also the benefits that have been received. She noted that the methods for assessing compensation have varied from case to case, but referred again to *Stock v Morris* where the Court commented that a non-owner's free occupation of the land would be taken into account as a factor in any relief. Ms Wara submitted therefore that the fairest method of calculating compensation is of contributions made minus benefit received. The valuer calculated the value of the applicant's contributions as $57,000.00 and the benefit he has received at $61,000.00. Accordingly, counsel submits that the applicant is indebted to the whānau trust in the amount of $4,000.00, which the whānau trust is willing to forgive.

[45] Mr Hemi argued that the calculation method proposed by the respondents is inappropriate and does not reflect the nature and understanding of the original agreement between the applicant and his wife, who were married for 33 years. This was not a commercial agreement nor a landlord and tenant arrangement.

[46] Mr Hemi argues for a compensation award of $22,690.00. He calculates this figure based on the rental amount for a reasonable period Joseph may have remained in the property, which counsel has set at five years. The costs that would be met over that period, such as rates and insurance, are then deducted there to arrive at the proposed amount. Effectively, this amount represents the loss to the applicant by him vacating the property before the termination of what he understood to be the agreement between him and Hariata. Mr Hemi submitted that this represents approximately 32-40 per cent of Joseph's financial contributions to the house and would satisfy the equity as between the parties.

[47] In examining the authorities which have awarded compensation to non-owners, it is clear that determining an appropriate award will depend on the particular circumstances of the case. However, there are several decisions in which the nature of the arrangement, as one involving family or marital relationships, has been noted as a relevant factor.

[48] In *Brokenshaw – Te Kaha B6X2* the Court dealt with a situation where a wife and her second husband built a house on land which the wife solely owned. [12] After the wife's death, and later the husband's, their children (each from previous relationships) sought determination of ownership of the house and associated buildings. The Court concluded that a constructive trust could be established in the husband's favour as he would expect that his contribution to both the marriage and the property would result in at least the right to claim compensation. Further, his wife obviously intended that he would have an interest. In determining the level of compensation, the Court noted:[13]

> It would be improper for the Court to find for the Ottoways in line with the sum assessed by Lillian. After all, the house was the matrimonial home of both Mr and Mrs Ottoway. The contributions were not one sided, she contributed the land and she may have contributed more. The evidence is not clear on the exact extent of the contributions from either her side of that of Mr Ottoway's. What we do know is that at the time the building was constructed in 1987, it cost $50,000 to build. There was evidence, acknowledged by Mr Peterson that some or all of the money for the construction of the house must have come from the sale of Mr Ottoway's property in Auckland. The funds from that sale produced $45,412. Despite that, after a marriage of this duration, Mrs Ottoway could have claimed an equal interest in the buildings before her death in 1998. That being the case, an award that recognises equal benefit from the capital growth of the buildings as at the date of her death or thereabouts is the fairest way to effect distribution in the particular circumstances of this case.

[49] In *Matenga v Bryan* the Court found that the equitable interest in the property of a non-owner, Mrs Matenga, amounted to the value expended by her in purchasing and erecting the house, connecting it to services, and otherwise making it a liveable home.[14] The Court also noted that making a deduction in lieu of rental would fail to recognise the original family nature of the transaction and would be quibbling, given the cost of the house as compared to any rental due.

[50] In *Stock v Morris* the determination of ownership of the house was a contest between Ms Stock, an owner in the land who held a licence to occupy, and Mr Morris, her former

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12 *Brokenshaw – Te Kaha B6X2* (2003) 81 Ōpōtiki MB 18 (81 OPO 18).
13 At 27.
14 *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 18I* (2003) 73 Tauranga MB 150 (73 T 150).

partner who was not an owner but who had paid for the construction of their cottage and claimed compensation.[15] The Court found Mr Morris was entitled to compensation in terms of constructive trust principles as, to do otherwise, would allow Ms Stock's family to be unjustly enriched. The Court determined that Mr Morris was entitled to half the value of the cottage as at the date of the couple's separation. Such approach took into account that Mr Morris had met the cost of the cottage, that he did not have to contribute the cost of acquiring the land, and that Ms Stock had an interest in the cottage by reason of their relationship.

[51] In *Rautangata v Rautangata* the Court noted that Mrs Rautangata, being a non-owner, paid approximately 85 per cent of the costs of constructing the couple's house and other structures, on land solely owned by her husband.[16] The Court concluded that she was entitled to be compensated on constructive trust principles for her substantial contributions at the level of the 85 per cent she contributed. However, the Court did not accept that she was entitled to the remaining 15 per cent contributed by her husband on the basis she was his wife. The Court noted that her entitlement as Mr Rautangata's wife to the benefits of his ownership were recognised by the life interest she received as her statutory entitlement.

[52] Mr Hemi relied on the approach to the level of compensation adopted in *Tipene v Tipene*.[17] In that case, the Court rejected several approaches before calculating compensation on the basis of an approximate value of the lost entitlement to the applicant:

> [66] As to the amount of compensation, I do not think that simply adopting the 1984 and 2011 values and then imposing a deduction to represent a notional rental [represents] a fair response to the nature of the arrangement. I also think there is force in Mr Shanahan's submission that to approach it on this basis would result in a degree of unjust enrichment to the Trust. On the other hand, neither am I persuaded by Mr Shanahan's submission that I should simply accord to Tania and Gary the full benefit of the capital gain between 1984 and 2011 (plus additional compensation) with no deductions. That would be akin to recognising ownership per se, which I don't think was inherent in the nature of the arrangement.
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> [67] I accept the force of Mr Coutts' submission that it is neither possible nor necessary to determine in detail the extent or cost of particular works undertaken by Gary and Tania during their occupation because such value is in depreciated terms captured in the value of the property as at June 2011. I also accept that the value of the works paid for by the Housing Corporation loan (said to be approximately $27,000) should not be regarded as a direct financial contribution by Gary and Tania personally. … I also note that on the basis of Mr Coutts' calculations, Gary and Tania

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

16 *Rautangata v Rautangata – Opuatia No 6D No 2D* (2013) 63 Waikato Maniapoto MB 132 (63 WMN 132).

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

> would not be entitled to compensation at all. Given the relatively modest value of the house as at June 2011, the application of even a low notional rental for the entire period 1987-2011 has the effect of overtaking the capital gain on the property during the period of Gary and Tania's occupation. I do not consider this to be a fair outcome either.
>
> [68] Having carefully considered the evidence and the submissions on behalf of the parties, I have concluded that a different approach is required. I consider the true nature of the arrangement was that in return for renovating and maintaining the old home, Tania and Gary would be entitled to use it rent free as their family home so long as they needed it (presumably at least until their dependent children had left home). They had for most of their time in occupation met the rates payments; they had helped maintain the farm and had raised calves for both their own and the wider whānau's benefit. In broad terms, this was the basis on which they occupied the Old Home for some 24 years. What was compromised by the unilateral imposition of a rental policy so soon after Gary's death was the continuity of tenure on existing terms that Gary and Tania were in good conscience entitled to.

[53] The Court considered the applicant may have remained in the house for a further nine years and calculated the rental amount for this period, deducting rates and other maintenance costs, to arrive at the compensation figure.

[54] Mr Hemi argues that the factual situation in *Tipene* is directly comparable to the present case and the Court should adopt a similar approach. He says such approach reflects the true nature and understanding of the agreement between the applicant and Hariata and their relationship as husband and wife.

[55] Although Ms Wara notes the comments in *Stock v Morris*, that a non-owner's free occupation of the land would be a factor, Judge Ambler in fact did not take this into account in his calculation of compensation. Instead, he noted the relationship between the parties and split the value at the date of their separation. As noted above, in other cases where the relationship between the parties has been a marriage or family relationship, the Court has not adopted a strict "contributions minus benefit" approach either.

[56] I consider that, given the relationship between the parties as a marriage and the circumstances of the case where Hariata has provided the original house and the applicant has provided improvements to the house, essentially that Hariata and the applicant have made different contributions to the house through their many years of marriage – a strict "contributions minus benefit" approach is not appropriate.

[57] The respondents say that the applicant has had significant benefit by being allowed to stay in the house rent-free for more than 21 years. However, by their own submissions, the whānau have also been able to seemingly come and go as they please, and have had a place that can accommodate them and their own families and allow them that connection to their turangawaewae.

[58] According to the valuation, the value of Joseph's contributions represents 43 per cent of the total current value of the house. Joseph has stated that both he and Hariata contributed to the house, however the extent of her contribution is unclear. It is hard to say that she contributed the land as it was the whānau trust that ultimately purchased shares, but neither Hariata nor the whānau trust hold an occupation order or licence to occupy. I accept however, that by virtue of Hariata's relationship with the land and the trust, this allowed her and the applicant to reside in the house rent-free.

[59] The respondents do not deny that the applicant has made certain improvements to the house, they rely on the valuer's assessment that the added value arising from the applicant's improvements is $57,000.00, rather than his claimed $100,000.00. Ms Wara argued that Joseph has also received considerable benefit from living in the house permanently since 1992, which has been valued at more than his contributions, leaving him indebted to the whānau trust. The respondents' position therefore is that the contributions made by the applicant are outweighed by the benefits he has received.

[60] A fair approach is required. Simply valuing the applicant's contribution and deducting rental fails to recognise the nature of the marriage relationship between Hariata and Joseph and the agreement that they had. This approach also leaves Joseph Kingsnorth indebted to the whānau trust. This is clearly not a fair approach.

[61] Neither would it be fair in this situation to simply take the current value of the house and split that in half. This is also not a situation where Joseph could claim entitlement to half the value of the house due to their marriage. The applicant rightly does not seek that. What he does seek is recognition and compensation for his contribution, not only to the house but to the marriage.

[62] From the authorities noted above, it is clear that the Court has struggled with finding one appropriate approach. The approach to be taken is dependent on the facts of the particular case. One approach does not fit all situations. In looking to be fair to all parties and to do equity in the case, consideration of the particular circumstances is necessary.

[63] I consider the approach that is needed in this situation is one that recognises and considers a whole range of factors. Those factors include the nature of the relationship – it was a marriage, not a landlord and tenant situation. Consideration must also be had of the fact that Hariata did provide the original house, although the original value is unknown. Further, the house is on Māori land and the land is vested in trustees of an ahu whenua trust.

[64] Of note is the fact that Hariata and Joseph lived in this house for over 20 years. During this time, Hariata and Joseph were entitled to use the house rent free for as long as they needed. They had, for most of their time occupying the house, met the rates payments, maintained the home, improved it and paid the insurance on the house. Neither the ahu whenua trustees nor the whānau trust trustees, ever asked for, or expected, rent.

[65] Joseph has vacated the premises and no longer has the benefit or enjoyment of living in the house that he and his wife enjoyed for so long. According to Mr Hemi's submission, Joseph could have resided on the property for another five years. That benefit has now been taken from him. If Joseph had been able to stay on the property, he then would have had to contribute to rates, house insurance and pay the outstanding rates. In this situation, these matters must be assessed in calculating a compensation amount.

[66] The house has been improved from its original state. Although there is some disagreement as to what that original state was, it is agreed that the house has been improved. Joseph no longer has the benefit of those improvements or the enjoyment of living in the house. Given Joseph has vacated the house, the whānau now enjoy the improvements they have contributed to the house along with the improvements Joseph made.

[67] The house is currently valued at $132,000.00. As noted, the valuer’s assessment is that the added value arising from the applicant’s improvements is $57,000.00, rather than Joseph's claimed $100,000.00. Mr Hemi's submits that compensation sits at around $22,000.00. Ms Wara says when rent Joseph should have paid (although it is unclear as to

who that rent would have been paid to) is deducted from the improvements made – the whānau trust is owed $4,000.00.

[68] Taking all matters into consideration in seeking to be fair and do equity to all parties, I find that Joseph is entitled to equitable relief by way of compensation for his contributions to the house, and that is in the amount of $20,000.00. This amount recognises the factors noted above while seeking to ensure that neither party is unjustly enriched.

Kupu whakatau – Decision

[69] The house is owned by Hariata Kingsnorth and an order under s 18(1)(a) of the Act is made determining ownership of the house accordingly.

[70] Joseph Kingsnorth has an equitable interest in the house and is entitled to relief by way of compensation for his contributions to the house. The estate of Hariata Kingsnorth must pay compensation in the amount of $20,000.00 to Mr Joseph Kingsnorth.

[71] I note the intention in constituting the Hariata Kingsnorth Whānau Trust was to secure ownership of the house. I also note that it appears that succession to Hariata Kingsnorth has not occurred. If those entitled to succeed to Hariata Kingsnorth wish to vest the house in the whānau trust, an application together with consents can be filed within one month and orders can be made accordingly. In that situation, the compensation to Mr Joseph Kingsnorth must accordingly be paid by the whānau trust.

Pronounced at 11:00 am in Rotorua on Wednesday this 24th day of October 2018.

C T Coxhead
JUDGE