

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

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

A20180003237

UNDER Section 328, Te Ture Whenua Māori Act 1993

IN THE MATTER OF Waione Y Block

BETWEEN JOSEPH TE POROA MALCOLM AND
ANDREW PEHEA MALCOLM
Applicants

Hearing: 4 July 2018, 192 Waiariki MB 295-311
(Heard at Rotorua)

Judgment: 5 September 2018

JUDGMENT OF JUDGE C T COXHEAD

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] The idea of a papakāinga development on the Waione Y block is not new. There has long been an intention to provide housing for owners close to the marae with a view to bringing alive both the papakāinga and the marae. Despite ongoing discussions over a number of years, progress on a papakāinga development has been slow. No applications have been brought to the Court until now.

[2] Mr Joseph Malcolm (Te Poroa Malcolm) and his son Andrew Malcolm apply for an occupation order so they can build two houses on the land, one of which is a rebuild of Andrew's house. That house was on the land but unfortunately burned down in 2017.

[3] Both applicants have tried to work with the owners and trustees with a view to building on the site where Andrew's original house stood. They have sought consent from the trustees and owners. However, they have been unsuccessful in obtaining owner support and have therefore sought the judgment and assistance of the Court.

Te Whenua - The Land Block

[4] Waione Y is Māori freehold land, 4.0665 hectares in area. It was created by partition order on 19 December 1980.¹ There are currently 88 owners in the land holding a total of 6,513.48116 shares.

[5] The Waione Y Land Trust was constituted over the land on 9 October 1987 pursuant to s 438 of the Māori Affairs Act 1953, and vested in the Māori Trustee.² The current trustees are Charles Wilkie, Dulcie Ward and Grace Pouesi.³

¹ 195 Rotorua MB 278 (195 ROT 278).

² 219 Rotorua MB 228-253 (219 ROT 228-253).

³ 284 Rotorua MB 262-263 (284 ROT 262-263).

Te mahi papakāinga - The papakāinga development

[6] The first meeting of owners regarding the development of a papakāinga took place in October 2004. A working group was later established in October 2007 to progress the development.

[7] A proposal for 15 houses was put before the owners and trustees by Te Poroa Malcolm during 2009 and 2010. This showed Mr Malcolm's intent for the land to be utilised for housing, not just for him, but the other owners, with a view to bringing alive the papakāinga and the marae. However, there was no support from the owners and trustees and it was argued that they saw the proposal as an impediment to their own plans. Te Poroa Malcolm subsequently obtained resource consent from the Rotorua District Council for a two-house proposal on the papakāinga area in 2011.

[8] The trustees submit that two trustees have worked diligently for many years to consult with and seek agreement among all owners. They say it is clear from meetings held that a majority of owners wish to proceed with developing a papakāinga on Waione Y so that all owners can benefit and build homes. However, while discussions and meetings have been ongoing for a number of years, progress has been slow. The trustees advised that a further working group was established in 2017 and a house design and proposal is currently being worked on. The proposal provides for those who have indicated a desire to build now and would allow other whānau to build later. The working group has met with the Council who were receptive to the concept.

Ngā Kaupapa - The issues

[9] There are two main issues which arise regarding this application. Firstly, whether the applicants have an interest in the land sufficient to support the grant of an occupation order. Secondly, whether the application meets the requirements as set out in ss 328 and 329 of the Te Ture Whenua Māori Act 1993. Here, the central issue is clearly whether the applicants have a sufficient degree of support for their occupation application.

Ngā kōrero a te Kaitono - The applicants' position

[10] The applicants seek an occupation order for an area of 658 square metres for a term of eighty years. They propose to build two houses on the land. One of which is a replacement of Andrew's house, which was on the land for 30 years before being burned down in 2017. The application notes that their shareholding entitlement is 105.42546 shares and records that they are persons entitled to succeed to the beneficial interests of Makarita Te Mutu Malcolm, Te Poroa's deceased mother, who holds 368.98914 shares in the land.

[11] Grace Malcolm, a current trustee and the daughter of Te Poroa Malcolm, appeared at the hearing and spoke on behalf of the applicants. She noted that her father has given a considerable amount of his time, work and passion negotiating with the "powers that be" to build resources and structures for the iwi of Ngāti Tarawhai. His work for the marae has been consistent and he has been dedicated to improving Ngāti Tarawhai. She advised that Andrew Malcolm moved on to the land as a caretaker for the marae. He has lived on the papakāinga for 30 years, mowing lawns, cutting scrub and attending to the upkeep and maintenance of the marae. Sadly in 2017 his house burned down.

[12] Ms Malcolm submitted that the applicants have tried to work with the owners and trustees to progress the papakāinga development on Waione Y for the benefit of all owners and, failing that, have asked for consent for their own occupation. The applicants have sought consent from the trustees and owners at various times through various methods and in March 2014 and October 2017 called owners hui to address this issue. A number of letters have also been written to the trustees seeking approval to build on the land. Ms Malcolm confirmed that only two owners were in support of the application, however, she pointed out that there was no set level of support required and the particular circumstances of the case must be taken into account.

[13] Ms Malcolm argued that the applicants have been frustrated in their attempts to obtain consent from the trustees or owners. In her view, since 2009 no further in-roads have been made towards a concrete plan for development of a papakāinga. The owners and trustees are acting to preserve their own interests and with the intent to develop a papakāinga for their own use. However, as a result of their inability to decide, the applicants are disadvantaged by having to wait until the owners and trustees have sorted themselves out.

She says the applicants have been waiting for some 10 to 15 years and the trustees are now unreasonably withholding their consent.

[14] Ms Malcom submits that their application is filed without disadvantaging the other owners or taking anything away from any owners' rights to live on and develop their shareholdings. It is the family's dearest wish to see their parents live out their days on the papakāinga next to the marae that they have helped to establish for the people of Ngāti Tarawhai.

Ngā kōrero a ngā Kaiurupare - Respondents/Opposition to the application

[15] The trustees opposed the application. They argued that they wish to progress the papakāinga development by taking into consideration all proposals from whānau to build on the land.

[16] Charles Wilkie, one of the trustees, submitted that a majority of the owners do not support the application. Owners wish to proceed with developing a papakāinga on Waione Y so that all owners can benefit and build homes. While it appears that no specific motions in relation to the occupation order were put to the owners at the meetings held on 1 March 2014 and 22 October 2017, Mr Wilkie's view was that it was clear at both meetings that the occupation order was not supported.

[17] Mr Wilkie noted that the major objection by the trustees was in terms of the requirements of the Rotorua District Council and the number of dwellings which could be built on the land. He says the trustees cannot allow one group of owners to have access to the land but not others. They want to ensure that the land can be recognised as a papakāinga by the Council for that purpose. They are currently working with Council on a proposal. Mr Wilkie argued that the applicants must work with the other owners to develop a papakāinga that includes all owners.

[18] Several owners also filed letters of opposition with the Court. Members of the Malcolm family do not support the actions attempted by Te Poroa and Grace.

Te Ture - The Law

[19] The Court has jurisdiction to make occupation orders pursuant to s 328 of Te Ture Whenua Māori Act 1993. That jurisdiction is discretionary and allows the Court to vest in an owner, or the successor of a deceased owner, the exclusive use and occupation of the whole or any part of the land as a site for a house.

[20] Section 329 sets out those matters the Court must consider in determining whether 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
 - (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.

[21] One of the most common difficulties applicants face is in terms of s 329(2)(b). Under that provision, the Court must not make any order for occupation unless it is satisfied that

there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.

[22] In *Bhana v Paniora – Wairau North 1B2C*, the Court reviewed relevant authorities which have considered the issue of sufficiency of support and noted:⁴

[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] More recently in *Leckie – Matauri 2K* the Court noted:⁵

[10] The question of what amounts to a “sufficient degree of support” for an application for an occupation order (and other applications under the Act) has been addressed in several decisions. In short, the Court must assess the sufficiency of support having regard to the nature and importance of the application before the Court, which includes the circumstances of the owners and the land. That assessment is not dictated by any specific percentage threshold. If there is opposition, the Court can take into account the reasons for that opposition. In making the assessment the Court is to have regard to the kaupapa of the Act as contained in the Preamble and ss 2 and 17.

Kōrerorero - Discussion

The applicants’ interest in the land

[24] As a preliminary point, I note that there is some uncertainty as to the applicants’ entitlement to shares in the land. The Court can only make an occupation order in favour of an owner, or any person who is entitled to succeed to the beneficial interests of a deceased owner. Neither applicant is currently an owner in the land. The application records that the applicants are entitled to succeed to the beneficial interests of Makarita Malcolm and that their interest equates to 105.42546.

[25] An application for succession to Makarita Malcolm is currently before the Court.⁶ That application seeks succession only to the shares of Makarita Malcolm in the Waione Y block. While that application has been made on the basis of a family arrangement, there

⁴ *Bhana v Paniora – Wairau North 1B2C* (2013) 69 Taitokerau MB 139 (69 TTK 139).

⁵ *Leckie – Matauri 2K* (2016) 137 Taitokerau MB 23 (137 TTK 23).

⁶ Application A20170004487.

appears to be some disagreement amongst the family and more discussion has been requested. The application currently stands adjourned pending a further hui of Mr Malcolm's siblings, to clarify whether there is agreement in terms of the application.

[26] Therefore, it is not certain at this point what shares, if any, that Te Poroa Malcolm will receive in the land from the estate of Makarita Malcolm. Further, it does not appear that Andrew Malcolm will hold any shares, unless it is intended he will receive some by way of gift. These aspects of the application need to be resolved to allow the grant of orders.

The statutory requirements

[27] In terms of the requirements in ss 328 and 329, I am satisfied that there has been sufficient notice of the application and sufficient opportunity for the owners to discuss and consider it. The papakāinga development is a significant issue which has been around for a long time and is clearly a major task for this trust. The documents filed show that occupation by the Malcolm whānau and their desire to build on the land has been raised with owners and trustees on several occasions.

[28] I note the following matters from the meetings held and the minutes provided to the Court:

- (a) At a meeting of Waione Y owners on 8 October 2017, there was extensive discussion regarding consent or otherwise from the land owners for a licence to occupy land by the whānau of Te Poroa Malcolm.
- (b) At a meeting held on 13 October 2017 there was one item on the agenda being Grace Malcolm seeking a licence to occupy for Waione Y. In this meeting, the trustees did not vote to grant a licence to occupy. There is clearly discussion regarding the trustees' consideration of whether to grant a licence to occupy but once again no resolution was voted on. There is a clear sense that the trustees do not wish to grant an occupation licence.
- (c) At a special meeting of owners on 22 October 2017, it is noted that the most important item on the agenda was a response to the licence to occupy by the Te Poroa Malcolm whānau. It is also noted at that meeting that this is the

third attempt by Grace Malcolm to build on the Waione Y lands since 2009. The meeting does not record any support for an occupation order.

[29] Despite the extent of discussions, it is very clear that there is little support for the grant of an occupation order to Te Poroa Malcom and Andrew Malcolm at this time. The Court has not been presented with any letters of support, any minutes of meetings showing resolutions in favour of the application or showing a consensus in support of the application. There is no other documentation from owners in support of the grant of an occupation order to the applicants.

[30] On the other hand, the trustees do not consent to the application and several owners have filed letters opposing the grant of an occupation order.

[31] The applicants recognise that they lack support for this application. That is why they have brought this matter to the Court, given their frustration with the trustees and owners.

[32] At the hearing, Ms Malcolm stated that there were essentially two persons in support of the application. However, one is yet to succeed to their shares in the land and the other, Donna Inia, expressed her support for the occupation order as conditional upon such a grant not impeding her own whānau's proposal for papakāinga housing.

[33] Given there are 88 owners in the land, no matter how one considers it, that level of support is not sufficient. Especially given how important the papakāinga development is for the trustees, the owners and the applicants. One would need a much higher level of support to satisfy the Court that there is a sufficient degree of support for the application among the owners.

Kupu whakataua - Decision

[34] I have also considered the application within the context of all the challenging work Mr Malcom has done for his marae, his hard work in seeking to develop housing on the land, and the fact that Andrew previously lived in a house on the block for some 30 years. However, even taking all those factors and others into account, I am not satisfied that there

is a sufficient degree of support for the applicant among the owners, having regard to the nature and importance of the matter.

[35] In any case, the trustees have not consented to the application. Under s 328(2) of the Act, the Court cannot make an order unless the trustees consent to the application.

[36] The application is therefore dismissed.

Pronounced at 10:00 am in Rotorua on Wednesday this 5th day of September 2018.

C T Coxhead
JUDGE