

I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI
In the Māori Land Court of New Zealand
Waiariki District

A20220014144

WĀHANGA <i>Under</i>	Section 19, Te Ture Whenua Māori Act 1993
MŌ TE TAKE <i>In the matter of</i>	Waikite 3A
I WAENGA I A <i>Between</i>	MARGARET AMY EDWARDS; PAULINE ETHEL ROSS; EVA MOLLY WARETINI; LORRAINE AMY GALVIN AND FRANCES RAUKURA KAHUKIWA Ngā kaitono <i>Applicants</i>
ME <i>And</i>	JIMMY ROSS Te kaiurupare <i>Respondent</i>

Nohoanga: 18 October 2022, 283 Waiariki MB 145-169
Hearing (Heard at Rotorua)

Whakataunga: 5 April 2023
Judgment date

TE WHAKATAUNGA Ā KAIWHAKAWĀ T M WARA
Judgment of Judge T M Wara

Hei tīmatanga kōrero*Introduction*

[1] Waikite 3A is located in the heart of Ohinemutu, a historical village set on the shores of Lake Rotorua. While the location is picturesque, the land and the people who connect to the land have been in conflict for some time. There have been multiple applications before this Court since 2017, including applications to terminate whānau trusts and partition the land.¹ None of the applications were successful.

[2] The current application relates to the occupation of the land. A permanent injunction is being sought to remove Jimmy Ross from the land, along with all buildings, planting and fences.

[3] There are five co-applicants who are either owners or trustees of whānau trusts. Eva Waretini, Margaret Edwards and Pauline Ross are trustees of the Maea Makarita Loffley Ross Whānau Trust. Frances Kahukiwa is a trustee of the Hokimatemai Raukura Kahukiwa Whānau Trust, and Lorraine Galvin who is an owner.

[4] Jimmy opposes the injunction being sought, and is supported by his sister and co-trustee of the Maea Makarita Loffley Whānau Trust, Theresa Heywood.

[5] This issue for determination is whether the injunction sought ought to be granted.

He aha mō kōtitanga?*What is this case about?*

[6] Waikite No. 3A is 0.0018 hectares of Māori freehold land situated at 24 Kiharoa Street, Ohinemutu. There are currently six owners of the land, who collectively own one share. The owners of the land represent two whānau: the Webber whānau, being the descendants of Amy Kumaiterangi Webber, and the Ross whānau being the descendants of Maea Makarita Loffley Ross. Each whānau collectively holds 0.5 shares each.

¹ On 14/11/2017 Theresa Heywood and Jimmy Ross applied for a partial termination of whānau trust. The application was dismissed at 248 Waiariki MB 235-245 (248 WAR 235-245). On 19/04/2018 Frances Kahukiwa, Juliet Rameka and Lorraine Galvin applied for a partition of the land. The application was declined by Judge Coxhead in *Kahukiwa v Ross - Waikite No 3A* (2019) 217 Waiariki MB 68 (217 WAR 68).

[7] The land was occupied by Maea Ross from the late 1980s. No permanent dwelling was erected on the land, rather, in accordance with Council records, a caravan was permanently placed on the land, and consent was issued for connections to both water and council sewerage. A bath house on the land was also consented to as a secondary building. When Maea Ross passed away in 2015, her son, the respondent Mr Ross, moved onto the land.

[8] Since 2017 there have been multiple issues within the whānau. In 2017, Theresa and Jimmy applied for a partial termination of the Maea Makarita Loffley Whānau Trust, seeking the removal of their entitlement.² This application was ultimately dismissed, however as part of the proceedings, Shane Gibbons was appointed to facilitate a meeting of the trustees. This meeting resulted in an agreement being reached, dated 5 June 2018. The terms of that agreement are as follows:

It was agreed in respect of the Whanau house that:

- All seven beneficiaries and their descendants wished to retain an interest through the whanau trust;
- Jim is the Kaitiaki and has the right to occupy (exclusive possession) for his life without payment of rent, but will pay rates;
- Jim to repair and maintain, at his cost, the buildings to the condition they were in when the tenancy agreement was signed;
- New structures require discussion with and approval of the whanau trust;
- That a formal tenancy agreement or occupation order be completed.

[9] In 2018, Francis, Juliet Rameka and Lorraine applied for a partition of the land, seeking to divide the interests between the two whānau.³ Issues concerning Jimmy's occupation of the land were raised during these proceedings. While half of the ownership supported partition, in 2019 the Court declined to grant an order as the land was small, and therefore a division of the land would not be practical.⁴ It is relevant that the Court made the following observation:⁵

² 248 Waiariki MB 235-245 (248 WAR 235-245).

³ *Kahukiwa v Ross – Waikite No 3A Block* (2019) 217 Waiariki MB 68 (217 WAR 68).

⁴ Above n 3 at [24].

⁵ Above n 3 at [36].

At the moment, only Jim Ross appears able to use and occupy the land but the applicants as equal owners are entitled to access the land and use the existing bath. This is not Jim Ross's land, even though he appears to treat it as his solely.

[10] It is clear that the conflict within the whānau continued outside of the courtroom arena, as information was provided to the Rotorua Lakes Council about illegal building work on the land. Site visits were undertaken on 08 February 2018 and 15 February 2019, and building work was deemed to be in breach of the Building Act 2004. Correspondence shows that the Council issued a notice for the building work to be removed.

[11] Since 2021 the Council has been in regular communication with the whānau, and the focus was non-consented building work on the land. The Council had two meetings with owners, one in mid-2021, and a further meeting in July 2022. Evidence was only provided as to the latter.

[12] On 20 July 2022 the meeting was called by the Council to meet with owners and beneficial owners to discuss the property. At the meeting, the buildings on the land were discussed, and the Council advised that all the buildings were non-consented. The Council advised that all owners were responsible for the buildings, and that they had to be removed within three months of the meeting. When asked what would occur if the buildings were not removed, the Council advised that an abatement notice would be issued to all owners.

[13] Jimmy was not at the meeting, as he was not permitted to take his support person, Theresa, with him into the meeting.

[14] The Council's position was then reaffirmed in writing in a letter dated 22 July 2022, noting:

As agreed by all parties present on the 20/07/2022 (1 member from each Trust), **all buildings will be removed from the site 24 KIHAROA STREET – OHINEMUTU – WAIKITE 3A BLOCK, within 3 months, and any property on the neighbouring site being 26 KIHAROA STREET – OHINEMUTU – TE ANAKIWI 9 BLOCK, is to be removed as soon as possible.**

[15] The Council arranged for service of this letter, including the minutes of the meeting on 20 July 2022, on Mr Ross.

[16] On 6 August 2022, a meeting took place of the Maea Makarita Loffley Ross Whānau Trust. Present at the meeting were Eva, Pauline and Margaret. At the meeting, a discussion took place regarding the removal of the buildings, and the steps the trust ought to take. Jimmy was not at this meeting.

[17] On 20 September 2022 the present application was filed, as two months had passed, and the buildings had not been removed. A hearing was fixtured for 18 October 2022.

[18] Having heard from all the parties, as well as the Council, my decision was reserved.

He aha te ture e hāngai ana?

What is the relevant law?

[19] The Court has jurisdiction to grant either an interim or permanent injunction per s 19 of Te Ture Whenua Māori Act 1993 (“the Act”).

[20] In *Taueki v Horowhenua Sailing Club – Horowhenua II (Lake) Block*, the Māori Appellate Court held, when seeking a permanent injunction, the applicant must first demonstrate a trespass has occurred.⁶ If that is established, the Court then considers whether to exercise its discretion to grant an injunction.⁷

[21] I adopt that approach.

Kua he haere pokanoa?

Has a trespass occurred?

[22] In the present case, the parties are co-owners in the land who hold shares as tenants in common. Tenants in common are equally entitled to occupy, use and enjoy all of the land, and an action in trespass can only succeed where one tenant’s possession excludes the other co-owners from exercising rights of ownership.⁸ In this situation they are deemed to have been ousted, and the effected owner can sue for trespass by ouster.

⁶ *Taueki v Horowhenua Sailing Club - Horowhenua II (Lake) Block* [2014] Maori Appellate Court MB 60 (2014 APPEAL 60) at [15]-[16].

⁷ At [16].

⁸ *Fredricsen v Hikuwai* (2016) 143 Taitokerau MB 135 (143 TTK 135) at [20].

[23] In *Faulkner v Hoete*, the Māori Appellate Court commented on the unique issues that arise for trespass by ouster within the context of Māori land, stating that the Court must apply its powers in a manner that furthers the principles and kaupapa of the Act.⁹ The Appellate Court offered a series of factors to be taken into account when determining such an application:

[23] In these circumstances, we consider that when applying s 19 of the Act, and the principles of ouster, the Court has jurisdiction to settle the dispute and make a determination on the use of the area in question, to be enforced by way of injunction. We offer the following factors as a guide to any such assessment:

- (a) The history of the use of the land;
- (b) The proposed use of the area by the competing owners;
- (c) Any detriment to an owner if prevented from using the land in the manner proposed or if subjected to the use of the opposing owner;
- (d) The views of the owners generally (those for and against the proposed use by number and shareholding);
- (e) The conduct of the parties; and
- (f) The best overall use and development of the land.

The History of the Land

[24] Ohinemutu is a historical Ngāti Whakaue settlement, which continues to be occupied by Ngāti Whakaue today. The Waikite blocks are in the heart of Ohinemutu, located next to Te Papaouru Marae.

[25] 24 Kiharoa Street is situated on Waikite No. 3A, which is 0.0018 hectares of Māori freehold land. The land was the result of a Partition Order dated 3 August 1932, where Waikite 3 was divided into two titles, and 3A was vested in Timi Piatariki, also known as Timi Loffley.

[26] On 23 March 1960, succession to Timi Loffley was completed and the land was vested in two beneficiaries, namely Amy Ku Webber and her sister Maea Margaret Ross.

[27] Maea moved onto the land in the 1980s. Initially there were plans for a dwelling to be erected, however this was replaced with a caravan and ancillary structures.

⁹ *Faulkner v Hoete - Motiti North C No 1* [2018] Māori Appellate Court MB 17 (2018 APPEAL 17) at [21].

[28] Maea's sister and co-owner Amy passed away in 1989, and her children (and successors) allowed their aunt Maea to remain on the land. Maea passed away in 2015, and following her death her son Jimmy moved onto the land.

The proposed use of the area by the competing owners

[29] The land is only 180m², and some owners have had limited use or access of the land. The desired use of the land, as expressed by some of the owners, is for a communal bathhouse.

[30] While an occupation agreement was achieved with the trustees of the Maea Makarita Loffley Whānau Trust in 2018, there are a couple of issues that arise. First, the agreement was conditional on (a) Jimmy seeking approval from the whānau trust for new structures; and (b) Jimmy formalising his occupation. It appears that neither of these conditions were met, which renders the agreement unenforceable. The second issue, being a significant issue, is that the Maea Makarita Loffley Whānau Trust only represents half of the ownership. The other owners were not consulted, nor was their permission sought for Jimmy's occupation.

[31] The Court heard from Francis of the Hokimatemai Raukura Kahukiwa Whānau Trust, who confirmed that she never consented to Jimmy occupying the land. She gave evidence that she never had a problem with Jimmy, but when she went to talk to him about the land, he told her to "Go away." This was accepted by Jimmy.

[32] The Court also heard from Lorraine, who confirmed that she too never consented to Jimmy occupying the land. She advised that in 2015 when her aunt passed away, no decisions were made by the Webber whānau as to the utilisation of the land. However, in 2017 their whānau decided that they wanted to build a bathhouse on the land, and when Lorraine sought a meeting with Jimmy, he was hostile and declined to meet.

The views of the owners

[33] It is clear that the seven-year conflict between the parties has strained relationships between close whānau. The conflict has played out through various applications before the Court, and through the Council. At the hearing, the owners present were asked whether they

were prepared to engage in an alternative dispute resolution process. The views of those who support the injunction is that they are not willing to engage, as the passage of time has not settled any of the conflict and whānau are simply seeking a resolution.

[34] The following owners and beneficial owners seek Jimmy's removal from the land:

- (a) Trustees of the Hokimatemai Raukura Kahukiwa Whānau Trust holding **0.125 shares**;
- (b) Lorraine Galvin holding **0.125 shares**;
- (c) Three of seven trustees of the Maea Makarita Loffley Ross Whānau Trust (being Margaret Edwards, Pauline Ross and Eva Waretini).

[35] The following beneficial owners oppose the removal:

- (a) Two of seven trustees of the Maea Makarita Loffley Ross Whānau Trust (being Jimmy Ross and Theresa Heywood)

The conduct of the parties

[36] Jimmy says that all whānau are welcome to come to the whenua, and that it is open to all whānau and cousins. However, this position is at odds with his behaviour when various owners have reached out to him to discuss a change in the use and occupation of the land. The evidence is clear, and he has not been willing to engage on this kaupapa, and has been hostile towards those who have raised it.

[37] It does appear that some of the owners have involved the Council, and to some extent weaponised the Council to aid in Jimmy's removal from the land. Certainly, during the hearing, some of the owners present expressed that they would sooner be liable to pay Council fines, rather than explore an alternative dispute resolution process. At the hearing the Court has heard from Ms Cafatsakis, compliance officer of the Council as to its engagement with the whānau. It is apparent to the Court that the approach taken by the Council in threatening to issue an abatement notice against all the owners, rather than Jimmy,

whom it knew was responsible for the dwellings, has simply added to the existing internecine conflict.

Assessment

[38] Half of the ownership were not considered when decisions were made concerning the occupation of the land. The agreement that was reached within the Ross whānau was then never formalised, and the conditions were not complied with.

[39] The land is a very small block of 180m², and the Webber whānau cannot use the land while Jimmy is occupying it. The majority of owners who have expressed a view are opposed to Jimmy's ongoing occupation.

[40] The ability to access and utilise the land has previously been raised. In the 2019 decision, Judge Coxhead had signalled the need for the owners to consider processes for defining whānau areas,¹⁰ and it is unfortunate that this wasn't pursued, as the present conflict could have been avoided.

[41] Having considered the evidence I am satisfied that Jimmy's possession excludes the other co-owners from exercising their rights of ownership, and this amounts to a trespass by ouster.

Te eke o whakawā

Exercise of discretion

[42] Once the trespass has been made out, the Court must then decide whether to exercise its discretion. The prima facie rule is that a landowner is entitled to an injunction to restrain a trespass, however, the Court still has discretion as to whether to grant the injunction. There is a good working rule that if an injury to the applicant is small, it can be compensated by a small monetary payment, and damages may be awarded in substitution for an injunction.¹¹ However, this is not a situation where the injury is small, and damages are a suitable remedy. Jimmy has occupied the land to the exclusion of the other owners, and this cannot be compensated by a small monetary payment.

¹⁰ *Galvin v Heywood – Waikite No 3A* (2019) 217 Waiariki MB 68 at [33].

¹¹ *Dawson v Young - Maungaturoto DIB* (2018) 174 Taitokerau MB 89 at [13].

[43] As injunctions are an equitable remedy, I must take into account any equitable considerations, including the parties' conduct. These must also be balanced against the statutory objectives set out in the Preamble and ss 2 and 17 of the Act.

[44] Jimmy has not been willing to engage with the other owners to discuss the shared use of the land. While he has been meeting rates, he has not been paying any ground rent to the other owners. The other owners want Jimmy to vacate the land to allow them to utilise and develop the land for the benefit of all the owners. This is consistent with the kaupapa of the Act promoting the retention of the land in the hands of the owners and the effective use, management and development of the land by or on behalf of the owners.

[45] Against this Jimmy has been living on the land for over seven years, and his mother was the sole occupant from the late 1980s. He assisted his mother in clearing the land, and has invested time, money and effort into maintaining the land. Many people have provided statements in support of Jimmy, confirming his hard work, passion and commitment to both his community and his marae. It is unfortunate that the whānau, including Jimmy, did not resolve the issue of utilisation outside of a court process. I do not doubt that the grant of an injunction will have a significant impact on Jimmy. However, while I have given this full weight, it cannot outweigh the right of the other owners to have unfettered access to utilise and develop the land in a way that meets the needs of all the owners.

[46] In these circumstances, my only option is to grant the injunction sought. To try and reduce the negative impact on Jimmy, I am going to allow a further 120 days for him to vacate the land. This will ensure he has sufficient time to find alternative accommodation, to vacate the land and remove his belongings.

Kupu whakatau

Decision

[47] Pursuant to section 19(1)(a) of Te Ture Whenua Māori Act 1993, I grant an injunction requiring Jimmy Ross to vacate the Waikite No 3A Block, and to remove his possessions, including all buildings, planting and fences within 120 days of this decision.

I whakapuaki i te 2:30pm i Rotorua, te tuarima o ngā rā o Āpereira i te tau 2023.

T M Wara
JUDGE