

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

**APPEAL 2014/8
A20140012298**

UNDER Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF OMAIO 43 SECTION 4 BLOCK
BETWEEN EDWARD HOWELL, JOHN GERARD,
PHILIP HOWELL AND ROTA GERARD AS
TRUSTEES OF OMAIO 43 SECTION 4
Appellants
AND IHAKA JARAM
Respondent

Hearing: 20 May 2015 (2015 Māori Appellate Court MB 221-257)
(Heard at Rotorua)

Court: Judge S R Clark (Presiding)
Judge S F Reeves
Judge M P Armstrong

Appearances: Mr J P Koning, Counsel for the Appellants
Mr M T Milroy, Counsel for the Respondent

Judgment: 23 June 2015

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] On 3 August 1998 Ihaka and Rongomai Jaram obtained an occupation order from the Māori Land Court in relation to the Omaio 43 Section 4 Block (“the block”).¹ The block is administered as an ahu whenua trust and vested in responsible trustees.²

[2] In April 2014 the respondent, Mr Jaram, sought an amendment to the occupation order. That application was heard by the Māori Land Court on 3 June 2014.³ In a reserved decision dated 10 September 2014, Her Honour Deputy Chief Judge Fox made an order pursuant to s 330 of Te Ture Whenua Māori Act 1993 (“the Act”), amending the occupation order in favour of Mr Jaram.⁴

[3] The trustees, represented throughout the proceedings by Mr Edward Howell, have appealed that decision.⁵ They say that the order made by Judge Fox constituted a grant of a new occupation order, which the Court did not have jurisdiction to grant by way of a variation under s 330 of the Act.

[4] In making a decision to grant an amendment to the original occupation order, Judge Fox exercised a discretion. Our task is to examine whether or not the exercise of that discretion by Judge Fox was a proper one.

Background

[5] On 3 August 1998 Judge Smith granted an occupation order pursuant to s 328 of the Act in favour of Ihaka Jaram and his wife Rongomai Jaram. The order was for half an acre. A sketch plan was produced before the Court, which Judge Smith referred to as exhibit “A”. The sketch plan was not prepared by a surveyor and is informal in nature.

¹ 72 Opotiki MB 149 (72 OPO 149).

² The block is Māori freehold land comprising a total area of 113.5877 hectares. 60.5737 hectares is set apart as a Māori Reservation – CIR 295029; 53.0139 hectares is administered as an ahu whenua trust – CIR 295028.

³ 99 Waiariki MB 136 (99 WAR 136).

⁴ *Trustees of Omaio 43 Section 4 Trust v Jaram – Omaio 43 Section 4* (2014) 104 Waiariki MB 73 (104 WAR 73).

⁵ We have been informed that one trustee, Mr Rota Gerard, is deceased.

[6] In 2001 issues had arisen concerning the operation of the trust and the Jaram occupation order. The trustees filed an application for directions pursuant to s 237 of the Act.⁶

[7] That application came before Judge Fox on 3 July 2001. Mr Howell on behalf of the trustees raised a concern that once Mr Jaram had obtained the occupation order he went to Australia to live and had not built on the block. Judge Fox adjourned the application sine die and directed Mr Jaram to write to the Court indicating what his intentions were regarding occupation on the block.⁷

[8] Nothing further appears to have happened until July 2012 when Mr Edward Howell requested that the application be reactivated.

[9] The matter next came before Judge Fox on 6 March 2013.⁸ Mr Howell raised a concern that during the 15 years that had elapsed following the grant of the occupation order, the Jarams had not built on the block. Other issues were also raised concerning the locking of gates, access to the beach and the correct location of the Jaram site. As a result Judge Fox directed that a sketch plan of the occupation order be prepared by a surveyor.

[10] A survey report was prepared by Stratum Consultants Limited and made available to the Court on 20 June 2013. Unfortunately it did not accurately reflect the occupation order originally granted. The sketch plan calculated the area of the occupation order at 5,500m², when the original order referred to an area of half an acre – 2,022m².

[11] The matter came back before the Court on 3 July 2013 and was adjourned on that day to enable Judge Fox to undertake a site visit.⁹ We note that Mr Jaram was not present at Court on that day, sadly his wife had passed away before the hearing.

⁶ Application A20000057625.

⁷ 76 Opotiki MB 70 (76 OPO 70).

⁸ 74 Waiariki MB 18 (74 WAR 18).

⁹ 80 Waiariki MB 43 (80 WAR 43).

[12] The matter next returned to Court on 4 September 2013.¹⁰ During that hearing it became apparent that the Jarams had, for a considerable period of time, seasonally camped on a different site to that encompassed in the occupation order. The Jarams had also started to clear the new site. The trustees opposed them occupying a new site.

[13] Mr Jaram queried whether he could vary or change the occupation order. Judge Fox noted that he could file an application for amendment of the occupation order. She then dismissed the s 237 directions application.

[14] Issues continued to surface between the parties. In November of 2013 the trustees sought an interim injunction against Mr Jaram on the basis that he had removed: a gate; a post; a long drop; padlocks on a gate entrance and, had fenced off access to the beach. Judge Fox granted an interim injunction on 20 November 2013.¹¹

[15] At the same time the trustees filed an application pursuant to s 238 of the Act for enforcement of the obligations of trust. They sought directions from the Court regarding Mr Jaram's activities on the block.¹²

[16] A s 67 conference was held before Judge Fox on 29 January 2014.¹³ A variety of issues were canvassed on that day. The trustees' position was that Mr Jaram had an occupation order which was granted in 1998, that he had not built on that site and had now changed his mind as to where he wished to build. Their position was that he should build only in the area encompassed by the 1998 occupation order.

[17] By that stage it was apparent that the area intended to be built upon by Mr Jaram was a completely new site. Mr Jaram maintained that there was confusion as to the actual site as a result of the 1998 order and the informal sketch plan.

[18] Judge Fox adjourned the application and directed the Registrar to commission a different surveyor to:

¹⁰ 83 Waiariki MB 171 (83 WAR 171).

¹¹ 86 Waiariki MB 244 (86 WAR 244).

¹² Application A20130010133.

¹³ 91 Waiariki MB 111 (91 WAR 111).

- a) map and depict the area encompassed in the 1998 occupation order; and
- b) map and depict the area that Mr Jaram actually wished to occupy.

[19] On 21 March 2014 the Court received two plans from Overington Surveyors. The first plan, reference 3108/1, depicts the 2,022m² site set aside in the 1998 occupation order.

[20] The second plan, reference 3108/2 depicts an area of 2,022m² marked “Area B”, which Mr Jaram has cleared and wishes to occupy. That area is adjacent to, but other than a shared boundary, was not encompassed in the 1998 occupation order.

[21] On 3 April 2014 Mr Jaram filed an application pursuant to s 330 of the Act to vary the occupation order made in 1998.¹⁴

[22] On 3 June 2014 a substantive hearing took place before Judge Fox. She released a reserved decision on 10 September 2014.¹⁵ In her decision she amended the occupation order, the new site being “Area B” in the Overington survey plan 3108/2.

[23] We note for completeness that a sealed order was drawn for the amended occupation order. It wrongly refers to an occupation order in favour of both Ihaka and Rongomai Jaram, the error being that at the date of the hearing Rongomai Jaram was deceased.

Appellants’ submissions

[24] In summary the submissions made by Mr Koning, counsel for the appellants, were:

- a) There was very little case law on the nature and extent of the Court’s jurisdiction under s 330 of the Act. The existing authorities establish the principle that the Court must take into account relevant considerations when exercising its discretion;

¹⁴ A20140004782.

¹⁵ 104 Waiariki MB 73 (104 WAR 73).

- b) The plans prepared by Overington Surveys demonstrate that the new site amounts to a “completely new occupation order”. In effect what was sought was not a variation;
- c) If the Court has jurisdiction to grant a wholly new site under s 330 of the Act then it must have regard to those matters set out in ss 328 and 329 when exercising its discretion;
- d) The power of the trustees to regulate occupation of the block is set out in the trust order. The lack of trustee consent to the amendment should not have been undermined by the application of s 330 of the Act;
- e) The consent or otherwise of the trustees must outweigh the convenience to the beneficial owners on any variation under s 330 of the Act;
- f) The Court failed to give sufficient weight to the position of the trustees as the registered proprietors and the representatives of all other beneficial owners;
- g) Judge Fox was wrong to characterise the trustees as acting as an “oppressive majority”;
- h) The lack of consent of the trustees must be weighed against the failure of Mr Jaram to erect a dwelling for over 16 years;
- i) The finding that the new site was for Mr Jaram’s children was wrong in that they are not eligible for an occupation order under s 328(1) of the Act;
- j) There was no evidence before the Court that it was not possible to locate a house site within the original site;
- k) Judge Fox placed undue weight on the argument that the occupation order was not sufficiently defined and caused confusion. The original site was easily defined by Overington Surveyors in their March 2014 plan 3108/1.

[25] Mr Koning also submitted that s 330 of the Act encompasses variations of a technical or minor nature relating to boundary errors, the shape and size of the occupation order, the term or a change in the grantee's circumstances. All variations are fact dependent.

[26] Mr Koning went on to submit that a s 330 application did not contemplate a completely new site. Taken to its logical extension, the lower Court, by way of variation, could have granted Mr Jaram a new site anywhere on the block, which was surely not within the contemplation of s 330 of the Act.

[27] Mr Koning then submitted that if in fact what was sought was a "new site" then the Court did not have jurisdiction to consider that application under s 330 of the Act. In those circumstances the application should have been considered afresh pursuant to ss 328 and 329 of the Act.

Respondent's submissions

[28] In summary the submissions made by Mr Milroy, counsel for the respondent, were:

- a) He strongly emphasised that Judge Fox's decision involved an exercise of discretion. The Act did not provide for any fetter on the discretion and Judge Fox had exercised it properly. He submitted that Judge Fox took into account a number of relevant factors, did not take into account any irrelevant factors and it could not be said that she got it plainly wrong;
- b) In exercising that discretion Judge Fox was entitled to take into account the Preamble, ss 2 and 17 of the Act;
- c) All variations to occupation orders must constitute a "new occupation order to some degree" and where is the Court to draw the line between a "variation" and a "new" occupation order? What degree of amendment to the original order is necessary to determine that a variation of an existing occupation order requires a fresh application for an occupation order?;

- d) The application for variation was correctly made under s 330 of the Act, as a new occupation order was not sought. Mr Milroy stressed this point because if the application before the Court was an application for a new occupation order then the Court is drawn to a consideration of the mandatory factors set out under ss 328 and 329 of the Act. In contrast Mr Milroy emphasised that a decision under s 330 of the Act was an exercise of discretion. Whilst those matters referred to in ss 328 and 329 of the Act are important they are not mandatory considerations when an amendment was being sought;
- e) Judge Fox had the benefit of sitting on various applications relating to the block and the occupation order over a number of years, she had had heard a great deal of evidence, knew the parties and topography of the block and had conducted a site visit. Thus it was submitted that we should be hesitant to disturb her decision;
- f) In reaching her decision Judge Fox turned her mind to and responded to a number of the objectives set out in s 17 of the Act;
- g) The trustees' opposition was not a veto to the variation being granted. Judge Fox took it into account and placed an appropriate degree of significance on that factor;
- h) Judge Fox was entitled to take into account and weigh a number of factors including the nature and terrain of the land, that the respondent was the only person wishing to build on the land and that he wished to obtain the order for his children;
- i) The sketch plan attached to the original order for occupation was vague and inaccurate which contributed to the confusion on the part of the trustees and respondent as to the correct site.

Legal principles

[29] Part 15 of the Act deals with occupation orders. It reads:

Part 15 Occupation Orders

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.

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.

330 Power to amend or cancel occupation order

The Maori Land Court may at any time, on the application of any person or of its own motion, make an order amending or cancelling any occupation order.

330A Review of occupation orders

- (1) The Maori Land Court may review an occupation order made before this section comes into force, on application by an owner of a beneficial interest in the land over which the occupation order has been made, or by the person in whom the occupation order is vested.
- (2) The Maori Land Court may conduct a review under subsection (1) as if it were exercising its jurisdiction to make the initial occupation order, and must have particular regard to the fact that, after it was made, the occupation order could pass by succession.

331 Regulations

The Governor-General may from time to time, by Order in Council, make such regulations as may be necessary or expedient to give effect to this Part.

[30] The Māori Land Court has exclusive jurisdiction to grant an occupation order in accordance with Part 15 of the Act. An occupation order facilitates land utilisation by provision of a house site.¹⁶ The scheme of Part 15 requires that the Court must be satisfied of certain prerequisites, set out in s 328, prior to considering the matters set out at s 329 of the Act.

[31] First, the Court can only grant an occupation order in favour of the owner of any beneficial interest in that land or a person entitled to succeed to a beneficial interest of any deceased person in that land – s 328(1).

[32] Unfortunately this provision, perhaps unwittingly, prevents occupation orders being made in favour of beneficiaries of a whānau trust. This is a matter which has been commented on by the lower Court on a number of occasions.¹⁷ In order to get around that difficulty some Judges grant an occupation order in favour of the trustees of a whānau trust with those trustees in turn granting a licence to occupy to the beneficiary of the whānau trust. As an alternative some Judges terminate or partially terminate the whānau trust and then vest shares back to those entitled. Those persons then gift shares to the non-owning applicant, thus enabling the applicant to meet the ownership criteria.

¹⁶ See *Sione – Te Hapua 24* (2000) 4 Taitokerau Appellate MB 275 (4 APWH 275) at 276.

¹⁷ See for example the discussion in *McCarthy – Utakura 9* (2008) 124 Whangarei MB 84 (124 WH 84).

[33] Whatever process is adopted it is unnecessarily convoluted. It is highly unlikely in our view, that the drafters of the legislation had it in mind that beneficiaries of whānau trusts would be ineligible to apply for occupation orders. However, that is the effect of s 328(1) of the Act. It is a matter which we draw to the attention of the legislature as warranting reform.

[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.

Should Judge Fox have considered the application afresh pursuant to s 328 or as an amendment pursuant to s 330 of the Act?

[35] Mr Koning, for the appellants, argued before us that the grant of a wholly new site could not be said to be a variation as contemplated under s 330 of the Act. In effect the grant of a new site constituted a new occupation order and should have been considered in light of those matters set out in ss 328 and 329 of the Act. In this case as there is a lack of consent from the trustees then the application must fail at the first step.

[36] Mr Koning also submitted that s 330 of the Act contemplated amendments or variations of a technical nature. Where for example there needed to be adjustments to a boundary, the shape of the occupation site, the term, a change in circumstances of the grantee, those type of amendments were what was contemplated as being within the ambit of s 330 of the Act. However where the application was in reality to grant a completely new site, then it should be considered taking into account those matters set out in ss 328 and 329 of the Act.

[37] We acknowledge there is some force in Mr Koning's submission that the purpose of s 330 of the Act is to allow the Court to make minor variations to an occupation order when the circumstances warrant it. Many applications for occupation orders are supported by informal sketches and diagrams. Occupation orders have sometimes been made which are vague in their description of the size, location and term. Survey plans may have altered due to unforeseen circumstances involving the topography of the block or erosion. In such circumstances it is appropriate to amend orders. Having said that we are reluctant to attempt to lay down some hard and fast rules about the type of cases and situations in which an amendment pursuant to s 330 of the Act is appropriate. Many of the applications will be fact dependent. Suffice to say however the more significant the amendment the closer the Court will need to consider those matters set out at ss 328 and 329 of the Act as well as the Preamble, s 2 and s 17. If changes are substantive the very least the Court should do is gauge the consent of the trustees or the management committee of an incorporation and the views of the owners.

[38] In this case we accept that the amendment was as close to a new occupation order as can possibly be the case. Apart from one shared boundary no area of the new site was encompassed in the previous 1998 site. With the benefit of hindsight it would have been preferable for the application to have been considered as a new application for an occupation order rather than as an amendment.

[39] Having said that we note the following:

- a) The application for amendment was made in relation to the same block;
- b) The parties remain the same (with the exception of Mrs Jaram);
- c) The size of the proposed new site was exactly the same as the size of the original site – 2,022m².

[40] In our view it would have been preferable to have considered the application as a new application for an occupation order. However that is not the same as saying that an application for amendment could not be brought and heard pursuant to s 330 of the Act. We consider Judge Fox had jurisdiction to consider the matter pursuant to s 330 of the Act.

[41] We turn now to what we consider is the central issue before us, did Judge Fox correctly exercise her discretion under s 330 of the Act?

The exercise of discretion

[42] We remind ourselves that as this is an appeal against the exercise of a discretion there is a burden on the appellant to show that a Judge acted on a wrong principle, or failed to take into account a relevant matter, or took into account an irrelevant matter, or was plainly wrong.¹⁸

[43] At paragraph [18] of her reserved decision Judge Fox made it clear that she was exercising a discretion and that she should take into account relevant considerations including whether there was trustee consent.

[44] Judge Fox then went on at paragraphs [19] – [22] inclusive to set out the factors she took into account and her reasoning as to why she decided to amend the occupation order. The majority of the factors Judge Fox took into account were clearly relevant.

[45] Paragraph [20] is a key paragraph and we set it out in full as follows:¹⁹

[20] However, I consider that the reasons for the trustees' opposition to this application can not outweigh where the interest of justice falls in this case. While their view is important, and it is in keeping with the policy of Part 15 to give their opinion a high degree of significance as a relevant factor, I am also mindful of the Preamble, ss 2 and 17(2). Other factors that I have taken into account include the fact that Mr Jaram is the only person at the moment, as far as the Court is aware, who wishes to build on the land beyond those already in occupation. He wishes to do so for his children. His position as a minority and the need to protect him from an oppressive majority is equally relevant. So is the need to ensure fairness between owners.

[46] There are three matters Judge Fox referred to in paragraph [20] which warrant closer examination:

- a) Section 17(2) of the Act – the wishes of the owners;

¹⁸ *Harris v McIntosh* [2001] 3 NZLR 721 at [13], *May v May* [1982] 1 NZFLR 165 at 170, *Blackstone v Blackstone* [2008] NZCA 312 and *Kacem v Bashir* [2011] 2 NZLR 1 at [32].

¹⁹ *Trustees of Omaio 43 Section 4 Trust v Jaram – Omaio 43 Section 4* (2014) 104 Waiariki MB 73 (104 WAR 73) at [20].

- b) Characterising the trustees as majority owners;
- c) The need to ensure fairness between owners.

Section 17(2) of the Act – the wishes of the owners

[47] At paragraph [20], after referring to the trustees’ opposition as being a relevant factor, Judge Fox also said:

I am also mindful of the Preamble, ss 2 and 17(2).

[48] We set out s 17(2) of the Act as follows:

17 General objectives

...

- (2) In applying subsection (1), the court shall seek to achieve the following further objectives:
 - (a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:
 - (b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:
 - (c) to determine or facilitate the settlement of disputes and other matters among the owners of any land:
 - (d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:
 - (e) to ensure fairness in dealings with the owners of any land in multiple ownership:
 - (f) to promote practical solutions to problems arising in the use or management of any land.

[49] Subsections 17(2)(a)-(c) of the Act refer to the “owners of any land”. The reference to owners not only includes the trustees as the legal owners but also the 86 beneficial owners in the block.²⁰ Judge Fox was aware and took into account the position of the legal owners (the trustees) however she did not have any information before her concerning the views of the beneficial owners.

[50] In this case we know that none of the beneficial owners (other than Mr Jaram and Mr Howell) were:

²⁰ Block Details Report as at 18 November 2013 – p 135 Record of Appeal.

- a) Notified of the application to amend the 1998 occupation order;
- b) Given an opportunity to discuss and consider the application for amendment;
- c) Given a copy of Overington survey plans showing the original and new sites.

[51] A significant amendment to the original occupation order was sought by Mr Jaram. The application was as close to a new application as could possibly be, given that it was for a completely new site. The circumstances of this case clearly called for the views of the beneficial owners to be ascertained. There was no such evidence before the Court, because there had been no opportunity for the owners to consider the new site, whether they agreed or disagreed, how it affected the other owners or indeed how it affected the block as a whole.

[52] We accept that the responsibility for obtaining evidence of that nature rests with Mr Jaram. However the views of the owners concerning the proposed amendment were an important and relevant consideration. Absent that evidence Judge Fox should have either declined the application on that basis or adjourned it to allow Mr Jaram an opportunity to gauge the views of his fellow owners.

[53] By stating that she was mindful of s 17(2) of the Act, the inference was that Judge Fox had taken into account the views of the owners. The evidence before the Court indicates otherwise. The views of the owners were never sought by Mr Jaram nor were they placed before the Court and therefore could not be considered by Judge Fox. Thus we reach the conclusion that she failed to take into account a significant relevant factor.

Are the trustees majority owners?

[54] At paragraph [20] Judge Fox took into account the lack of consent from the trustees. She was undoubtedly right to state that the trustees' view was important and to give their opinion a high degree of significance. We are troubled by the characterisation of

the trustees' opposition as being "an oppressive majority" and the need to protect Mr Jaram in his position as a "minority".

[55] In making this observation we infer that Judge Fox was relying upon s 17(2)(d) of the Act which provides that the Court shall seek to protect minority interests in any land against an oppressive majority.

[56] The trustees are not majority or minority interests, they are the legal owners of the block. As this Court made clear in the decision of *Eriwata v Trustees of Waitara SD Section 6 and 91 Land Trust*, legal ownership is vested in trustees.²¹ They have the power to control the land and to permit occupation in accordance with the trust order, the Act and general trust principles.

[57] In *Matchitt – Te Kaha 65* Judge Fox had before her an application for partition.²² There were eight owners in the block. Five including the applicant supported the application for partition.

[58] In that case Judge Fox took into account the number of owners in support of partition and their relative weighting of shares in the land. She reached the view that she needed to protect the minority against an oppressive majority as required by s 17(2)(d) of the Act. She considered that a majority of owners were acting oppressively as they wanted the best portion of the block for residential development. In that case the block was not vested in responsible trustees.

[59] In *Bhana v Paniora* Judge Ambler considered an application for an occupation order by Barbara Bhana.²³ She owned 25% of the interests in a block of Māori freehold land. The application was opposed by her two uncles who collectively held the remaining 75% of the interests in the land.

²¹ *Eriwata v Trustees of Waitara SD Section 6 and 91 Land Trust* (2005) 15 Aotea Appellate MB 192 (15 WGAP 192).

²² *Matchitt – Te Kaha 65* (2012) 65 Waiariki MB 120 (65 WAR 120).

²³ *Bhana v Paniora – Wairau North 1B2C* (2013) 69 Taitokerau MB 139 (69 TTK 139).

[60] Barbara Bhana and her uncles owned the land as tenants in common in unequal shares. It was not a situation in which the legal estate was vested in trustees as in the present case. In that case Judge Ambler found that the uncles were acting in an oppressive manner.

[61] The present case can be distinguished from the *Matchitt* and *Bhana* cases. The dispute is not between assembled owners, minority or majority beneficial owners or those who hold interests as tenants in common in equal or unequal shares. In this case the block is vested in responsible trustees who have the power to control the land and to permit occupation.

[62] Whilst Judge Fox was correct in taking into account the lack of trustees' consent, we consider it was wrong to characterise their position as one of "an oppressive majority" for the reasons we have explained. Thus we conclude that Judge Fox acted on a wrong principle.

[63] If we have wrongly interpreted what Judge Fox was referring to by the phrase "an oppressive majority" that also does not assist the respondent. If Judge Fox was in fact referring to an oppressive majority of beneficial owners, there was simply no evidence before her on that point. Either way the approach was incorrect.

Fairness between owners?

[64] We are also concerned with the penultimate sentence of paragraph [20] wherein Judge Fox stated a need to "ensure fairness between owners". This was not a case in which there were competing groups of owners before the Court. There was no evidence before the Court that other owners wished to obtain occupation orders, licences to occupy or build on the block. We are unsure what Judge Fox was referring to when she referred to ensuring fairness between the owners given that there was no issue or evidence on that point. To that extent we consider that she took into account an irrelevant consideration.

Decision

[65] In reaching her decision to grant an amended occupation order Judge Fox:

- a) By failing to ascertain the views of the owners, failed to take into account a relevant factor;
- b) By characterising the trustees' opposition to the amendment as being "an oppressive majority", proceeded on a wrong principle; and
- c) By stating a need to "ensure fairness between owners" when there was no issue between the owners, took into account an irrelevant factor.

[66] For those reasons the appeal must be upheld.

Orders

[67] Pursuant to s 56 of Te Ture Whenua Māori Act 1993 we:

- a) Annul the order of Judge Fox made at 104 Waiariki MB 73-80 (104 WAR 73-80) granting an amended occupation order – s 56(1)(a);
- b) We direct a rehearing on the amendment application – s 56(1)(e).

[68] In reconsidering the s 330 application, the Court should take into account whether the views of the owners have been sought, whether they support or oppose the application, the effect of the proposal on the interests of the other owners and whether there is a sufficient degree of support for the application among the owners. We accept that the onus and responsibility for presenting that evidence rests upon Mr Jaram. If Mr Jaram fails to present that evidence to the Court that is a relevant factor which must, we would think, weigh heavily in the lower Court's considerations.

[69] The lower Court in reconsidering this matter will also need to take into account whether or not the trustees oppose the application. Judge Fox in her decision correctly indicated that the trustees' opposition is an important factor. We concur with that view. In keeping with the policy of Part 15 of the Act the trustees' support or opposition to the amendment is a relevant factor and of high significance. That significance is emphasised

by the trust order which states that the control and allocation of housing sites on the block is vested in the trustees – see clause 2 and 3(b)(i) of the trust order.²⁴

Costs

[70] The appellants have been successful on this appeal and ordinarily would be entitled to an award of costs pursuant to s 79 of the Act. They are however in receipt of special aid for their legal representation thus we make no order for costs.

This judgment will be pronounced at the next sitting of the Māori Appellate Court.

S R Clark (Presiding)
JUDGE

S F Reeves
JUDGE

M P Armstrong
JUDGE

²⁴ 65 Opotiki MB 64 (65 OPO 64).