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

A20200012426
2020/10

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Te Whaiti-Nui-A-Toi Block
I WAENGA I A *Between*	PHYLLIS NICHOLAS Te kaitono pīra *Appellant*
ME *And*	ANDREW TE AMO, DOUGLAS REWI, PETER WHITE AND RENEE REWI AS TRUSTEES OF TE WHAITI-NUI-A-TOI TRUST Ngā kaiurupare pīra *Respondents*

Nohoanga: *Hearing*	11 February 2021, 2021 Māori Appellate Court MB 65-95 (Heard at Rotorua)
Kooti: *Court*	Judge S Te A Milroy (Presiding) Judge M J Doogan Judge T M Wara
Kanohi kitea: *Appearances*	M Sharp for Applicant M McKechnie and G Dennett for Respondents
Whakataunga: *Judgment date*	19 July 2021

TE WHAKATAUNGA Ā TE KOOTI
Judgment of the Court

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Hei tīmatanga kōrero

Introduction

[1] In the late 1980s Phyllis Nicholas, the appellant, erected a shed on Te Whaiti-Nui-A-Toi. On 20 February 2019 the trustees of Te Whaiti-Nui-A-Toi Ahu Whenua Trust, the respondents, applied to the Court seeking an injunction to prohibit Phyllis from entering the land to occupy the shed.

[2] The ownership of the shed was also contested between Phyllis and members of her wider whānau, but on 20 May 2020 Judge Coxhead determined that Phyllis owned the shed pursuant to s 18(1)(a) of Te Ture Whenua Māori Act 1993 ("the Act"). However, he also found that there was no current authority for the shed to be on the land and granted an injunction prohibiting Phyllis from occupying the land. He also directed her to remove the structure within 6 months.[1] The issuing of final orders was delayed to enable the trustees to convene a meeting to consider Phyllis' application for an occupation order.

[3] The trustees refused to grant Phyllis a right of occupation and final orders were issued. [2] Phyllis now appeals the order preventing her from occupying the land and requiring her to remove the shed.

Kōrero whānui

Background

[4] Te Whaiti-Nui-A-Toi is 3024.93442 hectares of Māori freehold land located in Te Whaiti. The block was created by an amalgamation order dated 1974, amalgamating several formers blocks of land including Te Turi C, being the area where the dwelling is situated.[3] The appellant's whanau were owners in Te Turi C prior to the amalgamation. After amalgamation the land was vested in the Māori Trustee, who then entered into a forestry lease with the Ministry of Forestry for a term of 90 years. The lease was to expire in 2066, although there were provisions in the lease for the Ministry to terminate the lease at an earlier date.

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1 233 Waiariki MB 92-115 (233 WAR 92-115).
2 234 Waiariki MB 188 (234 WAR 188).
3 173 Rotorua MB 272-276 (173 ROT 272-276).

[5] On 14 August 1989 the Māori Trustee ceased to be trustee for the block and individual responsible trustees were appointed.[4] The current trustees are Andrew Te Amo, Douglas Rewi, Peter White and Renee Rewi.[5]

[6] In 1989, after obtaining the consent of one of the advisory trustees, Phyllis bought a shed and moved it onto the land. As the lessee of the land, the Ministry of Forestry had the authority to grant a licence for the erection and occupation of the shed. On 31 January 1990 the advisory trustees wrote to the Ministry of Forestry, to set out the terms and conditions for the issue of any such licence.

[7] The trustees advised the Ministry of Forestry that they would give consent for the Ministry to issue a licence on the following terms and conditions:

> 1. Provided you are satisfied that the Whakatane District Council building permit has been fully complied with.
>
> 2. You assume responsibility to ensure that the Martin family do actually reimburse you for lost revenue due to the loss of one hectare of trees.
>
> Then the trustees approve the issuing of a building licence to the Martin family of the existing building on the land but that the licence be subject to the following conditions:
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> 1. That the licence to occupy will be for the remaining unexpired portion of the lease only which expires on 31 May 2066.
>
> 2. That from 1 June 2066 the future of the building will depend on owners of the land at 31 May 2066.
>
> 3. That the Martin family meet all costs associated with the Licence.

[8] On 9 July 1990 the Ministry of Forestry granted a licence to Frank Martin, Phyllis' brother, to occupy the land. That license would end upon the occurrence of certain events including the surrender of the licence, abandonment, failure to fulfil obligations under the licence, or the Ministry of Forestry no longer having an interest in the estate.

[9] On 20 May 1999 the Ministry of Agriculture and Forestry wrote to Frank Martin, outlining two proposed variations to the licence. First, the names that appeared on the licence

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4 225 Rotorua MB 42 (225 ROT 42).
5 206 Waiariki MB 189-193 (206 WAR 189-193).

were to change to "the Martin Whanau with Frank Martin named as responsible caretaker". Second, the annual rental was to be reduced from $582.00 per annum to an annual consideration of $1.00. A Deed of Variation dated 16 August 1999 was executed, recording these changes.

[10] In 2003 Frank Martin died, and the shed was then occupied by Reo Martin, Phyllis' brother. No further variations were made to the licence.

[11] In 2012 the Deed of Lease to the Ministry of Forestry was surrendered. At this time, no steps were taken by the Martin whānau to obtain a new licence to occupy the land.

[12] In 2016, Reo Martin died and the shed was then occupied by Reo's son, Daniel Martin. Daniel took steps to prevent Phyllis from entering the shed, however his application to the Māori Land Court to be determined as owner of the shed was dismissed.[6]

[13] Conflict amongst members of the Martin family concerning the ownership of, and right to occupy the shed ensued, leading the trustees to issue a trespass notice on 15 February 2019 prohibiting Phyllis from entering the land.

Tikanga pīra

Approach on appeal

[14] This is an appeal from the exercise of a discretion where the Māori Land Court was asked to determine whether Phyllis had a right of occupation of the shed and surrounding area on the basis of equitable principles. In such cases the appeal criteria are different from those of a general appeal. The Supreme Court in *Kacem v Bashir* said:[7]

> [32] In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

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6 143 Waiariki MB 283-284 (143 WAR 283-284).
7 *Kacem v Bashir* [2010] NZSC 112 at [32].

[15] These criteria were applied by the Court in *Faulkner v Hoete,* which determined that the appellant must show that the Court below:[8]

(i) Erred in law or principle;

(ii) Took into account an irrelevant matter;

(iii) Failed to take into account a relevant matter; or

(iv) Was plainly wrong.

Te Pīra

The Appeal

[16] Two grounds of appeal have been advanced for the appellant. We have rephrased these appeal points as follows:

(i) The Māori Land Court erred in fact and law in finding that the appellant was not entitled to a right of occupation of the shed and its surrounds on the basis of constructive trust arising from a reasonable expectation.

(ii) The Māori Land Court made further errors in law in finding that the appellant, an owner in Māori land held in trust, who built a shed on the land with the agreement of the trustees, must reach an additional agreement with the trustees for the right to occupy that shed.

Ngā kōrero a te Kaitono Pīra

Submissions for the Appellant

[17] The Appellant submitted that:

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[8] *Faulkner v Hoete - Motiti North C No 1* [2018] Māori Appellate Court MB 17 (2018 APPEAL 17) at [11].

i) Applications under s 18(1)(a) can be made for 'ownership' or 'possession' of Māori land. The concept of ownership can include rights of possession, but rights of possession can also exist separately from ownership.

ii) In cases where a landowner has built on Māori land with the express or implicit consent of the legal owners of the land, the Courts have tended to grant orders under s 18(1)(a) recognising ownership rights that include rights of possession.

iii) Having found that the shed was built with the consent of the trustees, the approach of the Court to the application for possession as well as ownership of the shed should have been straightforward.

iv) The Courts can find the existence of occupation rights based on constructive trust and reasonable expectation principles as part of the exercise of determining ownership rights under s 18(1)(a).

v) The judge in the lower Court incorrectly applied constructive trust principles by restricting any occupation rights to those legally granted through the Ministry of Forestry licence, and, after termination of the forestry lease in 2012, any implied licence granted by the trustees.

vi) The judge did not address the appellant's arguments that through the conduct of the parties over time a reasonable expectation had arisen that the appellant continued to hold long term occupation rights in regard to the shed.

vii) There must have been a reasonable expectation between the appellant and the trustees that she and her whānau would be able to occupy the shed for a significant period of time. The trustees must have known that Phyllis was spending a considerable amount of money on purchasing and erecting the shed on the land, and that its purpose was so that the whānau could stay on their traditional kāinga.

viii) The grant of the licence by the Ministry of Forestry would have strengthened that expectation as the trustees signed the consent and provided a letter of support for

the licence. The expiry of the lease in 2012 would not have affected the expectations of the parties, and the appellant's whānau applied for a fresh licence, indicating an expectation of a continuation of the arrangements for occupancy of the site.

ix) The dispute between Phyllis and her brother over ownership of the building should not have altered expectations as to occupancy rights. The trustees have given no reason for refusing a fresh licence to occupy, so there appear to be no circumstances that would have changed past expectations of occupancy rights. Nor are there any changes to the administration of the land which would warrant a change of reasonable expectations.

Ngā kōrero a ngā Kaiurupare Pīra

Submissions for the Respondents

[18] The respondents submitted that:

a) The necessary criteria for a constructive trust were not established in these proceedings.

b) A number of factual matters indicate that no constructive trust was established.

c) The trustees' actions have not given rise to any valid assumption, belief or expectation for Phyllis to rely on – the terms of any agreement between Phyllis and the trustees is unclear and nothing the trustees said or did created any belief or expectation that she would have a possessory interest in the land.

d) A belief in a certain state of affairs is not the same thing as 'a reasonable expectation.' There must be conduct by both parties which lays a credible factual foundation for a reasonable expectation. Here there was no such credible factual foundation.

Te take mo te pīra nei

Issue for determination

[19] The issue for determination is whether a person who owns a building located on Māori freehold land, which has been occupied by the whānau pursuant to a licence to occupy, is entitled, once the licence has expired, to possess and occupy the building and its surrounds on the basis of a reasonable expectation arising from a constructive trust. We first address this issue and then consider whether it has been shown that the Court below erred in the way it exercised discretion to grant the injunction against Phyllis.

Te Ture

The Law

[20] Section 18(1)(a) of the Act states:

> **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:

[21] Section 18(1)(a) provides the Court with jurisdiction to hear and determine any claim as to the ownership or possession of Māori freehold land and has been used extensively to determine the ownership of houses built on Māori freehold land. The legal position can be summarised as follows:

(i) The Court cannot create new ownership rights, only declare those that already exist at law or in equity.[9]

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[9] *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223).

(ii) It may be found that a building is not a part of the land and that the owners of the land are not the owners of a building; an owner in the land may separately own an improvement.[10]

(iii) The starting point for the Court is that a house is a fixture and ownership runs with the land. On application of the test, the Court may find that the house is a chattel or that it is owned separately from the land it sits on.[11]

[22] In *Tipene v Tipene* the Court applied the principles set out in the decision of *Lankow v Rose* concerning what factors may give rise to a constructive trust.[12] In this case the Court of Appeal identified four features which, if demonstrated, would mean it was unconscionable for the legal owner to deny the claimant an interest. The claimant must show:

(a) Contributions, direct or indirect, to the property in question;

(b) The expectation of an interest therein;

(c) That such expectation is a reasonable one;

(d) That the defendant would reasonably expect to yield the claimant an interest.

[23] We adopt that approach.

Kōrerorero

Discussion

[24] In the lower Court, Judge Coxhead determined that the shed is owned by the appellant and this ownership is not challenged. What is challenged is the extent of rights under the s18(1)(a) order; that is, whether the appellant is entitled to occupy the shed and the surrounding area now that the licence to occupy granted by the Ministry of Forestry has been terminated.

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10 *Tohu - Te Horo 2B2B2B Residue* (2007) 7 Taitokerau Appellate MB 34 (7 APWH 34).
11 *Tohu*, above n 10.
12 *Tipene v Tipene* – Motatau 2 Section 49A4F (2014) 85 Taitokerau MB 2 (85 TTK 2); *Lankow v Rose* [1994] CA 176/93.

[25] Generally, the cases determined by the Māori Land Court pursuant to s 18(1)(a) address the ownership of dwellings on the land as opposed to rights of possession of Māori freehold land.[13] While the Court has express jurisdiction to hear claims concerning the possession of Māori land, matters concerning occupation are specifically provided for under Part 15 of the Act, where the Court has jurisdiction to grant orders of occupation.

[26] In the lower Court, Judge Coxhead concluded that any occupation rights should be decided through a separate process and do not necessarily follow from a s 18(1)(a) determination of ownership. That said, there is a potential argument that the rights of ownership and possession explicitly provided for under s 18(1)(a) could encompass rights of occupation.

[27] In responding to the trustees' application for an injunction, the appellant filed an application for a declaration of ownership of the shed. As part of that application, she claimed that her ownership rights in the property included the right to access and occupy the building, and as such she cannot in the course of exercising these rights be treated as trespassing on the land.

[28] The appellant argued before us that the Court erred in determining that Phyllis owned the shed but did not have a right to access and occupy the shed. While we agree that it is possible for the Court to determine both ownership of a building on the land and rights to occupy the same, that is not the same as accepting that the appellant has occupation rights *because* she has been recognised as the owner of the shed.

[29] With regard to the ownership of a building on Māori freehold land, the Māori Land Court has intervened and imposed a constructive trust on multiple occasions to create or protect property interests.[14] In *Tipene v Tipene*, the Court endorsed the reasonable expectation approach set out in *Lankow v Rose*.[15]

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13 See *Stock v Morris – Wainui 2D2B* (2012)41 Taitokerau MB 121 (41 TTK 121); *Herewini – Maungaroa No 1 Section 23K (Keterau)* (2013) 85 Waiariki MB 141 (85 WAR 141); *Tipene v Tipene,* above n 12.

14 *Tipene v Tipene*, above n 12; *Thompson – Succession to Walter William Wihongi* (2015) 117 Taitokerau MB 245 (117 TTK 245).

15 *Lankow v Rose*, above n 12; *Tipene v Tipene*, above n 12; *Thompson*, above n 14.

[30] Ultimately, if a non-legal owner can establish that, in the factual circumstances before the Court, a reasonable expectation to receive an interest in property has arisen, and the legal owner does not allow for this, the Court may find such conduct unconscionable so as to require the intervention of equity and the imposition of a constructive trust.

[31] The reasonable expectation approach was developed and applied through a series of matrimonial property cases such as *Gillies v Keogh*, *Phillips v Phillips* and *Lankow v Rose* where the parties were in de facto relationships.[16] The non-legal owner of the property was recognised as having an equitable interest based on their contributions to the assets. This legal development stemmed from the fact that de facto relationships were not recognised under the Matrimonial Property Act 1976 and the imposition of a constructive trust was a means of ensuring equity between parties.

[32] In these matrimonial cases, the "matrimonial home" included both the house, together with any land, buildings, or improvements as defined under the s 2 of the Matrimonial Property Act 1976, now replaced by the Property (Relationships) Act 1976. Therefore, when the Court imposed a constructive trust it was with respect to both house and land. However the Property (Relationships) Act 1976 expressly states that Māori freehold land is not affected by the Act, meaning that it cannot be included as part of the relationship property.[17]

[33] This exclusion accords with the Preamble and principles of Te Ture Whenua Māori Act 1993, recognising that Māori land is a taonga tuku iho that should remain in the hands of its owners. The land is also very likely to be in multiple ownership, with the owners being of the same whānau and hapū. In addition, the land may well have a management structure, such as a trust, imposed over the land in order to facilitate utilisation and development by the collective owners.

[34] In light of these statutory provisions, equity could not intervene and impose a constructive trust to resolve a relationship property dispute involving Māori freehold land. Rather, in relationship property cases where the parties' principal residence has been built

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16 *Gillies v Keogh* [1989] 2 NZLR 327 (CA); *Phillips v Phillips* [1993] 3 NZLR 159 (CA)*; Lankow v Rose*, above n 12.

17 Property (Relationships) Act 1976, s 6.

on Māori freehold land, a constructive trust may be imposed over other property, so that the non-legal owner can be compensated for his or her interest in the house from that other property (assuming the circumstances allow).

[35] With regard to Māori freehold land, the Courts' approach to improvements on land differs from that under the Property (Relationships) Act 1976, as the Court can recognise a separation in the ownership of the improvement from the ownership of the land. This is a means of ensuring equity between owners, as the common law assumption is that a fixture is owned by all the owners.

[36] Given that the approach in our jurisdiction is to separate the ownership of the improvement from the ownership of the land, it follows that the reasonable expectation test must be applied with respect to both the improvement *and* the land if the claim is to succeed. The claimant must satisfy the Court that he or she has a reasonable expectation to own or possess the improvement, and that he or she also has a reasonable expectation to own or possess at least that portion of the land on which the fixture is located. Where land is vested in trustees, the trustees are the legal owners of all of the land rather than those with shares in the land owning a portion according to their share.

[37] If we accept the submission of counsel for the appellant that a constructive trust ought to be imposed on the basis of a reasonable expectation, the subject matter of the constructive trust is limited to the property to which the appellant made a direct contribution. The lower Court considered the appellant's financial contributions to the shed and recognised these contributions by granting an order determining ownership of the shed in the appellant's favour. In our view the appellant's contributions have been recognised. There is no evidence that the appellant made any direct contributions to the land that would give rise to a reasonable expectation of an interest in the land.

[38] Counsel for the respondent submits that the necessary criteria to establish a constructive trust were not established due to a range of factors and we agree. These include that:

(i) There is insufficient evidence to find that the appellant had consent from the advisory trustees to occupy the land. After moving the shed onto the land the

appellant obtained consent from one advisory trustee to her occupation but the evidence is unclear as to whether the other advisory trustees knew of her occupation.

(ii) Even if the advisory trustees consented to Phyllis' occupation of the land, they did not have the authority to grant such consent, as at the relevant time that authority sat with the Ministry of Forestry as the lessee of the land. Therefore, it is not reasonable for Phyllis to have formed an expectation that the trustees would allow her to occupy the land over and above what was provided for in the Ministry of Forestry licence to occupy.

(iii) The right of occupation was settled when a licence was granted by the Minister of Forestry who was leasing the land. While the advisory trustees endorsed the licence, they were not a party to it, and therefore it is not reasonable to expect that they agreed to Phyllis' occupation of the land other than as set out in the licence

(iv) The appellant was not a party to the licence to occupy.

(v) The forestry lease came to end in 2012, and therefore the licence that was granted by the lessee also came to an end. The licence was explicit that it would end upon the termination of the forestry lease. Again, in such circumstances it is not reasonable to expect that Phyllis would be entitled to occupy the land for any period after that. Any such occupation would be informal and would come to an end at the will of the trustees.

[39] Ultimately, although the appellant hoped to occupy the land for a much longer duration, she ought to have been aware that the right of occupation under the licence would end if the Ministry of Forestry's lease came to an end. This is explicit in the Deed of License to Occupy. We see nothing in the evidence in terms of the conduct of the trustees that would support a reasonable expectation that Phyllis would be entitled to a right of continuing occupation once the forestry lease ended.

[40] Contrary to the submissions of the appellant, the judge in the lower Court did address the requirements of a right of occupation based on constructive trust and reasonable

expectation principles. Unfortunately for the appellant the factual foundation for such a right was lacking. We find that the lower Court judge did not err in law or principle, and we affirm the order of injunction made on 17th June 2020 at 234 Waiariki MB 188-189.

Kupu Whakatau

Decision

[41] The appeal is dismissed pursuant to s 56(1)(g) Te Ture Whenua Māori Act 1993.

[42] If costs are at issue, counsel have three months from the date of this decision to exchange and file submissions.

I whakapuaki i te 2pm i te 19 o ngā rā o Hōngongoi te tau 2021.

S Te A Milroy (Presiding)	M J Doogan	T M Wara
JUDGE	**JUDGE**	**JUDGE**