IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20170002872
APPEAL 2017/7

	UNDER	Section 58 of Te Ture Whenua Māori Act 1993
	IN THE MATTER OF	Motiti North C No 1
	BETWEEN	LIZA FAULKNER Appellant
	AND	GRAHAM HOETE AND AUBREY HOETE Respondents
Hearing:	8 August 2017 (Heard at Hamilton)	
Court:	Judge M P Armstrong (Presiding) Deputy Chief Judge C L Fox Judge L R Harvey	
Appearances:	M Sharp for the Appellant K Feint for the Respondents	
Judgment:	31 January 2018	

JUDGMENT OF THE COURT

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Introduction

[1] On 14 March 2017, Judge Clark granted an injunction requiring Liza Faulkner to move a partially constructed dwelling on Motiti North C No 1 to an alternative site, and to reinstate the land on which her dwelling was constructed.[1] Ms Faulkner appeals that decision.

[2] This judgment determines whether the appeal should be upheld.

Background

[3] Motiti Island is located off the Bay of Plenty coast between Mount Maunganui and Maketu. It is a small but arable island with freshwater springs. It supports a small Māori community plus several larger farms that are in general title. The island has no public infrastructure.[2] The infrastructure that exists is on private land. Access to the island is by sea or air. Motiti is not regulated by existing local authorities. Residents do not have to pay local body rates. The Minister of Local Government acts as the territorial authority, though there has been little government presence on the island.[3]

[4] Motiti North C No 1 is 15.2769 hectares of Māori freehold land located on the eastern side of the island. It is approximately 750 metres in length and 200 metres wide. There is no administration structure in place. It has 83 owners, including the appellant and the respondents, who hold unequal shares as tenants in common.

[5] In December 2008, an airstrip was formed by the respondents over part of the block. The airstrip remained in use until late March 2016 when the appellant started building a small house in the middle of the airstrip.

[6] On 8 April 2016, an interim injunction was granted requiring Ms Faulkner to cease work on the house.[4] The permanent injunction was granted on 14 March 2017.[5] On 3 May

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1 *Hoete v Faulkner - Motiti North C No 1* (2017) 136 Waikato Maniapoto MB 278 (136 WMN 278).
2 Other than a telephone installation.
3 *Hoete v Faulkner - Motiti North C No 1* (2017) 136 Waikato Maniapoto MB 278 (136 WMN 278) at [2].
4 118 Waikato Maniapoto MB 30-37 (118 WMN 30-37).
5 Mary Faulkner, the appellant's mother, also applied to partition the area on which the dwelling is Located, application A20160003646. This application was adjourned 'sine die'.

2017, the Court below granted an application to stay the permanent injunction until further order. However, the interim injunction remains in force.[6]

[7] The appeal was heard on 8 August 2017, following which we convened a conference with counsel to discuss whether there was any prospect of resolving this issue by consent.[7] Counsel filed a joint memorandum advising that agreement was not reached and a decision is sought.

The decision of the Māori Land Court

[8] Judge Clark considered the rights of co-owners to possession of the land, and the principles concerning trespass by ouster. He assessed the views of the owners, the Motiti Island Environmental Management Plan ("the District Plan"), the involvement of the Department of Internal Affairs on behalf of the Minister, the history of the use of the land, and the location of the house. On the latter, Judge Clark drew "the irresistible inference that the house was built deliberately on the airstrip to ensure that it could not operate as an airstrip." He found:[8]

> [86] This is a case in which the construction and maintenance of an airstrip on the block is a permitted activity. There is a specific rule in the District Plan which provides that buildings shall not be erected within an area extending 50 metres either side of the centre line of the airstrip and for a distance of 200 metres from either end. In this case a house has been built in the middle of the airstrip, which I found was an act done deliberately to thwart the use of the airstrip.
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> [87] Graham and Aubrey Hoete and others have been unable to use part of the block as an airstrip which, by reason of its recent usage and the provisions of the relevant District Plan, they were entitled to do.
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> [88] In the exercise of my discretion, I have given serious consideration as to whether or not the Māori Land Court should grant the order sought. Undoubtedly it would be preferable for the Department of Internal Affairs, as the entity tasked with providing administrative support for the operational functions of the Minister to have taken action in the first instance. After all, the case responds in part to an understanding and interpretation of the MIEMP. Having said that, the Māori Land Court undoubtedly has jurisdiction to entertain the permanent injunction application and the activity complained about, being a house built on the airstrip, given it is located on Māori freehold land. Thus I have taken the position that I should not step away from the issue or the necessity for it to be considered head on by this Court.
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> [89] Having done so I consider that the applicants are entitled to an order for a permanent injunction on the basis that they have been ousted from being able to use part of the block as an airstrip, as provided for in the District Plan.

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6 *Hoete v Faulkner – Motiti North C No 1* (2017) 140 Waikato Maniapoto MB 1 (140 WMN 1).
7 2017 Māori Appellate Court MB 357-417 (2017 APPEAL 357-417).
8 *Hoete v Faulkner - Motiti North C No 1* (2017) 136 Waikato Maniapoto MB 278 (136 WMN 278) at [86] to [89]

What are the grounds of appeal?

[9] The grounds of appeal are:

(a) The decision of the Māori Land Court is based upon the premise the respondents had individual rights to use the airstrip because an airstrip was provided on the District Plan and the building of the house by Liza Faulkner ousted their ability to exercise that right;

(b) This finding is incorrect in law as the provision of an airstrip in the District Plan only permits landowners to use the land for an airstrip if they wish. In the present case, the owners of the land have not made a collective decision to use the area as an airstrip and at an owners' hui convened by the Court they decided that the land should not be used for that purpose;

(c) The building restrictions under the District Plan only apply to an area that is useable as an 'existing airstrip'. In the present case, the area in question is not useable as an airstrip because of existing buildings and other unusable land within set back areas; and

(d) Whether the building contravenes the District Plan is not a matter which provides the Court with jurisdiction to order an injunction but rather is a matter to be determined by the territorial authority.

[10] In determining this appeal, we consider the following issues relevant:

(a) Does the District Plan provide a right to use the land as an airstrip?

(b) Do the owners support the use of the airstrip?

(c) Is this an 'existing airstrip' under the District Plan?

(d) Does the Court have jurisdiction to grant an injunction to enforce the District Plan?

(e) Did the Māori Land Court err exercising its discretion?

Legal principles

The approach on appeal

[11] The Māori Land Court has jurisdiction to grant injunctive relief per s 19 of Te Ture Whenua Māori Act 1993. The grant of an injunction is a discretionary remedy. On appeal, it is not relevant that we may have exercised the discretion differently. The appellant must show that the Court below:[9]

(a) Erred in law or principle;

(b) Took into account an irrelevant matter;

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

(d) Was plainly wrong.

[12] We adopt this approach.

Trespass by ouster

[13] Trespass by ouster has not been considered in detail by this Court. Because of the importance of this issue to Māori land owners generally, we consider the relevant legal principles in full.

[14] In *Taueki v Horowhenua Sailing Club – Horowhenua 11 (Lake) Block* this Court held that when seeking a permanent injunction, an applicant must fulfil the legal elements relating to trespass before the Court will consider whether to exercise its discretion to grant an injunction.[10]

[15] An action in trespass is primarily intended to protect possessory rights rather than rights of ownership. In the present case, the parties are co-owners in the land who hold shares as tenants in common. In *Fredricson v Hikuwai* Judge Ambler held:[11]

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9 *Flight v Fletcher – Waipapa 1D 2B 3B* [2017] Maori Appellate Court MB 96 (2017 APPEAL 96); *Harris v McIntosh* [2001] 3 NZLR 721 (CA); *Kacem v Bashir* [2010] NZSC 112. This can be contrasted with the approach to a general appeal as set out in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103.

10 *Taueki v Horowhenua Sailing Club – Horowhenua 11 (Lake) Block* [2014] Maori Appellate Court MB 60 (2014 APPEAL 60).

11 *Fredricsen v Hikuwai* (2016) 143 Taitokerau MB 135 (143 TTK 135).

> [20] …Tenants in common enjoy unity of possession and are equally entitled to occupy, use and enjoy all of the land. In general, an action in trespass cannot therefore be maintained against a co-owner in possession, unless such possession completely excludes the other co-owners from possession of the land and they are deemed to have been ousted.

[16] In *Nicholls v Nicholls – Part Papaaroha 6B Block*, Judge Coxhead held:[12]

> [86] Each co-tenant is entitled to be present on the land and to make normal use of it. It follows that a tenant in common may not sue another co-tenant in trespass where that co-tenant is simply making normal and ordinary use of the land, regardless of whether their consent has been obtained. This is because such consent is not necessary (see *U-Needa Laundry Limited v Hill* [2000] 2 NZLR 308).
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> [87] Therefore, neither co-tenant can sue the other co-tenant for trespass unless that co-tenant ousts the other co-tenant from the land, or destroys the subject matter of the tenancy. In these circumstances, a co-owner's action is usually termed an action for recovery of land, rather than an action for trespass.

[17] Trespass by ouster has also been considered in other jurisdictions. In *Wu v Body Corporate 366611*, the Supreme Court held:[13]

> [116] With respect to property owned in common, since each co-owner is entitled to be present on the land and to make normal use of it, neither can sue the other for trespass, unless one co-owner expels (ousts) the other from the land or destroys the subject matter of the tenancy.
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> [117] In this case, the respondents, who act on behalf of the co-owners in managing, maintaining and controlling the common property, have unlawfully excluded Mr Wu from accessing the common property that he has a legal interest in. Mr Wu therefore has an action in trespass.

[18] In *Sitarz v Burke*,[14] Tipping J held:

> The simple fact is that the Respondents had a clear prima facie right to use the access way. Indeed by dint of their being owners of the land on which it stands they have just as much prima facie right as Mr and Mrs Sitarz to make use of it. There is a strong case of trespass by ouster. That rather antique expression simply means that the Respondents have been kept out of land which, by reason of the state of the title and usage, they have a right to pass over.

[19] In *Paroz v Paroz*,[15] the Supreme Court of Queensland considered that ouster could be constructive where the conduct of the party in occupation manifests a denial of the rights of the other co-owners.[16]

[20] In our jurisdiction, the principles relating to ouster must be considered within the context of Māori land. Māori land is often held in multiple ownership by tenants in common.

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12 *Nicholls v Nicholls – Part Papaaroha 6B Block* (2009) 120 Hauraki MB 116 (120 H 116).
13 *Wu v Body Corporate 366611* [2015] 1 NZLR 215 (SC).
14 *Sitarz v Burke* HC Chirstchurch AP 259/93, 9 August 1993 at 10.
15 *Paroz v Paroz* [2010] QSC 203.
16 See also *Biviano v Natoli* (1998) 43 NSWLR 695 (NSWCA).

Owners are generally, but not always, related to each other. It is not uncommon to find that owners have moved away, are not engaged with the use and administration of the land, or are deceased. Where there is no administration structure in place, it can be difficult for owners to act collectively concerning the land.

[21] The Court must also apply its powers in a manner that furthers the principles and kaupapa of the Act. This includes:[17]

(a) The retention of the land in the hands of the owners;

(b) Promoting the effective use, management and development of the land by or on behalf of the owners;

(c) Ascertaining and giving effect to the wishes of the owners;

(d) Determining or facilitating the settlement of disputes amongst the owners;

(e) Protecting minority and majority interests;

(f) Ensuring fairness in dealings with the owners; and

(g) Promoting practical solutions to problems arising in the use or management of the land.

[22] In the present case, several owners are competing to use the same area of land. The competing uses are incompatible. The parties have equal rights to possess and use the whole of the land. None have a right to exclusive use of this particular area. They have been unable to resolve this issue and require a resolution.

[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;

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17 Te Ture Whenua Maori Act 1993, s 17.

(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.

[24] This is not a prescribed or exclusive list. Ultimately, the Court will consider whether to exercise its discretion, based on the facts of the case, in a manner that promotes the principles and kaupapa of the Act.

Discussion

Does the District Plan provide a right to use the land as an airstrip?

[25] Mr Sharp, for the appellant, argues the provision of an airstrip in the District Plan permits the owners to use the land as an airstrip, but does not grant a right to do so. He contends Judge Clark erred in law by finding the respondents had individual rights to use the land as an airstrip because this was provided for in the District Plan.

[26] We agree that the District Plan does not provide a right to use the land as an airstrip. Any provision in the District Plan permits an owner to undertake certain activities for planning purposes. It does not create a right to do so. However, we do not consider Judge Clark made such a finding. He found the respondents were unable to use part of the land as an airstrip which "by reason of its recent usage and the provisions of the relevant District Plan, they were entitled to do."[18] Judge Clark did not find the District Plan granted a right to use the land as an airstrip, it only entitled or permitted the respondents to do so.

[27] Judge Clark also relied on the usage of the land. The right to use the land as an airstrip derives from the respondents' rights as owners in the land. They have a right to possession and ordinary use of the land along with all owners. What constitutes ordinary use must be considered within the context of the land itself. Motiti is a remote island that can only be

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[18] *Hoete v Faulkner - Motiti North C No 1* (2017) 136 Waikato Maniapoto MB 278 (136 WMN 278) at [87].

reached by sea or air. There are no public airstrips, or jetties, that can be used to access the island. Prior to the airstrip being formed on this land, both parties had used an airstrip on a neighbouring block for access. That airstrip was closed by the owner of that land.[19] The respondents formed an airstrip on their own land to obtain access.

[28] In these circumstances, forming an airstrip to provide access must come within ordinary use. The airstrip on this land was then used from 2008 to 2016 until the appellant started to construct her house. Judge Clark relied, in part, on that previous usage in coming to his decision. We see no error in that approach.

[29] It may have been different if the respondents sought to form an airstrip on the mainland, which had clear and direct access by public road. It would be difficult to argue an airstrip comes within ordinary use in those circumstances. That is not the case here.

[30] We also accept that occupation of the land also comes within ordinary use. The appellant, as an owner in the land, has a right to possess and occupy the land. This is a case where owners with equal rights are competing to use the same area. This falls squarely within the circumstances where the Court must provide a practical solution to the use or management of the land.

Do the owners support the use of the airstrip?

[31] The appellant contends that at a Court convened meeting, the majority of the owners voted against the use of the airstrip, and in favour of the appellant's house remaining where it is. Mr Sharp argues this should be treated as a collective decision of the owners.

[32] We do not agree that the outcome of this meeting should be treated as a collective decision. 27 out of 83 owners voted at the meeting. This is 32.5 per cent of the owners by number, though they hold 56.8 per cent of the shares in the land. Of those in attendance, 21 owners voted against the use of the land as an airstrip. This represents 25.3 per cent of the owners by number and 36.88 per cent of the shareholding.

[33] While the majority of the owners in attendance at the meeting voted against the use of the airstrip, they still constitute a minority by number and shareholding. Difficulties with owner turn-out and engagement are common with Māori land. The outcome of this meeting

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[19] The neighbouring airstrip has since been reopened.

is clear evidence that the majority who attended were against the use of the airstrip. This is certainly a relevant factor for the Court to take into account, but it is not determinative.

[34] Even so, if the same outcome were to be repeated over a second meeting or if votes in support or opposition were recorded in writing and resulted in the same or an even greater degree of support, then that would make the importance of ascertaining and giving effect to the wishes of the owners, per s 17 of the Act, even more relevant. The decision of this Court in *Whaanga v Niania - Anewa Block* underscores the reality that, in the context of assessing owner support and opposition, each case must be carefully considered on its merits.[20]

[35] The starting point is that owners can make ordinary use of the land and do not require the consent of their co-owners. The views of the owners as demonstrated by an owners' meeting will always be relevant. However, this is just one factor for the Court to consider in coming to an overall decision.

[36] Judge Clark did take this account. He referred to the meeting, the resolutions posed, and the outcome of the vote. Judge Clark concluded that "there is little evidence which suggests that the airstrip was ever broadly supported by the owners".[21] We consider Judge Clark made an accurate assessment of this evidence.

[37] It appears the appellant argues Judge Clark did not place sufficient weight on the views of those owners at the meeting. Ultimately, that assessment was for Judge Clark to make. He took this factor into account in deciding whether to exercise his discretion and it is not for us to determine whether we would have exercised that discretion differently.

Is this an 'existing airstrip' under the District Plan?

[38] Mr Sharp argues the airstrip on this land is not a permitted activity under the District Plan as it does not comply with r 3.2.5. Mr Sharp submits that, on this approach, there is no basis for the possessory rights exercised by the respondents to use the land as an airstrip.

[39] Rule 3.2.5 of the District Plan states:

> **3.2.5 Building Restrictions along Airstrip Alignments**

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20 *Whaanga v Niania – Anewa Block* [2011] Māori Appellate Court MB 428 (2011 APPEAL 428).

21 *Hoete v Faulkner - Motiti North C No 1* (2017) 136 Waikato Maniapoto MB 278 (136 WMN 278) at [57].

> No buildings shall be erected along the alignment of any existing airstrip, or any new airstrip, in an area extending 50m either side of the centreline of the runway and for a distance of 200m from either end.

[40] Mr Sharp contends that when this airstrip was formed there were three houses within the 200m setback area, and so the airstrip does not comply with this rule. We do not agree. Rule 3.2.5 imposes restrictions against erecting buildings within the setback areas of existing or new airstrips. It relates to new buildings not existing buildings. This rule also imposes restrictions on building within the setback areas, it does not provide that where there is an airstrip with buildings within the setback areas, it is no longer an airstrip.

[41] In any event, this argument is misconceived. As addressed, the respondents' right to use the land as an airstrip does not derive from the District Plan but from their rights as owners.

Does the Court have jurisdiction to grant an injunction to enforce the District Plan?

[42] Mr Sharp contends planning disputes concerning Māori land should be left to the process provided in the Resource Management Act 1991. He submits enforcement is for the territorial authority or the Environment Court and Judge Clark exceeded his jurisdiction granting an injunction in this case.

[43] We accept it is not the role of the Māori Land Court to enforce the District Plan. Clearly such issues are for the territorial authority and the Environment Court. We do not consider Judge Clark attempted to enforce the District Plan by granting this injunction. Judge Clark certainly took the provisions of the plan into account in deciding whether to exercise his discretion. He was entitled to do so.

[44] Whether certain activities are permitted under a District Plan may well be a relevant factor when the Court is exercising its powers. For example, when deciding whether to exercise its discretion to grant an occupation order per s 328 of the Act, the Court will often hear evidence on whether the proposed occupation complies with planning and building requirements regulated by territorial authorities. The legislation does not require the Court to be satisfied of such matters before granting an order. However, there may be no utility in granting such an order if the recipient cannot obtain consent to build pursuant to the order.

[45] In the present case, Judge Clark was entitled to take into account whether the competing uses complied with planning requirements when deciding whether to exercise his

discretion to grant injunctive relief. Ultimately, Judge Clark granted an injunction per s 19 of the Act to settle the dispute between the parties over the competing use for this area of land. He had jurisdiction to grant such an order. He did not err by taking planning issues into account nor did he exceed his jurisdiction granting the order.

Did the Māori Land Court err exercising its discretion?

[46] Mr Sharp argued that, even if there were grounds for injunctive relief, the appropriate course was to wait for a decision from the territorial authority on planning issues, and any enforcement action they may take.

[47] This issue is not pleaded in the Notice of Appeal. There are also serious hurdles to any such argument as it directly challenges the exercise of discretion by the Court below, an avenue not available to us.

[48] This is a dispute between owners competing to use the same area of land. The Māori Land Court has jurisdiction to determine the dispute and to provide a practical solution enforceable by injunctive relief. In the present case, there is sufficient space on the land for both the house and the airstrip. Judge Clark's finding that the house was deliberately built on the airstrip to ensure it could not operate was not challenged. He ordered the appellant to relocate her house to another location on the block allowing both occupation of the house and use of the airstrip. This is a practical and equitable outcome. We see no error in this approach nor do we consider this decision is plainly wrong.

[49] When exploring whether agreement could be reached, we raised with counsel whether the airstrip could be moved to the southern boundary which at present is uninhabited, given that its formation consists of mowing a grass strip on the land. By joint memorandum, counsel advised the airstrip could not be moved as the terrain on the southern boundary is uneven, and there is no heavy machinery available on the island to level it. This information was not available to Judge Clark, but it reinforces that relocating the dwelling is the practical solution in this case.

[50] We also note that Judge Clark's decision does not authorise the airstrip to remain as a permanent feature on the land. His judgment provided a practical solution to the dispute between these competing owners. It does not operate as a determination against the rights of other owners, or against future use of the land. The ongoing use of the airstrip remains

vulnerable. It is possible an owner could bring a future claim arguing they have been ousted by the use of the airstrip.

[51] The best long term solution for these owners is to consider the establishment of an administration structure such as an ahu whenua trust. That will allow the owners to elect trustees who can administer the land on their behalf. Such decisions are binding on the owners with relief available from the Court should trustees breach their obligations. Without such a structure in place, ongoing issues over the use of this land may continue. While we encourage such a solution, this is for the owners to consider.

Decision

[52] The appeal is dismissed. The stay granted on 3 May 2017 is cancelled.

[53] Both parties are in receipt of special aid. This case involves important issues that affect all Māori land owners. Our tentative view is that costs should lie where they fall. If counsel disagree, they are to file submissions on costs within four weeks.

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

M P Armstrong **JUDGE** (Presiding)	C L Fox **DEPUTY CHIEF JUDGE**	L R Harvey **JUDGE**