

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION)**

APPLICATION NO: 87/2022

UNDER Section 50, Cook Islands Amendment
Act 1946

IN THE MATTER of Matoteare & Areporia 6E, Ngatangia

BETWEEN KATHLEEN TIAMARAMA NAPA-
BERGIN
Applicant

AND TAI NICHOLAS
Objector

Hearing: 14 July 2022
12 July 2023

Appearances: C Evans for the Applicant
T Moore for the Objector

Judgment date: 14 May 2024

JUDGMENT OF JUSTICE C T COXHEAD

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Introduction

[1] Kathleen Tiamarama Napa-Bergin, the Applicant, seeks an occupation order over 780m² of Matoteare & Areporia 6E, Ngatangia (the Land), for a term of 60 years for the purpose of a house for her and her descendants, pursuant to s 50 of the Cook Islands Amendment Act 1946. Tai Nicholas, the Objector, opposes the application.

Background

[2] The significance of the Land has been impressed to this Court by both parties and explains why the current application, and previous disputes over the Land, have been so contentious:¹

It is well known that Avana is one of the natural harbours where vaka left to travel overseas with voyagers to distant lands including Aotearoa and to which vaka returned bringing with the knowledge of those distant lands. In that regard the area is of historic value to the Cook Islands and Polynesia.

[3] The Land was previously subject to a 60-year lease, granted first on 21 August 1973 to Maria Nicholas, also known as Maria Henry nee Napa, Kathleen's mother (the Lease).

[4] In 1991, Maria and her husband gave permission to the Cook Islands' government to carry out reclamation work on the foreshore of the Land, so the Land would be useable for the Pacific Arts Festival. After the festival, the government continued to maintain the Land until 1995, where the Cook Islands' public service saw a decreased number of staff, which impacted the resources available to maintain the changes to the Land.

[5] Kathleen says that her and her family have undertaken this maintenance responsibility since 1995, which has included filling the area between the foreshore and seabed with soil, clearing large trees and bush, and generally maintaining the property.

[6] In 2009 Maria had the Land surveyed and partitioned into five lots. Maria then applied to the Ministry of Public Works to build a "covered decking area" on the Land. The deck later became covered over, and Maria applied to the Ministry of Health for the installation of a septic tank, toilet and shower (the Dwelling). The Dwelling has since been

¹ Submissions of Counsel for the Applicant, (14 February 2023) at [27].

used by Kathleen and her family as a “beach Bach” for those who either live inland or were visiting.

[7] In 2010, Phillip Nicholas, another landowner, served Maria with a forfeiture of lease and rent review notice. Upon receipt of the notices, Maria called a meeting of assembled owners (MOAO) to discuss and oppose the notices. Resolutions dated 19 May 2011 evidenced the support Maria garnered to stay on the Land. Maria had received unanimous support from those present for both notices to be dismissed.

[8] Proceedings related to the Lease, and the Land, were laid to rest until 2021 where the issues of rent review and forfeiture of lease were once again raised, and the application for the occupation order was filed.

Related Applications 496 & 498/2021

[9] The application for an occupation right by Kathleen was first proposed at a MOAO at Avana House on 16 September 2021. This appears to have been the trigger for Tai Nicholas who raised the issue concerning the existing Lease and the rent owed on the Land.

[10] Tai, on 7 December 2021, filed notice of rent owed on the Land by Maria, per the capital value of the land pursuant to cl 2(b) of the Lease, amounting to the sum of \$264,000.00 in rent arrears from 1973 to 2018, as well as a forfeiture of lease notice.

[11] On 13 December 2021, Maria notified her counsel of her intention to apply to the Court for relief against forfeiture, and an interim injunction to preserve Maria as lessee until a MOAO could be held for surrender of the Lease.

[12] Tai and his counsel filed an objection to the relief against forfeiture and the interim injunction applications on 19 April 2022, insisting on payment of the full sum of rent owed starting from 1973.

[13] Maria filed for relief against forfeiture and an interim injunction on 27 April 2022.

[14] I heard this matter on 14 July 2022, after previously receiving the submissions of the parties. The material outcome was that the rent arrears sought could only be calculated from the date of the first demand for payment of rent, which was made in 2010, to the surrender of the lease, which was surrendered on the date of this hearing. At each review period until

2010, the lessors had waived their right to forfeit the lease and accepted the \$200 per annum paid by Maria to the Court for their benefit.

[15] The first rent review was issued in 2010. In accordance with established law on forfeiture, Maria was ordered to pay rent arrears, which totalled \$143,000.00. This total amount was for the \$9,600 per annum from 2010-2013, \$11,000 per annum from 2013-2018, and \$12,000 per annum from 2018-2022.

[16] Maria passed on 8 December 2022, and it was ordered that this amount was to be paid from her estate within three months of hearing date.

[17] The rent arrears were initially submitted as a consideration in the exercise of my discretion to grant the occupation right. However, I have issued a decision in this regard, and the landowners appear to have forgiven the owing debt.

Current Application

[18] As noted above, Kathleen first proposed an occupation order over the Land to the wider koputangata on 16 September 2021.

[19] During this meeting, Tai raised several issues regarding Kathleen's proposal. The primary one at that time being an agreement made in 2010 at another MOAO for the establishment of a Native Reserve over the Land upon expiry of the Lease (the Reservation proposal).

[20] However, the Chairperson during the meeting directed Tai to keep to the agenda, and after subsequent attempts to raise different issues than those on the agenda, Tai left the meeting.

[21] Makiroa Nicholas, a landowner present, strongly stated her support for resolutions sought by Kathleen and spoke against Tai's objections regarding the Dwelling and the Reservation proposal. Makiroa's support of Kathleen is a point of contention for Tai, as discussed later in this judgment.

[22] The meeting continued and those present passed a resolution for the occupation order to be granted, as well as for the surrender of the Lease, and for forgiveness of the accrued

rent arrears. Kathleen then formally filed her application for the occupation right with the Court on 9 March 2022.

[23] Tai filed a Notice of Opposition on 19 April 2022. It was submitted that the owners of the Land had, in 2010, supported the Reservation proposal for the establishment of a native reserve over the Land once the lease to Maria came to an end. In light of that, the primary submission by Tai was that, under s 489 of the Cook Islands Act 1915, which deals with native reservations, once a native reserve is created the Land is inalienable. Tai also raised issue with the Dwelling on the Land, specifically that it was in breach of the original consents issued as the original Lease only allowing for an elevated deck, not a dwelling with utility services provided.

[24] Manavaroa Mata’iapo Tutara also filed a Notice of Opposition, in support of Tai, to the granting of an occupation right, asserting that as a tribal leader the application for an occupation right “in all of the circumstances” is inappropriate.

[25] In a second Notice of Opposition dated 12 July 2022, Tai raised issues with the then-current Record of Title (the ROT) for the Land. Namely that the Taraare interest was intended to only be a life-interest in the Land, but due to an error in the maintenance of the land register, the interest has been severally succeeded to; 61 people who have incorrectly succeeded and are now noted as current landowners.

[26] According to the ROT at this time, there were 410 landowners (including deceased landowners), and the majority support required would be 207 consents. Kathleen initially submitted 258 ‘Expression of Wishes’ forms (the Forms) which were signed by landowners who supported the granting of an occupation order to Kathleen. The Forms recorded the name of the consenting landowners, their respective shareholding in the Land, and the page of the ROT where their interests were recorded.

[27] Tai held that if his contentions were accepted, there would be 61 landowners removed leaving 359 landowners in total, and the Forms would fail to express majority consent from the new sum.

[28] In the hearing on 14 July 2022, upon submissions by the parties, I held that it is within the Court’s authority to accept the ROT as it stands; until the Court makes an order to remove the interests, the landowners recorded are still considered to have those shares.

[29] However, Tai raised a second issue with the ROT which was the “doubling-up” of recorded interests, which did lead to my directions to the Registrar to undertake a recount of the interests on the ROT. The recount was only to be undertaken on this limited basis, the doubling-up issue, and not in consideration of the Taraare interests.

[30] The Court completed the recount on 7 February 2023. The total number of landowners was confirmed to be 457 (including deceased landowners), the number of owners required in support in order to grant the occupation order was confirmed to be 230. Kathleen had submitted support from 251 owners (excluding the deceased), purportedly meeting the majority threshold.

[31] After the recount of the ROT, Tai requested that the Registrar be cross-examined to ascertain and inquire into the methods undertaken when completing the recount. The request was made per the 2022 Practice Note of the Court, and via the principle confirmed in *George v Teau*:²

The important point here is that the Certificate is completed by the Deputy Registrar of the Court and not the Applicant. The onus is removed from the Applicant and the information required by the Court is collated by the Deputy Registrar and it is information upon which the Court and the Applicant rely when an application under s 50 is considered.

If there are questions or concerns in relation to the Certificate, then these need to be raised in Court and the Deputy Registrar as to how the calculations were done.

[32] I held a final hearing for this application on 12 July 2023, which included the examination and cross-examination of the Deputy Registrar of the Court who had been the one to complete the recount of the ROT.

[33] Catherine Evans, counsel for Kathleen, and Travis Moore, agent for Tai, both took the opportunity to examine the Deputy Registrar as a witness as to the methods she employed when correcting the ROT as to any double-votes.³

² *George v Teau – Tuoro Section 87A5, Arorangi*, HC Cook Islands (Land Division) Application No. 204/2011, 20 April 2012 at [38]-[39] as referenced in *George v Teau* [2013] CKCA 1; CA 2 of 2012 (20 February 2013) at [15]. Please note the paragraph numbering of the quote from the High Court decision as referenced in the Court of Appeal decision is incorrect.

³ Hearing transcript of App. No. 87/22, (12 July 2023).

[34] At the hearing's conclusion, and with the omission of any further issues regarding the ROT, I confirmed that the ROT is accepted, consequently so are the figures arrived at as to the number needed to constitute majority consent:⁴

Well, where I would stand is that I would rely on the certificate because there has been a process that's been gone through which has confirmed for the Court based on that situation as to who's opposed to it. And as it currently stands, there is a majority for that.

Law

[35] The intention of land law in the Cook Islands is for the preservation of the collective ownership structure of the island. Occupation orders exemplify this principle. There is no change of ownership nor permanent alienation; occupation orders do not transfer an absolute uninhibited right.

[36] Occupation orders do transfer, however, the right to exclusive possession against the world, and against one's fellow owners, on such terms and for such time as the Court deems appropriate, in light of the views of the owners and the context of the subject land. Consequently, occupation orders can be automatically cancelled if not used as required by the terms of the granting.

[37] The Cook Islands Amendment Act 1946 (the Act), s 50 is the authority for the Court when granting an occupation order to a landowner:

50 Land Court may make orders as to occupation of Native land

- (1) In any case where the Land Court is satisfied that it is the wish of the majority of the owners of any Native land that that land or any part thereof should be occupied by any person or persons (being Natives or descendants of Natives), the Court may make an order accordingly granting the right of occupation of the land or part thereof to that person or those persons for such period and upon such terms and conditions as the Court thinks fit.
- (2) Any person occupying any land under any such order of the Court shall, subject to the terms of the order, be deemed to be the owner of the land under Native custom.
- (3) No order shall be made by the Court under this section without the consent of the person or persons to whom the right of occupation is granted.

⁴ Above, at 9.

[38] Section 50 necessitates, through development with case law, a two-step test that the Court must undertake when considering granting an occupation right:⁵

- (a) The first step is whether the Court is satisfied that the majority of landowners consent to the granting of an occupation order; if yes,
- (b) The second step is whether I should grant the order, as a matter of discretion.

[39] The parties have made several submissions to each point, and I consider each with the respective law.

First Step: Landowner Support

[40] Landowner consent is the jurisdictional threshold to be met before the Court can consider granting an occupation order. There is not a prescribed form for an applicant to get support it is merely whether, as a matter of fact and to the satisfaction of the Court, a majority of landowners support an occupation order being granted.⁶

[41] Kathleen after the recount submits expressions of support from 251 landowners, the necessary number to constitute a majority being 230, and maintains this position in her final submissions of 17 April 2023.⁷

[42] Tai maintains that despite the recount of the ROT, Kathleen continues to lack the necessary landowner support for the granting of an occupation order.

Issue 1: Record of Title

[43] Kathleen accepts the ROT post-recount and based the majority she has gathered on this.

[44] Tai argues that the memorialised errors of the Taraare interests must be removed from the ROT before the Court can assess whether there is majority support.

⁵ *Ihaka v Nicholas* CA Cook Islands, CA4/85, 14 October 1985; *Ka v Pakau* CA Cook Islands, CA11/05, 1 December 2006, at [20]; *Nicholls v Karika – Karekare 127W2B2B* HC Cook Islands (Land Division) Application 123/2019, 22 December 2020, at [49].

⁶ *Upoko Ingram Te Pa Mataiapo v Amarama – Te Kauariki Pat Section 131, Matavera* CA Cook Islands, CA 1/85, 14 October 1985; *Nicholls v Karika – Karekare 127W2B2B* HC Cook Islands (Land Division) Application 123/2019, 22 December 2020, at [51].

⁷ Affidavit of Kathleen Bergin in Reply to Third Affidavit of the Objector, (17 April 2023).

[45] To note, Tai is a lawyer who previously held the position as Senior Legal Officer and Secretary of Justice in the Cook Islands.

[46] Tai maintains that the Taraare interests in the Land, who have consented to the occupation order, should not be on the ROT. The Land Division Registry has failed to enter the removal of their interests, despite a Court order removing the Taraare land interests on 2 June 1970.

[47] Mr Moore states they have lodged a s 390A application under the Cook Islands Act 1915 for the Chief Judge to investigate the several succession orders made because of this failure, which will materially impact the granting of the occupation order.⁸ Counsel directs the Court to a “near mirror-image” case where the Chief Justice found the Registry had erred in approving succession applications, though I cannot identify the case referred to, nor have I been presented with a 390A application.

[48] Despite the s 390A application, the Objector holds that the recounted ROT must fail for “other identified anomalies”, although, it is not noted what these anomalies are.

Issue 2: Withdrawal of Votes

[49] Tai has also raised issue with a specific kopu of landowners, voted on by representative Jane Taramai Sr., who purport to support the granting of the occupation right. Jane Taramai Sr. votes on behalf of 53 members of her kopu.

[50] Jane first stated her support by signing the Forms submitted with the application to the Court on 9 March 2022. However, Jane withdrew her initial support by an affidavit filed with the Court on 26 July 2022, saying she was unaware that Kathleen only intended to occupy the Land for holidays.⁹

[51] However, Jane Taramai Sr. has since reinstated her support for the occupation order by signed document filed with the Court on 25 February 2023.¹⁰ Tai has made submissions to the ability to withdraw consent once given, however, I find this point moot, largely as she appears to again support the occupation order.

⁸ Third Affidavit of the Objector Tai Nicholas, (22 February 2023).

⁹ Third Affidavit of Tai Nicholas, above n 8.

¹⁰ Affidavit of Kathleen Bergin in Reply to Third Affidavit of the Objector, above n 7.

[52] Tai also alleges that another landowner, Junior Vaevaepare, has also withdrawn support on behalf of three landowners, but the document has been misplaced and not been provided to the Court.

Issue 3: Voting on behalf

[53] The last submission of Tai regarding the first step of the s 50 test goes to the rules regarding landowners who are able to vote, and how they vote, on behalf of several other landowners.

[54] Tai submits that the Forms are inconsistent and have confused other landowners as to where their support lies, e.g., the first five pages contain three wishes, and the next 31 pages contain two wishes which may be in conflict with other wishes of landowners, having created confusion when placed in front of a landowner.

[55] It has also been put forward that there are conflicts between the Forms and the Deputy Registrar's notes, e.g., the names submitted by Makiroa Nicholas include wishes of deceased owners, lack of detail of authority, and repeat names that have also been noted by another landowner, Teokotai Nicholas.

[56] Tai states that the process used to ascertain who can represent whom, regarding expressions of support, should include the representee identifying their authority to exercise this representation, as affirmed in *George v Teau*,¹¹ and that the current application falls short of this. Specifically, that presiding Chairs of MOAOs in the Land (Facilitation of Dealings) Act 1970 are afforded significant discretion to determine whether one landowner has shown, in fact, authority to vote on behalf of others.

[57] For Tai, the Court should compare this process with the Forms submitted by Kathleen; one landowner should not be able to vote for dozens of others via the Forms, as such authorisation would “make a mockery of the Māori custom.”¹²

[58] Makiroa Nicholas filed an affidavit with the Court on 17 April 2023 in response to the above comments made by Tai regarding her ability to vote on behalf of her kopu:¹³

¹¹ *George v Teau* [2013] CKCA 1; CA 2 of 2012 (20 February 2013).

¹² Third Affidavit of Tai Nicholas, above n 8.

¹³ Affidavit of Makiroa Nicholas in Reply to the Third Affidavit of the Objector, (17 April 2023).

- (a) She is a senior member of his koputangata and recognised as the representative of her koputangata, and at a MOAO on 27 February 2023, she was recognised as pa metua of her family;
- (b) She knows the genealogy of the Land and the landowners; and
- (c) She keeps in regular contact by phone with his cousins and their children who live overseas, and she has represented his family before the court in land dealings. Her position as pa metua has not been challenged before.

[59] Makiroa Nicholas appeared as a witness at the hearing on 12 July 2023, where she confirmed before the Court she is a pa metua for his family, and has evidence of consent from the landowners she represents in the current application.

Discussion

[60] The current ROT must be considered to be valid until proven otherwise.

[61] To consider the ROT invalid pending the outcome of applications, in particular s 390A applications would, in the extreme, bring all ROTs into question. And while the objector has raised that a recount on the current ROT must fail for “other identified anomalies” until those anomalies are proven and the suggested changes to the ROT recommended and made, the Court accepts the ROT as is.

[62] The withdrawal of support and reconfirmation of support is not a unique situation with regards to this application. Unfortunately, it is a common occurrence with occupation order applications.

[63] In this situation the withdrawal of support is unclear, and the Court is left in the position of accepting that the support where unclear if it has been withdrawn is still considered to be in support of the applicant and where the support has clearly been withdrawn then it is no longer in support of the applicant.

[64] Having considered the support and objections for the applicant, I am satisfied that based on the ROT as presented to the Court and the votes for and opposing the granting of the occupation order, that the applicant does have a majority of landowners consenting to the granting of an occupation for her.

Second Step: Discretion

[65] Upon the finding that Kathleen has majority support for the occupation order, I now move to consider whether I should, as a matter of discretion, grant the occupation order.

[66] The Court's discretion regarding s 50 applications is unfettered by reference to any particular considerations; what considerations will be relevant, and what weight is prescribed to each, will depend on the circumstances of each case:¹⁴

The factors influencing the exercise of discretion will alter somewhat from case to case but a number will remain pivotal. It is highly desirable that the land be utilised and managed in accordance with the views of the owners, and that housing be provided for people on their land. This must be balanced against a need to ensure the occupation was not an alienation, and that the owners do not unreasonably fetter future generations.

[67] Counsel for Kathleen has drawn attention to a statement regarding the principle of discretion:¹⁵

Judicial discretion implies the absence of a hard and fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate.

[68] Section 50 does not require the Court to balance occupation rights among owners or groupings of owners.¹⁶ The persons named on the Order on Investigation of Title by the Court are the owners of the title and these titles are to be used for occupational or residential purposes.¹⁷

[69] Kathleen and Tai have both made several submissions as to relevant considerations for the granting of the current application, and I have summarised them as follows:

- (a) Kathleen's purpose for obtaining the occupation right.
- (b) The area of land the occupation right will include.

¹⁴ *Bates – Te Raovia Section 12K2, Ngatangiia* HC Cook Islands (Land Division) Applications 483/10 and 215/11, 18 May 2012.

¹⁵ Francis J. Ludes and Harold J. Gilbert *Corpus Juris Secundum* (Vol. 27, The American Law Book Co., Brooklyn N.Y., 1959) at 289, as referred to in *Aero Trader Pvt. Ltd v Ravinder Kumar Suri* (2004) 8 SCC 307 (India).

¹⁶ *Ka v Pakau* CA Cook Islands, CA11/05, 1 December 2006, at [20].

¹⁷ *Puia v Puia – Section 163A, Avarua* HC Cook Islands (Land Division) Applications 588/12, 228/16 and 311/16, 25 August 2017, at [9].

(c) The 2010 Reservation proposal.

(d) The Dwelling as it currently stands in light of its original building consents.

Purpose of the Dwelling

[70] Firstly, Kathleen denies possession of any other occupation rights on Rarotonga, or having ever owned an occupation right on the island, though she did note that her mother, Maria, held the lease on the Land before it was forfeited, and her father also holds an occupation right.

[71] At the hearing on 14 July 2022, when Kathleen was asked what her intended purpose for the occupation right was, she replied as a “beach Bach” and:¹⁸

I’m looking at it probably for my grandchildren.

[72] And when asked whether it would be her primary residence:¹⁹

No, because I run a business in town so I’m based in town, I look at it as a beach place to go... I would occupy it but not probably on a full-time basis, as somewhere to get away to in the weekends.

[73] However, at the 12 July 2023 hearing Kathleen said her intention is no longer to use the Dwelling nor the occupation right, if granted, as a beach Bach. Instead, her daughter and family have been living in the Dwelling on the Land since moving back to Avana earlier last year, and the sought occupation right will be so Kathleen’s daughter and family can continue to reside there.²⁰

[74] This is perhaps the more significant consideration for my determination of this application, whether Kathleen will be occupying the Land as it is intended under the Act.

[75] Both parties have submitted the definition of “occupy” from *Apera v Apera*:²¹

In my view a person can still occupy a property if they are away from the property for a lengthy holiday or to work overseas. But in my view lengthy would not extend to 38 years.

¹⁸ Hearing transcript of App. No., 87/22, (14 July 2022), at 17.

¹⁹ Above.

²⁰ Hearing transcript of App. No., 87/22, (12 July 2023), above n 3, at [16].

²¹ *Apera v Apera – Akaoa 6, Arorangi* (2018) HC Cook Islands AP131/18, at [12]-[13].

Factors which indicate a person occupies a property may include but are not limited to:

- a) a person residing in the property;
- b) the residence being the person's primary address;
- c) the person maintaining the property; or
- d) a person having control and being able to determine who can and cannot live on the property.

[76] Kathleen submits she still meets the definition of 'occupy' per point d) of the definition, as:²²

[she] maintains the property and has control over who can or cannot stay or live on the property. She occupies and intends to occupy the property as a beach house, not uncommon in Rarotonga, for people to live in town and have a beach house in Ngatangia or Puaikura.

[77] Kathleen maintains that this is not uncommon for people in Rarotonga who live in town and have a beach house elsewhere, although her daughter will now be occupying it more permanently.

[78] The Dwelling has a microwave, a sink, and a small fridge, which Kathleen asserts meets the definition of a kitchen, eschewing an intention to occupy the Dwelling.²³

[79] On the contrary, Tai argues that "occupy" means "living in it", "to reside in; be a tenant of" and "that the definition has a "requirement of occupation".²⁴ That, as held in *Apera*, an applicant who is merely visiting the land and not permanently living on it does not meet the requirements of "occupy" under s 50 of the Act.

[80] Tai states that Kathleen contravenes the law by applying for a 60-year alienation of family land for "weekend leisure".

[81] Tai goes further and asserts that Kathleen does not wish to occupy, as there is no evidence of cooking facilities being installed in the Dwelling, nor of an intention to install

²² Submissions of Counsel for the Applicant, above n 1, at [22].

²³ Hearing transcript Appl. No., 87/22, (12 July 2023), above n 3, at 17-18.

²⁴ Submissions of the Objector, (22 February 2023).

cooking facilities, which is demonstrable of Kathleen failing to meet the requirements of “occupy”.

[82] I do have concerns with regards to the idea that this would be a “beach bach”. Land is a precious and finite resource. One of the purposes of occupation rights is to allow people to build a home to live in or in some cases, with the Court’s consent, to use the area for commercial and/or agricultural purposes.

[83] The applicants had initially sought the occupation right for a “beach bach”. That now has changed in that she has submitted she seeks the area for her and her family, and her daughter’s family would reside on this area.

[84] I am satisfied that the area will be used for a residence of a permanent nature. Further, I think conditions can be made with the granting of an occupation order which will mitigate the concerns of the Court and the concerns of the objector.

Size of Area Sought

[85] Kathleen is only seeking for the occupation right to cover 780m² of the Land, as opposed to 1038.46m², which is the amount her shares in the land equate to. She believes this is a consideration as to the reasonability of granting the order.

[86] Further, Taaviri Nicholas and Tuaine Kaitara Nicholas descendants (Tai’s line) are occupying five of the Nicholas Koputangata lands and, in comparison to Papa Te Pou’s descendants (Kathleen’s line), the Taaviri and Tuaine Kaitara have over exceeded their relative interest share entitlements and have also over occupied these lands. Papa Te Pou’s descendants are only occupying a total of three of the Nicholas Koputangata land on Rarotonga.

[87] I note that s 50 does not require the Court to balance occupation rights among owners or groupings of owners although it is a consideration in rationalising areas for occupation in blocks of land.²⁵ In some situations, there is a balance to be made between trying to provide for an equal sharing of the land area amongst kopu while not waiting to stifle the

²⁵ *Ka v Pakau*, above n 16, at [20].

development of the land by owners who are ready to proceed with building a residence on the land.

Native Reservation Proposal

[88] As noted, there was, at one point in time, a proposal for a native reservation to overlay the Land. Tai still argues that the Land is intended to be a native reserve.

[89] Kathleen states that at a MOAO in 2022, the current landowners opposed a reservation, and even if the landowners in 2010 sought a reservation, the landowners have since changed and therefore so has the collective opinion on the use of the Land.

[90] Further Kathleen argues s 490 of the Cook Islands Act 1915 requires that there must be enactments or legislation in place to provide for the management and control of native reserves, to which there are none.

[91] Kathleen also states that there are no plans showing the proposed boundaries of a reservation. Tai has said that the occupation order would “sit in the middle of the reservation” however, no evidence has been presented regarding the proposed boundaries.

[92] The Taaviri kopu, Tai’s kopu as noted, is one line from the Albert Nicholas koputangata which consists of 11 family lines. The Taaviri landowners do not represent the majority of landowners.²⁶ The Taaviri kopu has attempted for 13 years to create a reserve on the land, however the majority of landowners have opposed the setting up of a reserve as they wish to share the land. Similarly, the Tuaine kopu is one line, and do not represent the majority of landowners.²⁷

[93] Although the Land has significant historic value to the Cook Islands and wider Polynesia, this does not in and of itself prevent the landowners on the Land being allocated their entitlement to occupy the Land. Kathleen refers to examples in New Zealand Whakarewarewa, Rotorua, which is Te Puia Geothermal Reserve, which remains preserved whilst landowners occupy it.

²⁶ Notice of Opposition Manavaroa Mata`iapo Tutara, (19 April 2022).

²⁷ Affidavit of Kathleen Bergin in Reply to Third Affidavit of the Objector, above n 7.

[94] There is no evidence before the Court that the Reservation proposal is still sought by the landowners; there is no evidence of a MOAO, nor having the necessary consents to put the Land into a reserve.

[95] While there appears to be a long outstanding proposal for a reservation, which would include the area that the applicant seeks an occupation right for, at this stage it is a proposal which has not progressed far and is much uncertainty as to whether it has the support of owners to be considered by the Court as opposed to the applicants request for an occupation right which does, as I have concluded, have majority support from the owners.

Building Consents

[96] Tai has raised issue with the compliance of the Dwelling with its building permits and consents, namely that it goes beyond what was approved by the original plans. He urges this should affect my discretion.

[97] Tai says the permit was only for an “elevated deck” and was not approved for the provision of services, and that “the plumbing that is visible does not meet the sworn evidence.” Namely, that Kathleen has described the Dwelling as “an open plan room with a toilet and shower” but it appears to be a fully-functioning dwelling.²⁸

[98] The issue of building consent is relevant in that to grant an occupation order for the purposes of a residence and then not be allowed to build on an area would make the granting of the occupation order meaningless. However, here building is allowed, and the questions is really whether the current building on the land is compliant.

[99] During the 14 July 2022 hearing, Kathleen filed with the Court four permits and consents that had been granted for the Dwelling on the Land.²⁹ The upgrades to the Dwelling were paid for by Kathleen and her husband.

Decision

[100] Kathleen has met the threshold of more than 50% owners support and should be granted an occupation right. The issues raised in opposition for consideration in discretion

²⁸ Affidavit of Objector, (16 June 2022).

²⁹ A successful Environmental Clearance Application, a Building Progress inspection, a Te Aponga Uira (power) and a sewage construction permit, ECA makes reference to a building permit, but one was not produced.

doesn't, in my view, justify declining the application. I will look to impose conditions to mitigate the issues raised by the opposition.

[101] I do grant the occupation right to the applicant, in respect of an area of 780m² of Matoteara & Areporia 6E, Ngatangiia being the land described in the plan attached to the application and more particularly delineated and endorsed in the plan, for a term of 60 years.

[102] The occupation right is granted to Kathleen personally. To be clear, the occupation right is not granted to Kathleen and her descendants. It will be for her occupation and clearly not for commercial purposes.

[103] I have granted the occupation right on this basis as when support was given for Kathleen to have this occupation right, it appears to me that those providing that support would have been of the view that the occupation right was for Kathleen and were not aware that Kathleen may have been obtaining the occupation right more for her daughter than for herself.

[104] In my view the purpose of an occupation right is to provide a residence for an applicant and their family, not as a place for others to occupy, unless authorised. In this situation, if, as the applicant has stated, her daughter will be occupying the place in a more permanent way - then her daughter should have applied for the occupation order.

[105] I therefore grant the occupation order to Kathleen on the following conditions:

- (a) The land shall be used for residential purposes.
- (b) The occupation right is to enable the use of a residence dwelling, and any out buildings used in conjunction with the residential dwelling.
- (c) The occupation right is granted to Kathleen Tiamarama Napa-Bergin and only the applicant may occupy the land. The occupation right cannot be assigned to others.

- (d) If Kathleen, who is granted the occupation right fails to occupy the land for a continuance period of three (3) years the order shall lapse and be of no effect. The person or persons holding the occupation right may apply to the Court for relief from this provision. Any such application must be made before or during the period of three (3) years of continuance absence.
- (e) Kathleen who is granted this order may not use the land as a rental property or for commercial purposes except by order of the Court. She may apply to the Court for relief from this provision. Any such application must be made before the land or fixtures upon the land are used for rental or commercial purposes. Any breach of this term has the result that the order shall lapse and be of no effect.

Dated at Rotorua, Aotearoa/New Zealand this 14th day of May 2024.

A handwritten signature in black ink, appearing to read 'C T Coxhead', written in a cursive style.

C T Coxhead
JUSTICE