

**In the Court of Appeal of the Cook Islands  
Held at Rarotonga**

**CA No 8/2018**

**IN THE MATTER** of Section 50 of the Cook  
Islands Amendment Act  
1946, Section 409(d) and (e)  
of the Cook Islands Act  
1915 and Section 52, Land  
(Facilitation of Dealings)  
Act 1970

**AND**

**IN THE MATTER** of an appeal from the  
Judgment of Coxhead J  
made on 17 August 2018

**BETWEEN**

**PHILLIP NICHOLAS,  
HENRY NICHOLAS AND  
GEORJEAN NICHOLAS**

Appellants

**AND**

**ROBERT NICHOLAS,  
AKAAU NICHOLAS AND  
CAMERON NICHOLAS**

Respondents

**Coram:** Williams P  
Barker JA  
Paterson JA

**Hearing:** 1 – 2 April 2019

**Judgment:** 7<sup>th</sup> day of July 2019

**Counsel:** Mr A K Irwin and Mrs T P Browne for the Appellants  
Mr S Mount QC, Ms A Mills and Mr M Scowcroft for the  
Respondents

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**JUDGMENT OF THE COURT OF APPEAL**

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**Solicitors:** Browne Harvey & Associates PC for Appellants  
Little and Matysik PC for Respondents

## Introduction

- [1] This appeal from a judgment of Coxhead J in the Land Division of the High Court dated 17 August 2018, raises important issues about land tenure in the Cook Islands and exposes deficiencies in both legislation and practice in this important area.
- [2] This appeal concerns a family dispute in the Nicholas family over the allocation of land situated within a block of approximately 60,000m<sup>2</sup> of land near the Rarotonga airport, described as Te Ravaki 107A1B2 Lot 1, Avarua District, established by a partition order on 14 October 1982. The disputed land area is 8,227m<sup>2</sup>, which equates to approximately 14 percent of the whole block. For convenience, we shall refer to the members of the family by their first given names. All but one of the family is a party to this appeal.
- [3] There are, in essence, two competing proposals for the land, one by the Appellants (dividing the property into five shares, increasing Phillip's adjacent section by 635m<sup>2</sup>, giving Robert the dwelling house area of 2,535m<sup>2</sup>, placing a right of way 5m wide between the Phillip and Robert sections and dividing the remaining land between Henry, Akaau and Cameron) and one by the Respondents (dividing the land into three for Robert, Akaau and Cameron and creating a new southern boundary dividing the area between Robert on the one hand and Akaau and Cameron on the other). Under either proposal, occupation rights would be granted to Akaau and Cameron. It is only the sizes and the positions that differ.
- [4] On 27 February 2001, the occupation of the land was formalised by an order of a Justice of Peace, the late Mr John David Kenning, made under s 50 of the Cook Islands Amendment Act 1946 (**the 1946 Act**) (**Occupation Order 2001**). The order reads as follows:

1. THAT the said land shall be used for the purposes of a dwelling house and agriculture.

2. THAT the construction upon the said land of the dwelling house shall be commenced within 5 years and completed within 7 years from the date of this order: **Provided that this period may upon application being made to the Court be extended by a period not exceeding 3 years.**
3. THAT this Order shall lapse automatically upon failure to comply with condition (2) above.
4. THAT the right of occupation hereby granted may be used by the owner of the right of occupation as security for any loans or monies advanced to him/her/them by any person or lending institution approved by the Minister of Finance for the purpose of the construction of a dwelling house and to carry out such renovations repairs and extensions or such other purposes as may be necessary on the land described in the schedule hereto.
5. THAT in the event of any default by the person in whose favour the right of occupation has been granted in the repayment of any monies lent or advanced pursuant to condition (4) above the lender may occupy and use the right of occupation for period not exceeding 15 years or such shorter period as may be necessary for the purpose of securing the repayment of any monies due and owing by the holder of the right of occupation.
6. THAT the owners of the right of occupation may nominate any person to occupy such right of that occupation.
7. THAT a Right of Way is ordered as per plan. [Note: There was no right of way on the Plan approved in the Order.]

[5] That order was granted in favour of Phillip Nicholas as trustee for the issue of the late Marama Nicholas and his wife, Tutai. There were five children of Marama Nicholas as set out below:

- a) Phillip (an Appellant);

- b) Frances;
- c) Henry (an Appellant);
- d) Robert (a Respondent); and
- e) Edwin.

Henry is the father of Georjean, another Appellant. Edwin died in 1994 and has been succeeded to by his surviving children, Akaau and Cameron (pursuant to a succession order), both of whom are Respondents in this appeal.

- [6] At that time of the occupation order, there were two houses situated on the land, including the homestead of Marama Nicholas and his family. The homestead has subsequently been demolished and a much larger concrete-block house was built by Robert Nicholas in its place. The other house situated on the land was renovated by Robert for his mother, Tutai Nicholas, as her residence.
- [7] Following the death of Marama, on 5 April 2013, Tutai, Frances, Henry, Phillip, Robert, Akaau and Cameron signed a document which read as follows (**2013 Document**):

To Whom It May Concern:

I, Tutai Nicholas the widow of Marama Nicholas hereby express my wish with regard to the home in Nikao owned by my late husband and myself. It is my wish that on my death the house and surrounding land be given to my son Robert Nicholas. I request that my children respect my wish.

- [8] On 24 May 2014, Phillip, Robert, Frances and their mother, Tutai, walked the boundaries of the land proposed to be set aside for Robert. Whilst the boundary between Robert's land and that of Cameron and Akaau was

then agreed, the exact boundary between Cameron and Akaau's plots was not then determined. The outcome of that meeting was that Robert's occupation would be at the northern end of the land but, a plan would have to be drafted to set out the specific boundaries, and Robert could commence building in that area of the land. There was no discussion at this meeting about any right-of-way such as Phillip now sought.

- [9] In early 2016, Robert commenced building a replacement homestead on the front part of the land.
- [10] In November 2016, Robert prepared a plan setting out proposed boundaries for the occupation by each of the Respondents. Under that proposal, the land would be divided in three for Robert, Akaau and Cameron. Frances, Phillip and Henry would get no land.
- [11] Between that time and mid-2017, Robert sought the signatures of the landowners (including Phillip, Frances, Henry, Akaau and Cameron) for his plan to obtain their support for it as required by legislation. 15 people signed the plans (including Frances, Henry, Akaau, Cameron and Robert). Henry subsequently revoked his support of that plan. Phillip did not sign this plan.
- [12] Over that period, three further meetings took place (on 23 January 2017, 2 February 2017 and 26 February 2017).
- [13] On 23 January 2017, a meeting to discuss occupation rights was attended by the following landowners: Henry Nicholas; Phillip Nicholas; Paine Nicholas; Christine Buckley; Teariki Buckley; Matarii Buckley; William Tuara; Sharon Maoate; Ena Young Dance; Daisey Young; and Jaewynn McKay (Secretary). The meeting was chaired by Charles Petero. Also, in attendance were Vaiana Dance and Georjean Nicholas. The majority of those in attendance agreed with Phillip's proposed plan. The minutes of that meeting were sent to Robert, Frances, Akaau and Cameron for comment.

- [14] On 2 February 2017, a further meeting was attended by the following: Derek Fox (Chairman); Sebon Nicholas (Secretary); Jaewynn McKay; Christine Buckley; Teariki Buckley; Matarii Buckley; William Tuara; Tina Maoate; Pauline Maoata; Sharon Maoata; Robert Nicholas; Phillip Nicholas; Frances Nicholas; Henry Nicholas; Georjean Nicholas and Charles Petero. In the meeting minutes, it was noted by Jaewynn McKay (the secretary for the 23 January 2017 meeting):

Not comfortable with the Minutes she took of the meeting held on 23 Jan 17 as she and those at the meeting were led to believe that all siblings were contacted and advised of that meeting. It now appears that those who had attended the previous meeting had been misled because they had been informed that both Frances and Bobby knew about the meeting and had chosen not to attend. As such the minutes of that meeting could not be taken as a true record as what was said was based on less than [full] information.

- [15] At the end of the meeting, the Chairman noted as follows:

The family are obviously not happy with the decisions made at the previous land meeting. The resolution from this meeting is that the 5 siblings have to meet again and resolve this land issue between themselves.

- [16] A meeting was held between the Marama Nicholas family on 26 February 2017 in New Zealand. Present at that meeting were Frances Nicholas; Robert Nicholas; Cameron Nicholas; Akaau Nicholas and Henry Nicholas. The meeting was chaired by Damian Ison and Sue Clarke was the secretary. After an argument about the closure of a right of way between one of Phillip's sections and Henry's sections, Henry left the meeting in a state of anger. At that meeting, Frances, Akaau and Cameron unanimously supported Robert's plan. Phillip's apology was recorded at the meeting.

- [17] Given the volatile family situation, the Respondents applied to the High Court to formalise their interest in the disputed land on 9 June 2017. The Respondents (then applicants) claimed that the 2001 occupation right had now become vested in them by virtue of a nomination by Phillip and sought the grant of new occupation orders in their favour. The Appellants (then respondents) contended that the High Court did not have jurisdiction to grant the orders sought (because an occupation right already existed over the land which had neither been surrendered nor cancelled), there had been no nomination as to who should occupy the land in terms of clause 6 of the occupation order, and that, if the court did have jurisdiction, the land should instead be divided amongst the five children of Marama Nicholas (in accordance with Phillip's plan).
- [18] On 26 July 2017, Georjean Nicholas (Phillip's daughter) filed an application for confirmation by the High Court of a resolution by the assembled owners approving a lease to her part of the disputed land. On 18 August 2017, Frances, Robert, Akaau and Cameron filed a notice of objection to Georjean's application. Various applications for injunctions were filed and dealt with by Coxhead J but it is unnecessary to consider these in the appeal.
- [19] On 21 and 23 August 2017, the judge heard evidence from five witnesses and conducted a site-visit of the disputed land (on 23 August 2017). Affidavits were also filed and considered.
- [20] On 17 August 2018, Coxhead J issued his reserved decision and made an order granting an occupation right in favour of the Respondents under s 50 of the 1946 Act, discussed below. It is not clear why there was such a long delay in the issue of the High Court judgment after the written submissions closed on 22 November 2017. Although this was a difficult matter and the judgment is careful and extensive the Judge, who would have had many commitments in his New Zealand Court, such a long delay in delivery is unfortunate.

- [21] At the time of the hearing in the High Court, there were a total of 41 landowners recorded on the register of title.
- [22] On 14 September 2018, the Appellants filed their appeal.
- [23] Sadly, Mrs Tutai Nicholas died after the hearing in the High Court and before the hearing in this Court.
- [24] A hearing of the appeal took place on 1 and 2 April 2019. Counsel made detailed and thorough arguments on the finding of Coxhead J that there had been a nomination in terms of the Occupation Order 2001, the effect of that nomination and whether Coxhead J had jurisdiction to cancel the Occupation Order 2001 and to make a new one. The arguments traversed the evidence (as did Coxhead J) on the conduct of the Parties over the years and whether there had been a consequential cancellation of the Occupation Order 2001 and approval of new rights in favour of the Respondents.
- [25] Surprisingly, neither counsel argued (nor did Coxhead J mention) the effect of conditions 2 and 3 of the Occupation Order 2001. In determining this appeal, it became clear to this Court that submissions were needed on the effect of those conditions. Submissions were duly filed by counsel on 15 May 2019.
- [26] In its minute of 2 April 2019, this Court suggested that the Parties might consider trying to resolve the dispute amicably and that judgment be withheld until this had occurred. Unfortunately, the Parties were unable to settle their differences and have asked this Court to proceed to judgment.

#### **Judgment of Coxhead J dated 17 August 2018**

- [27] In the High Court, Coxhead J granted the occupation orders sought by the Respondents (then applicants) on the basis that there had been a nomination by Phillip in terms of clause 6 of the Occupation Order 2001.



He considered that there was jurisdiction to cancel the order and make new ones.

[28] At paragraphs [56] – [60] of the judgment, Coxhead J held that there had been a nomination of Robert, Akaau and Cameron (the Respondents) by Phillip to have the entire area of the occupation right over the land in terms of clause 6 of the Occupation Order. He held that the nomination related to the front portion of the land for Robert and the rear portion of the land for Akaau and Cameron. At paragraphs [75] – [79], Coxhead J found that the Appellants (then respondents) were estopped from revoking the nomination and a family agreement for Robert, Akaau and Cameron to occupy the land.

[29] At paragraphs [87] – [88], His Honour made the following findings:

[87] As I noted earlier, the original occupation right was granted for the purposes of a dwelling house and agriculture. The right was granted to the issue of Marama Nicholas but vested in Phillip Nicholas as trustee. I consider that the ultimate purpose of the trusteeship was to facilitate occupation of the land by one or all of the issue of Marama Nicholas or by such other persons nominated. Once there was a nomination, the trusteeship was at an end. Given the nature of the order, I consider it must have been contemplated that a fresh occupation right would be required for the issue or issues of Marama Nicholas confirmed as occupiers.

[88] Since there has now been a nomination, I consider the original occupation right has now come to an end and the Court is able to make a declaration for a new occupation right.

[30] Section 50 of the 1946 Act reads as follows:

(1) In any case where the Native 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.

[31] Under that provision, His Honour identified a two-stage inquiry (with reference to the following authorities: *Ihaka v Nicholas* [1985] CKCA 3; *Ka v Pakau* CA 11/05, 1 December 2006 at [20]; *Bates – Te Raoia Section 12K2, Ngatangia* HC Cook Islands (Land Division) Applications 483/10 and 215/11, 18 May 2012). The two-stage inquiry is set out below:

1. Jurisdictional Threshold Test: Whether, as a matter of fact, the Court is satisfied that the majority of the land owners consent to the grant of the occupation right; and
2. Judicial Discretion: If so, whether, as a matter of discretion, the Court should grant the occupation right.

[32] As to jurisdiction, Coxhead J was satisfied that a majority of the landowners consented to the grant of occupation rights (at paragraph [97]). His Honour's reasoning is set out at paragraphs [93] – [96] of his judgment and can be summarised as follows:

- a) Three meetings were held regarding the occupation of the land (23 January 2017, 2 February 2017 and 26 February 2017).

- b) The result of the landowners' meeting on 2 February 2017 was that they voted to delegate any future decision on the occupation of the land to the issue of Marama Nicholas (demonstrating the consent of the landowners to either of the occupation proposals advanced). Accordingly, any subsequent decision by the majority of the issue of Marama Nicholas was to be accepted as representing the consent of the majority of the landowners.
- c) A subsequent meeting held on 26 February 2017 amongst the issue of Marama Nicholas voted to approve the occupation rights as applied for in the applications filed by the Respondents (then applicants).
- d) The occupation rights sought were for certain named issue of Marama Nicholas and for the same area of occupation as that in the original occupation right granted in 2001.
- e) Several of the landowners had signed the proposed plan prepared by Robert.
- f) The new occupation rights application concerned the same area of land for which the landowners had already consented to the children of Marama Nicholas occupying that area (such that further consent would only be required if the proposed area or terms were materially different).

[33] Next, Coxhead J considered whether the occupation orders should, as an exercise of the High Court's discretion, be granted. In this regard, His Honour noted that there were no particular considerations prescribed and that it would depend on the circumstances of each case. At paragraphs [102] – [103] of His Honour's judgment, Coxhead J concluded:

[102] Taking these matters into consideration I am satisfied that the occupation rights should be granted to Robert, Akaau and Cameron.

However, they are granted so as to be within the same area as the original occupation right. The proposed plan filed with the application shows areas for Robert, Akaau and Cameron which in totality of area are slightly more than the original occupation right area. A new plan will need to be filed with the Court that is adjusted so as to be within the area of 8,227m<sup>2</sup>.

[103] The original occupation order did not refer to direct descendants. These occupation orders shall be granted for a term of 60 years.

[34] His Honour concluded at paragraph [105]:

Akaau and Cameron's occupation rights are granted on the condition that the construction upon the land of a dwelling house shall commence within 5 years and [shall be] completed within 7 years from the date of the final orders. This period may upon application being made to the Court be extended by a period not exceeding 3 years. The order shall lapse automatically upon failure to comply with this condition.

[35] His Honour also considered the issue of whether a right of way should be included as part of the occupation orders granted, or alternatively, whether to grant the newer access further inland as shown on Robert's proposed plan. At paragraphs [115] – [117] of his judgment, Coxhead J stated:

[115] It is necessary that Robert, Cameron and Akaau have access to the areas for which I have granted occupation rights. Robert can access the area he will occupy from the road – there is no issue there.

[116] Cameron and Akaau asked that right of way ordered that runs behind the area occupied by Henry be reopened to allow them access to the areas they will occupy. In the alternative, they submit that a newer access further inland as shown on Robert's proposed plan would be a viable access way.

[117] Having considered the plans and visited the site I think the access as proposed on Robert's plan is the best option. The Court will make an order for a right of way as per Robert's plan. This will need to be factored into the new plan that I have asked to be filed.

[36] At paragraph [119] of the judgment, Coxhead J made the following orders:

- (a) I am not convinced that it was intended for the trustee to control the occupation of the right indefinitely, or to have the ability to nominate persons to occupy and then revoke such nomination at will.
- (b) I consider that once a decision or nomination was made regarding the occupation, the trust would effectively be at an end.
- (c) I consider that there has been a nomination of Robert, Akaau and Cameron to occupy the land in terms of cl 6 of the occupation order. That nomination relates to the entire front portion of the land for Robert and the entire rear portion of the land for Akaau and Cameron.
- (d) As such, I consider the only conclusion available is that it was agreed for Robert, Akaau and Cameron to have the entire area of the occupation right.
- (e) I find that the respondents are estopped from revoking their nomination and agreement for Robert. Given the circumstances they cannot now renege on their nominations and agreement. That agreement also extended to agreeing to Akaau and Cameron to occupy the land.
- (f) Since there has now been a nomination, I consider the original occupation right has now come to an end and the Court is able to make a declaration for a new occupation right.

- (g) The new occupation rights are within the same area of land. The landowners have already consented to the children of Marama Nicholas occupying that area. Further consent would only be needed if the proposed area or terms are materially different.
- (h) In the present circumstances, I am satisfied that a majority of the landowners consent to the grant of occupation rights.
- (i) I am satisfied that the occupation rights should be granted to Robert, Akaau and Cameron. However, they are granted so as to be within the same area as the original occupation right. The proposed plan filed with the application shows areas for Robert, Akaau and Cameron which in totality of area are slightly more than the original occupation right area. A new plan will need to be filed with the Court that is adjusted so as to be within the area of 8,227 m<sup>2</sup>. On filing, the Court will consider the plan and make final orders.
- (j) The original occupation order did not refer to direct descendants. These occupation orders shall be granted for a term of 60 years.
- (k) Akaau and Cameron's occupation rights are granted on the condition that the construction upon the land of a dwelling house shall commence within 5 years and completed within 7 years from the date of the final orders. This period may upon application being made to the Court be extended by a period not exceeding 3 years. The order shall lapse automatically upon failure to comply with this condition.
- (l) The Court will make an order for a right of way as per Robert's plan. This will need to be factored into the new plan that I have asked to be filed.
- (m) I decline to confirm the resolution of the assembled owners to lease an area of the land to Georjean, which includes part of the original occupation right.

- (n) I do not see any reasons for the injunction I granted to continue. Unless I hear from Counsel as to anything different the injunction will be at an end and is dismissed within 14 days from the date of this decision.

### **Grounds of appeal**

[37] The Appellants' specific grounds of appeal were set out in a memorandum dated 9 October 2018. The Appellants submitted that the learned Judge erred in making the following findings:

- a) It was not intended for the trustee to control the occupation right indefinitely or to have the ability to nominate persons to occupy and then revoke such nomination at will.
- b) There had been a nomination of the Respondents to occupy the land in terms of Clause 6 of the Occupation Order 2001. That nomination related to the entire front portion of the land for Robert and the entire rear portion of the land for Akaau and Cameron.
- c) The Respondents were estopped from revoking their nomination and agreement for the Respondents to have the entire area of the occupation right.
- d) The original Occupation Order had come to an end once the nominations were made and the Court could grant new occupation rights.
- e) The landowners had already consented to the children of Marama Nicholas occupying that area and that further consent of the landowners would only be needed if the proposed area or terms were materially different.

- f) A majority of the landowners had consented to the grant of the occupation rights to the Respondents.
- g) He declined to confirm a resolution of assembled owners to lease an area of the land to Georjean which included part of the original occupation right.

[38] The Appellants have sought the following relief:

- a) An order quashing the orders made by Coxhead J at paragraph [119] of his judgment; and
- b) Such other order as is necessary for the due determination of the appeal.

#### **Issues arising on appeal**

[39] There are three issues to address:

- a) Did the High Court have jurisdiction to make the new occupation orders, in light of the Occupation Order 2001?
- b) Was the High Court entitled to find that the majority of landowners consented to the new occupation orders?
- c) If so, did the High Court properly exercise its discretion to make an occupation orders under s 50?

#### **Submissions**

##### *Appellants' position*

[40] The Appellants submitted that there was no jurisdiction for the High Court to make the order under s 50 because the earlier 2001 Occupation Right had not ceased but had continued to have effect. In other words, the High Court was precluded from making subsequent orders unless Phillip Nicholas (as trustee) voluntarily relinquished the existing occupation right



from 2001. According to the Appellants, while Phillip's siblings held beneficial interests in the right of occupation (under the Occupation Order 2001), the right was granted to, and held by, Phillip.

[41] In support of this submission, the Appellants contended that there were limited means by which an occupation order made under s 50 could lawfully come to an end. Such means included, among others:

- a) Where there was an express term of the occupation order providing for expiry (e.g. a fixed term).
- b) Where a condition of the occupation order provides for expiry.
- c) Where all those with rights under the occupation order surrender their occupation rights.

In this case, the Appellants submitted that no grounds were met.

[42] The Appellants submitted that Coxhead J erred in law and in fact in finding that a nomination had been made under clause 6 of the Occupation Order 2001. The grounds for this finding rested on the 2013 document and the 2014 walking of the boundary of the land. This finding was wrong because there was no certainty as to the areas to be occupied (as is required for any such nomination to have been validly made). The Appellants submitted further that, in any case, an estoppel did not arise where the representation was made to a person only after that person had already altered his position (i.e after Robert had commenced construction of a house in place of the homestead in early 2016, prior to the preparation and signing of his plan in November/December 2016). In support of this proposition, the Appellants cited the decision of *Rongo v Bank of the Cook Islands Holding Corporation* HC Cook Islands, 35/2005, 1 January 2010.

[43] The Appellants also submitted that the majority of landowners did not support the new occupation right, as required under the first limb of s 50 of the 1946 Act. This submission was based on the following propositions:

- a) At no point has the majority of the landowners expressed their wish that Robert's plan should be approved and confirmed in a new occupation order (a minority of 15 landowners signed the plan).
- b) A minority of landowners (9 of the 15 present on 2 February 2017) decided that the Nicholas siblings should resolve the matter amongst themselves. Any such decision was expected to be reached by consensus, not by majority vote.
- c) A majority of 36 landowners subsequently met and 27 decided to grant a lease of land to Georjean, which would be inconsistent with Robert's proposal.

[44] According to the Appellants, the new occupation right granted and the High Court's decision that the Occupation Order 2001 was cancelled or found to have ended deprived Phillip and Henry of existing property rights in the land contrary to article 64(1)(c) of the Constitution, which provides:

- (1) It is hereby recognised and declared that in the Cook Islands there exists and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms –

[...]

- (c) The right of the individual to own property and the right not to be deprived thereof except in accordance with law: [...]

*Respondents' position*

[45] The Respondents submitted that the High Court did have jurisdiction to make the order on three alternative bases:

- a) The earlier 2001 order had lapsed or ended on its own terms;
- b) The High Court's decision impliedly cancelled the earlier order; or
- c) The High Court's jurisdiction may be exercised notwithstanding an earlier order.

[46] The Respondents submitted that there was no error of fact or law in Coxhead J's finding that there was a valid nomination under clause 6 of the Occupation Order 2001. More specifically, the Respondents submitted that the boundaries were sufficiently certain and clear.

[47] In response to the Appellants' submission that Henry was not estopped from revoking the nomination, the Respondents submitted that the date of Henry's signature on Robert's plan was immaterial. According to the Respondents, it was sufficient that Henry was aware of the nomination and its terms and his signature on Robert's plan in December 2016 only cemented the estoppel and confirmed that he did not expect to receive a portion of the land.

[48] On the first limb of the s 50 test (i.e. whether a majority of landowners wished that occupation be granted), the Respondents submitted that there is no specific process or requirement as to how the views of landowners must be ascertained. In that regard, the Respondents submitted as follows:

- a) There was evidence from Robert Nicholas that, between 2016 and June 2017, he “obtained the consents of a majority of the Landowners of Te Ravaki Section 107A1B2 to the occupation rights applied for”.
- b) There was evidence that at meeting of landowners on 2 February 2017, it was decided that the decision should be left for the siblings to work out amongst themselves.
- c) There was evidence that at the meeting of the siblings on 26 February 2017, a majority consented to the occupation rights sought.
- d) None of the evidence set out above was “challenged or questioned”.

[49] As to the exercise of the High Court’s discretion under the second limb of s 50, the Respondents submitted that the occupation right granted was consistent with the express wishes of the siblings’ mother, and with Phillip’s representations on a number of occasions that Robert was entitled to occupy the entire front area of land. The Respondents submitted further that the Court’s Order achieved an equitable distribution of interests in the overall block.

#### **Continued validity of the Occupation Order 2001**

[50] In a message to counsel on 2 May 2019, this Court noted that the relevance of conditions 2 and 3 of the Occupation Order 2002 had not been addressed by either counsel or Coxhead J in the High Court or by counsel before the Court of Appeal. The Parties were directed to file further submissions addressing the following two questions:

- a) Whether condition 2 of the Occupation Order 2001 was complied with; and
- b) If condition 2 was not complied with, what are the consequences if any that follow under condition 3.

[51] Those conditions read as follows:

**2. THAT the construction upon the said land of the dwelling house shall be commenced within 5 years and completed within 7 years from the date of this order: **Provided that this period may upon application being made to the Court be extended by a period not exceeding 3 years.****

**3. THAT this Order shall lapse automatically upon failure to comply with condition (2) above.**

[52] The Appellants and Respondents filed submissions on 15 May 2019.

*Appellants' submissions on conditions 2 and 3*

[53] The Appellants submitted that Coxhead J found that, as at the time of the Occupation Order 2001, two houses were situated on the land (an old small one-bedroom concrete block house with a car port and an old wooden three-bedroom house in poor condition).

[54] The Appellants submitted as follows:

Counsel notes that condition 2 was a standard condition used in numerous occupation rights. If the High Court (Land Division), in granting the 2001 occupation right, had intended the demolition of the two (then) existing dwellings and the construction of a new dwelling in their place, one would have expected the occupation right conditions to have recorded that intention expressly. In the absence of that express language, one can reasonably infer the Court intended that the standard conditions relating to occupation rights were intended: that is, that the

land was to be used for a dwelling and agriculture, and not some other purpose, and a dwelling was to be erected no later than 7 years after the grant of the order. Because two dwellings were already erected, these conditions were met.

[55] The Appellants submitted further that no evidence was adduced specifically about whether any construction occurred between 27 February 2001 (the date of the Occupation Order 2001), 27 February 2006 (five years after the Order was granted) and 27 February 2008 (seven years after the Order was granted). According to the Appellants, such evidence would be necessary for a finding that condition 2 had not been complied with.

[56] On the second question asked, the Appellants submitted that, if condition 2 was not complied with, the effect of condition 3 was that the occupation right automatically lapsed.

*Respondents' submissions on conditions 2 and 3*

[57] The Respondents submitted that there were two alternative interpretations to condition 2, both of which would require words to be read into the Occupation Order. The two alternatives advanced were as follows:

3.1. “THAT the construction upon the said land of the dwelling house, *if there is no existing dwelling*, shall be commenced within 5 years and completed within 7 years from the date of this order. ...

OR

3.2 “THAT the construction upon the said land of the *new* dwelling house shall be commenced within 5 years and completed within 7 years from the date of this order. ...

[58] According to the Respondents, the former alternative was preferred by the High Court of the Cook Islands in a recent decision in which the High

Court held that building conditions in the same terms had been satisfied because there was already a house on the land when the order was made (*Application by Metua Tangi Tinirau Grundy for a permanent injunction and vacant possession* HC Cook Islands (Land Division) Application 217/17, 19 May 2017 at [13] and [14] per Isaac J).

[59] However, the Respondents submitted that it is open for condition 2 to be interpreted as requiring the construction of a new dwelling house.

[60] Turning to the questions asked by the Court, the Respondents submitted:

If such an interpretation is accepted, then the construction should have commenced by February 2006 and the new house completed by 2008. Condition 3 stipulates that failure to comply with condition 2 results in the occupation right automatically lapsing. No formal steps are required. As no new house was constructed until 2016, the Occupation Right made in 2001 in favour of Philip Nicholas as trustee would have lapsed sometime between 2006 and 2008. Mrs Tutai Nicholas and family would have continued to occupy and use the land pursuant to custom.

[61] If the latter interpretation is accepted, and condition 2 was not met, then the Occupation Order 2001 would have lapsed and there would have been no impediment to the High Court granting a new occupation right in favour of the Respondents.

*Court's analysis*

[62] This Court does not agree with the submissions of the Parties nor the approach taken by Isaac J in the case cited by the Respondents (summarised above).

[63] The terms of the Occupation Order 2001 setting up the occupation right (and, in particular, condition 2) are prospective. They must mean that a new dwelling house was contemplated and that the Order cannot have referred to the old house on the land in 2001.

[64] The Court is driven to the view that the Occupation Order 2001 lapsed automatically when no building of a new house had commenced within 5 years of the Occupation Order 2001 (i.e. by 2006) nor completed within 7 years (i.e. by 2008) and without any extension as contemplated by condition 2 having been sought or given. It does not appear to have been disputed that Robert Nicholas had always intended to demolish the existing dwelling house and to build a new dwelling house on the land. Robert also renovated a small house on the disputed land in 2015 as a residence for his aged mother.

[65] At paragraph [44] of His Honour's judgment, Coxhead J notes:

Robert's evidence was that Phillip originally approached him in 2001 and told him he could have the property. He told Robert to build or refurbish a house for their mother and to take the house as his own on their mother's passing. In 2003, there was a family disagreement and Phillip revoked his agreement for Robert to take the property. Robert says that Phillip again approached him in 2013 and encouraged him to take the entire property on the same terms. Following that, Phillip circulated a document for signing amongst the siblings, together with Akaau and Cameron. Robert submitted they all understood that the agreement related to the entire property and they signed on that basis. Given the earlier dealings, Robert says he was wary and did not want to build until there was clarity as to the boundaries. In 2014, Robert walked the boundaries with Phillip, Frances and their mother. He says it was agreed that the boundaries would remain as they were, with the only new boundary being the one to the south between his area and the sections of land allocated to Akaau and Cameron. Robert then began the renovations and construction of a new house.

[66] It also appears to have been agreed that there is no objection to Robert's house being built where it now stands but there is sharp division as to what area of the land surrounding it he should have in addition. He has spent a large sum of money building the new house. There is also agreement in principle that Cameron and Akaau should have some of the



rear portion of the disputed land which was always intended by the family to go to their late father (Edwin Nicholas).

- [67] It seems that the Occupation Order 2001 was in a standard “one size fits all” format with little regard being paid to the individual circumstances of the case. Apparently, it has been used in the Land Division by Justices of the Peace when exercising such jurisdiction as they have in land matters. The terms and conditions affecting the time limit in which the occupation right holders of land intended for a residential dwelling house, must complete construction can be seen as intending to prevent occupation right land from being tied up by such orders and left unused for years, often by absentee landowners. Another reason could be to free up land held by such rights that have failed to meet the time limit conditions.
- [68] There is no record relating to the Occupation Order 2001 other than the order itself and an accompanying plan. Indeed, Coxhead J notes at paragraph [40] that there was “no transcript available of the Court hearing held in 2001”. Yet the fact that the terms of the Occupation Order 2001 were standard cannot reduce the plain meaning of conditions 2 and 3. Condition 1 states that the land shall be used for the purpose of a “dwelling house” and the wording of conditions 2 and 3 is clear in its terms. Those conditions are firm and will be enforced strictly. In accordance with condition 3, the Occupation Order 2001 must lapse automatically if condition 2 is not complied with. Robert’s house must have been what was contemplated by the Occupation Order 2001.
- [69] Counsel for the Respondents referred to a judgment of Isaac J in *Application by Metua Tangi Tinirau Grundy for a permanent injunction and vacant possession* HC Cook Islands (Land Division) Application 217/17, 19 May 2017. In that case, there was a house on the land when the occupation order was made in 1982 and had been occupied all the time with no new dwelling ever having been erected. The occupation order contained the same terms as conditions 2 and 3 of the Occupation

Order 2001 in this case. The 1982 occupation order also said that the land must be used for the purpose of a dwelling house.

[70] At paragraphs [12] – [14] of that judgment, Isaac J stated:

[12] The Applicant maintains that both Clauses 1 and 2 have been breached because Metuatangi has not lived in the house and Metua failed to construct a dwelling.

[13] In terms of the evidence before the Court of Lucy and Andrea Grundy, the land has clearly been used as a dwelling house. A house was present on the land when the occupation right order was made and this house has been renovated and occupied.

[14] Having regard to the evidence I am satisfied that both Clauses 1 and 2 have been complied with. A house existed on the land at the time of the occupation right and this house has been used as a dwelling.

[71] We do not consider that judgment is of assistance. Although the interpretation to which we are driven implies the addition of the word “new” before the words “dwelling house” in condition 2 of the Occupation Order 2001, there can be no other interpretation, given the intentions of the Parties at the time and given the apparent necessity of including conditions 2 and 3. We realise that this interpretation may cause difficulty in other cases, all of which could have been avoided if more care had been taken in formulating the “standard” terms adopted in s 50 orders and a minimum standard of precision observed. In this regard, we note the information from counsel for the Respondents that recent such orders do not contain such a blanket provision.

[72] In summary, it is clear that there has been no compliance with the terms and conditions of the Occupation Order 2001 and it has lapsed.

[73] In view of the above finding, there is no need for us to consider whether there had been a valid nomination in favour of the Respondents. If we had

not been constrained to find that the Occupation Order 2001 lapsed by reason of condition 3, we would have agreed with the judge's assessment of the family situation. Much of the evidence heard by the judge is relevant to the question of whether a new occupation right should be accorded to the Respondents. But we cannot leave the question of nomination without expressing strong views on the so-called "standard" terms of occupation orders.

- [74] First, as can be seen from the above, conditions regarding the building of a house with automatic lapse if not complied with, need careful assessment in any given circumstance instead of blanket provision. Such terms should be carefully crafted to state, for example, who is to build the house, where the house is to be located on the land and what surrounding land is included in the curtilage.
- [75] Secondly, provisions for a nomination should, as a basic rule, be in writing with specific statements as to the beneficiary (or beneficiaries) of the nomination and of any conditions attaching to the nomination. Precision accompanied by survey plans should support any nomination of part of the land or a nomination to more than one beneficiary. There should also be some provision for public registration of nominations
- [76] We note a lack of detail in the legislation on occupation rights. There should be some system of recording nominations. We strongly suggest that Parliament should address this lack of specificity. Legislation in this important area needs to be comprehensively stated to avoid arguments. Part 15 of the New Zealand Te Ture Whenua Maori Act 1993 deals with Occupation Orders made by the Maori Land Court. This legislation could provide a useful precedent.
- [77] This case demonstrates the difficulties unleashed when otherwise simple and obvious precautions such as written specificity are ignored. Indeed, family disputes are often avoided or ameliorated where there is certainty.

[78] We also consider that Coxhead J was right to assume the power to cancel an occupation right made under s 50. As noted above, the legislation suffers from some of the same criticisms as the Occupation Order 2001 itself in that it lacks many machinery terms. We agree with the approach taken by Coxhead J (at paragraphs [83] to [86]) and the authorities which His Honour cited.

[79] Finally, the Court disagrees entirely with the Appellants' submission that Phillip and Henry were deprived of existing property rights in the land contrary to article 64(1)(c) of the Constitution (as a result of the new occupation right granted and the High Court's decision that the Occupation Order 2001 was cancelled or otherwise ended). Indeed, Phillip and Henry did not have vested rights. They were possible beneficiaries under a trust established by the Occupation Order 2001, but they owned and did in fact receive nothing under that trust. Moreover, adjoining family land was taken into account in discussions.

#### **Whether a new occupation order could have been made under section 50**

[80] We now turn to consider whether Coxhead J was right to grant the fresh occupation rights sought by the Respondents, notwithstanding that the application for occupation rights was founded on the basis that the right was terminated by virtue of the nomination and not, as we have found, on the lapse of the Occupation Order 2001 pursuant to conditions 2 and 3.

[81] As noted above at paragraph [31], s 50 of the 1946 Act involves a two-stage inquiry:

1. Jurisdictional Threshold Test: Whether, as a matter of fact, the Court is satisfied that the majority of the land owners consent to the grant of the occupation right; and
2. Judicial Discretion: If so, whether, as a matter of discretion, the Court should grant the occupation right.

*Threshold test – Wish of majority of landowners*

[82] The first matter to consider is the condition precedent that the Court must be satisfied that the majority of landowners consented to the grant of the occupation rights sought by the Respondents.

[83] As to the first limb of the s 50 test, Coxhead J said at paragraphs [89] – [97]:

[89] The applicants have applied for new occupation rights under s 50 of Amendment Act. As noted earlier; that provision requires the Court to be satisfied that a majority of the landowners consent to the grant of occupation.

[90] As can be seen, the circumstances of this case are not those of an ordinary application for occupation right. The applications flow from an existing occupation right held in trust and involve issues regarding who should properly occupy the right. Accordingly, I note that the applications have not followed a standard process for obtaining the consent of the landowners.

[91] In *Kokaua v Brown*, Judge Savage also dealt with the grant of an occupation right in circumstances that were not ordinary. In that case, relief was sought under s 129A of the Property Law Act for an encroachment, where a house had been mistakenly built on the wrong section of land. The Court considered that the appropriate relief was the grant of an occupation right over the land on which the house had been built. [...]

[92] In *Te Upoko Ingram Te Pa Mataiapo v Amarama – Te Kauariki Part Section 13I, Matavera* the Court of Appeal noted that s 50 of the Amendment Act simply requires the Court to be satisfied as to the wishes of the majority of the land owners, there is no requirement as to how their views will be ascertained. That approach was confirmed by the Court of Appeal in *George v Teau – Tuoro Section 87A5, Arorangi*

who noted that there was no one way to obtain the consent of the owners.

[93] The parties referred to three meetings held regarding the occupation of this land. The first was a meeting of landowners held on 23 January 2017. Phillip and Henry attended, and the landowners approved their proposal to divide the land into five portions. I note however that the other siblings were not properly notified of that meeting and did not attend. A further meeting with the landowners was held on 2 February 2017. At that meeting the landowners revoked their earlier resolutions on the basis that they were under the impression all the siblings had been properly notified. They resolved to leave the matter of occupation to the siblings to sort out. A final meeting was then held for the siblings only on 27 February 2017. Unfortunately, Phillip did not attend and Robert walked out of the meeting. Those siblings present approved the proposals of Robert, Akaau and Cameron. (Note: The Judge was in error here. It was Henry – not Robert – who walked out of the meeting.)

[94] In reading the minutes of the meetings, it is clear that not all the background information was put before the landowners at the first meeting. When a subsequent meeting was held and such matters brought to the fore, the landowners decided that the issue of the occupation should be left for the siblings to work out amongst themselves.

[95] I consider this demonstrates the consent of the landowners to either of the occupation proposals, including those of Robert, Akaau and Cameron. I also note that the original occupation right granted in 2001 was granted in favour of the issue of Marama Nicholas. The present applications are for the issue of Marama Nicholas and for the same area of occupation. Arguably, the landowners have already consented. In addition, I note that several of the landowners have also signed the proposed plan.

[96] Further, the new occupation is for the same area of land. The landowners have already consented to the children of Marama Nicholas

occupying that area. Further consent would only be needed if the proposed area or terms are materially different.

[97] In the present circumstances, I am satisfied that a majority of the landowners consent to the grant of occupation rights.

- [84] If we had determined that the occupation right had not expired on its own terms this Court would have upheld Coxhead J's decision. On the basis of His Honour's factual findings which we would not have disturbed there was a family agreement to grant an occupation right to Robert in accordance with his plan and for Akaau and Cameron to take the balance of the land. Phillip had an obligation as trustee to make nominations in accordance with that agreement.
- [85] Given this Court's findings in relation to the lapse of the Occupation Order 2001, Coxhead J's comments at paragraph [90] are no longer applicable. In other words, because there was not an existing Occupation Right in place at the time that the new Occupation Rights were sought by the Respondents, the circumstances of this case are those of an ordinary application for occupation rights.
- [86] The difficulty is that the landowners and Coxhead J considered the applications on the basis that there had been a nomination and not that the prior Occupation Order 2001 had lapsed. The occupation right having been extinguished any new application would require as a starting point a new resolution of the owners. The only resolution on which an order could be made is the second resolution of the owners which left the decision to the family and in our view this requires a unanimous decision.
- [87] The applications will have to go back to the owners for consideration of this new basis for their consent (i.e. that there are no occupation orders in place and there was no nomination). Obviously, they will have to acknowledge that Robert has built an expensive house on part of the land without opposition and with encouragement from other family members

as well as the other expressions of consent with the arrangements canvassed by the judge. However, it is ultimately a decision for the landowners to make based on the facts as they now stand. Assuming that consent is forthcoming from the landowners, there will have to be a rehearing of the applications under s 50 in the High Court.

[88] We see no reason why Coxhead J should not conduct this rehearing, given his close familiarity with the subject and that he can consider without repetition all of the evidence that he has already heard. Further evidence can be called provided it is not simply evidence previously given. We consider that his judgment was correct if the decision to hear the applications had been based on the nomination. We think that his assessment of witnesses and findings of fact should remain on the subject of the various iterations of view and conduct by various of the Parties and should be made known to the land owners when considering whether to grant consent.

[89] In summary, unless and until any proposed orders sought have been considered and approved by the majority of landowners, this Court cannot determine whether a new occupation order could have been made under s 50 of the 1946 Act.

[90] As it stands, the land remains Native land unencumbered by Occupation Rights and requires a further resolution of the landowners before any new Occupation Right can be granted.

**Should the resolution of the landowners granting a lease to Georjean be confirmed?**

[91] We agree with the judge about Georjean's application when he said at paragraphs [106] to [109] of his judgment:

[106] Georjean Nicholas seeks confirmation of resolutions passed at a meeting of assembled owners, pursuant to s 52 of the Land (Facilitation of Dealings) Act 1970. That section provides:



## 52 Resolutions subject to confirmation by court

Application for confirmation by the court of any resolution duly passed at a meeting of assembled owners may without payment of any fee be made by any person interested.

[107] Georjean is seeking to lease an area that includes part of the original occupation right that is the subject of these proceedings. As noted above I order occupation rights, within the original occupation right area, to Robert, Akaau and Cameron.

[108] I also note that the landowners had already agreed to let the siblings sort out the occupation of the original right before agreeing to Georjean's lease. Many of the landowners signed their consent to the applicants' proposed plans. From an owners perspective, at the time of agreeing to Georjean's lease, Robert, Akaau and Cameron had already been nominated as the occupiers and therefore the occupation of the area has already been decided. The grant of lease is clearly inconsistent with the earlier agreement.

[109] I decline to confirm the resolution of the assembled owners to lease an area of the land to Georjean, which includes part of the original occupation right the subject of these proceedings.

## Decision

[92] The appeal is allowed, and the following orders are made:


- a) A declaration that the Coxhead J erred in making the following findings:
  - i) There had been a nomination of the Respondents to occupy the land in terms of Clause 6 of the Occupation Order 2001. That nomination related to the entire front portion of the land for Robert and the entire rear portion of the land for Akaau and Cameron.

- ii) The original Occupation Order had come to an end once the nominations were made.
  - b) A declaration that the Occupation Order 2001 lapsed on 28 February 2008 in accordance with condition 3 of that order.
  - c) A declaration that, as a result of the Occupation Order 2001 lapsing in 2008, there cannot have been a nomination in terms of condition 6 of that order (notwithstanding the Parties' clear intention in favour of agreeing for the Respondents to have the area of the Occupation Order 2001).
  - d) An order that the occupation rights granted in the High Court are to be quashed.
  - e) A declaration that, in the absence of an existing Occupation Right, the Court is able to make a declaration for a new Occupation Right should a new application be made under s 50 of the 1946 Act.
  - f) An order that confirmation of the resolution of the assembled owners to lease an area of the land to Georjean is declined.
- [93] An application for a right of way can be considered when and if a new s 50 application is made.
- [94] We make no order as to costs since we consider that the key finding was not raised before us by either of the Parties.
- [95] Coxhead J commenced his judgment thus (at paragraph [1]):

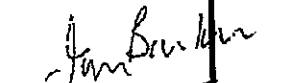
There are many sad cases that come before the Land Division of the High Court. This case is particularly sad due to the division that the land issues has caused amongst a once very close family. Issues of collectively owned land do sometimes strain family relationships.

However, in this case there is, sadly, a clear divide between siblings. This decision, like many court decisions, provides a resolution of the land matters. Family members will need to show leadership, compassion, courage, humility and love in order to repair family relationships issues. That is something beyond the scope of this decision.

[96] We agree with those sentiments. As noted earlier, we suggested at the end of the hearing before us that the Parties try to settle their differences and suggested mediation. We were advised by counsel that settlement efforts were no fruitful. We hope now that this judgment has been delivered that the Nicholas' family differences might still be resolved without further recourse to the courts.

  
Williams P

  
Paterson JA

  
Barker JA

