

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

**APPLICATION NO. 96/2020  
122/2020**

UNDER Sections 409(d) and 409(e) of the Cook Islands Act 1915

IN THE MATTER of the land known as VAIKERI 190 0, KIIKII, AVARUA, RAROTONGA

BETWEEN EDWARD BEAU FLINT on behalf of BEAU GEST HAWEA FLINT Applicants

AND GORDON ROBINSON First Respondent

AND ANI-MARA ROBINSON Second Respondent

AND BETWEEN GORDON ROBINSON Applicant

AND EDWARD BEAU FLINT Respondent

Date: 6 October 2023

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**JUDGMENT OF JUSTICE M P ARMSTRONG**

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## **Introduction**

[1] Vaieturangi Vaine Robinson is an owner in Vaikeri Section 190 0 in Avarua, Rarotonga. She married Raymond Robinson. They had three children Paula Robinson, Gordon Robinson and Ani-mara Robinson.

[2] On 26 June 2015, an occupation right was granted to Paula, Gordon and Ani-mara over part of this land for a term of 60 years. Paula was married to Edward Flint. Together they had a son Beau Flint.

[3] A house was built on the site of the occupation right (the homestead). Sadly, Vaieturangi, Raymond and Paula have all passed away. Edward is living in the homestead.

[4] Gordon and Ani-mara have filed an application seeking a permanent injunction requiring Edward to vacate the homestead. In response, Edward has filed an application seeking an interim injunction preventing his removal pending the determination of:

- (a) An application for succession on behalf of his son; and
- (b) A statement of claim seeking an award of damages for financial contributions made to the homestead.

[5] In this judgment I determine:

- (a) Whether an interim injunction should be granted; and if not
- (b) Whether a permanent injunction should be granted.

## **Background**

[6] On the 28<sup>th</sup> of September 1981, an occupation right was granted to Vaieturangi on this land. Although that order was in place for some time, she did not build on the site. In 2008, the family decided to proceed with the build. A loan was taken out with Westpac to fund it. The borrowers named on the loan were Edward, Paula, Raymond and Vaieturangi. The loan was secured by mortgages over 12 Tamaki Street and 93 Western Road in Rotorua, New Zealand. 12 Tamaki Street was owned by Paula and Edward. 93 Western Road was owned by Vaieturangi and Raymond.

[7] The loan was used to build the homestead. Vaieturangi and Raymond then lived in the homestead.

[8] There is a dispute over who repaid the loan. Edward argues that he and his wife repaid the majority of the loan. Gordon and Ani-mara dispute the amount of the loan they repaid.

[9] On 26 June 2015, the occupation right granted to Vaieturangi was cancelled and a new occupation right was granted to Paula, Gordon and Ani-mara.

[10] Sadly, in 2017 Raymond passed away. After his death, Vaieturangi moved back to New Zealand and lived with her children. In 2019, Vaieturangi, Paula and Edward moved back to Rarotonga to live permanently in the homestead. Sadly, on 1 October 2019, Paula passed away unexpectedly.

[11] Beau had been living with his parents in the homestead. After his mother's death, he returned to New Zealand. He is now living in his grandparents' home on 93 Western Road. Vaieturangi also returned to New Zealand for medical reasons. Sadly, she also passed away.

[12] On 20 November 2019, Gordon and Ani-mara sent a letter to Edward requiring him to vacate the homestead. These applications were then filed.

### **What are these applications about?**

[13] Gordon and Ani-mara seek a permanent injunction requiring Edward to vacate the homestead. In response, Edward seeks an interim injunction preventing them from removing him from the homestead until his substantive applications have been determined.

[14] Edward's substantive applications are:

- (a) An application on behalf of Beau to succeed to Paula's interests in the occupation right. This has since been amended to also succeed to Vaieturangi's interest in the land.
- (b) A statement of claim by Edward seeking an award of damages to compensate him for the funds that he and Paula contributed towards the build of the homestead.

### **Procedural History**

[15] I heard these applications on 20 October 2022 in Rarotonga. Edward's counsel, Ms Rokoika, filed closing submissions on 7 November 2022. Gordon and Ani-mara's counsel, Ms Henry, filed closing submissions on 21 November 2022. These submissions were forwarded to me by the Court registry on 22 June 2023. I have been advised the registry was waiting for

submissions in reply from Ms Rokoika which were not filed. I received the transcript from the hearing on 21 September 2023.

### **How do I approach these applications?**

[16] I first consider whether I should grant the interim injunction. If I do, I cannot grant a permanent injunction as the interim injunction will prevent Gordon and Ani-mara from taking steps to evict Edward. If I do not grant an interim injunction, I then proceed to consider whether to grant a permanent injunction requiring Edward to vacate the homestead.

[17] When deciding whether to grant an interim injunction I have to take into account the substantive applications filed by Edward seeking a succession order and damages. However, I am not determining those substantive applications. They are merely relevant to whether an interim injunction should be granted. Those substantive applications will have to be set down for further hearing.

### **Should I grant an interim injunction?**

*What legal principles apply?*

[18] Section 409(e) of the Cook Islands Act 1915, provides that I can grant an interim injunction prohibiting any person from dealing with or doing any injury to any property which is the subject matter of any application to the Court.

[19] In order to obtain an interim injunction, the applicant must demonstrate that:<sup>1</sup>

- (a) There is a serious question to be tried;
- (b) The balance of convenience supports the grant of an injunction; and
- (c) The interests of justice supports the grant of an injunction.

[20] I consider these issues in turn.

*Is there are serious question to be tried?*

[21] When considering this issue, Edward, as the applicant, must demonstrate that he has a tenable argument in fact and law in the succession application and statement of claim.

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<sup>1</sup> *In Re – Akaoa 65, Arorangi* [2013] CKLC 2; App 213/2013 (22 April 2013), *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* [1985] 2 NZLR 129 (CA).

[22] Ms Henry argues that Gordon and Ani-mara are not dealing with or doing any injury to the property. She submits that they only seek to have Edward removed from the homestead. Ms Henry contends that, on this basis, s 409(e) of the Act does not apply and the application should be dismissed.

[23] I don't agree with Ms Henry's assessment. There is no evidence that Gordon or Ani-mara are going to damage or injure the homestead. However, they are seeking an order to remove Edward from it. That is dealing with the property within the meaning of s 409(e) of the Act. I can grant an interim injunction in these circumstances, the question is whether I should.

[24] The succession application originally sought an order allowing Beau to succeed to his mother's interest in the occupation right. That has since been amended to include succeeding to Vaieturangi's interest in the land.

[25] Vaieturangi has passed away. Succession laws provide that her interests in the land will go to her children. Paula's share of those interests will pass down to Beau as her son. There is a serious question to be tried in relation to that part of the succession application.

[26] The same cannot be said in relation to the application to succeed to the occupation right. The occupation right was granted to:

**PAULA ROBINSON, GORDON ROBINSON AND ANI-MARA ROBINSON**

[27] The occupation right does not refer to their descendants or their successors.

[28] In *Rimunui*,<sup>2</sup> Justice Savage found that an occupation right could not pass on succession as that would give it perpetual currency. Justice Savage considered that would enable occupation orders to act as vesting orders which would have a longer currency than a lease and would be contrary to the intention of s 50 of the Cook Islands Amendment Act 1946.

[29] A similar issue was considered by Justice Isaac in *Webb – Arepuka Pt Section 25, Anaunga, Aitutaki*.<sup>3</sup> Justice Isaac had to consider whether an occupation right terminated on the death of the original occupation right holder. He found:

[18] Further the 1982 order has no term. It was given to Kura and not to his successors. Therefore, in my view, on Kura's death the order is at an end and does not continue to the death of Maria.

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<sup>2</sup> *An Application for succession to occupation right by Rimunui* [2010] CKHC 31; 189 of 2009 (12 October 2010).

<sup>3</sup> *Webb – Arepuka Petroleum Tribunal Section 25, Anaunga, Aitutaki*, App 46/17 (4 December 2017).

[30] The effect of these decisions is that where an occupation right is granted it is restricted to those named in the order. Where the occupation right is to pass to the next generation, the order will expressly say that the occupation right is granted to [the named person] and his or her successors or descendants.

[31] The occupation right in this case does not include the successors or descendants. It was granted to Paula, Gordon and Ani-mara only. On this basis, Beau cannot succeed to the occupation right. Upon his mother's death, the occupation right is held by Gordon and Ani-mara. For these reasons, I consider there is not a serious question to be tried in relation to the application to succeed to the occupation right.

[32] There is a dispute between the parties over the terms of the loan, and who repaid it. Edward argues that he and Paula repaid the majority of the loan. Ani-mara says she has taken over the repayments since 2019. Edward says he only stopped making payments once he was served with the eviction notice.

[33] I consider the evidence demonstrates a tenable argument that Edward and Paula contributed towards repaying the loan. They were borrowers on the loan documents and Gordon and Ani-mara appear to accept that Edward and Paula made some contribution towards repaying the loan. It is not clear on the evidence before me exactly how much money they paid. Ultimately, it is not necessary to determine that for the purposes of this proceeding. That will be resolved in the substantive application. I am satisfied there is a serious question to be tried that Edward and Paula contributed towards loan repayments as pleaded in the statement of claim.

*Where does the balance of convenience lie?*

[34] The balance of convenience requires balancing the injustice that will be caused to Edward and Beau if an interim injunction is refused and their substantive applications ultimately succeed against the injustice to Gordon and Ani-Mara if the interim injunction is granted but then discharged in the substantive judgment.

[35] An important consideration is the adequacy of damages that Gordon and Ani-Mara are able to pay as compensation to Edward. If an award of damages is sufficient the balance of convenience leans against the grant of an injunction.

[36] If I do not grant the interim injunction restraining Gordon and Ani-Mara, and I then grant a permanent injunction requiring Edward to leave the homestead, he will have to vacate it before his substantive applications are determined. I now consider whether an injustice could arise from doing so.

[37] If Beau's succession application is successful, he will become an owner in the land. For the reasons outlined above, it is highly unlikely that he will succeed to his mother's interest in the occupation right. While that would make Beau an owner in the underlying land that will not give him a right to occupy the homestead as that is restricted to those named on the occupation right order.

[38] Gordon and Ani-Mara have made it clear that they are not seeking a permanent injunction against Beau. They say he can continue to use and reside in the homestead. They are only seeking a permanent injunction against Edward. Beau is currently residing in New Zealand. There will be no injustice to Beau if the interim injunction is refused, and his succession application succeeds, as the permanent injunction is not going to affect him personally.

[39] I appreciate that a permanent injunction is sought against Beau's father. No doubt Beau would be aggrieved if his father is required to vacate the homestead. However, the grant of a permanent injunction does not infringe against Beau's legal rights. This is not an injustice requiring an interim injunction to protect Beau's interests pending the determination of the succession application.

[40] Nor will there be an injustice if an interim injunction is refused and Edward's statement of claim succeeds. Edward's statement of claim seeks an award of damages as compensation for the money he and Paula contributed to the construction of the homestead. This is confirmed in Edward's affidavit sworn on 29 April 2022 where he says:

Given the amount of money that my wife and I spend on the building of the Rarotonga property I believe that it is only fair that we be reimbursed with the money that we have spent on the building of the home given the fact that they want to remove me from the property in question despite all of the Robinson children residing overseas.

[41] As noted, where an award of damages provides a sufficient remedy, that leans against the grant of an interim injunction. Damages are sufficient here as that is the award Edward seeks in his statement of claim.

[42] In addition to this, Edward's claim for damages is grounded in the fact that he has to leave the homestead. In her closing submissions, Ms Rokoika sets out that the statement of claim is based on unjust enrichment. She argues that:

Unjust enrichment occurs when one person is enriched at the expense of another in circumstances that the law sees as unjust. Where an individual is unjustly enriched, the law imposes an obligation upon the recipient to make restitution.

[43] Presumably, the claim would contend that:

(a) Edward and Paula made significant contributions to the property;

- (b) Edward is now required to vacate it;
- (c) When he does, Gordon and Ani-mara will take possession of the homestead; and
- (d) As a result, Gordon and Ani-mara will be unjustly enriched as they will benefit from the financial contributions that Edward and Paula made to the homestead.

[44] If this claim is established, damages may be awarded to compensate Edward for the contribution that he and his wife made to the value of the homestead. Edward cannot claim damages if he continues to reside in the property. His claim is predicated on the fact he is being forced to leave. If he is not forced to leave, Gordon and Ani-mara cannot take possession of the homestead and the claim for unjust enrichment does not arise.

[45] If an interim injunction is refused and a permanent injunction is granted Edward will be required to vacate the homestead despite the contributions he has made. I appreciate that, on its own, may seem unjust. However, Edward can still pursue his claim seeking damages for the contributions he and his wife made. His claim will not be undermined if an interim injunction is refused here.

[46] In her closing submissions, Ms Rokoika argued that a constructive trust may arise in this case. She submits:

The remedy for breach of reasonable expectation was not limited to the yielding up a proprietary interest in the property in dispute. It might extend to damages for breach of the equitable obligations devolving upon the defendant.

[47] In New Zealand, the courts have found that, in certain circumstances, a constructive trust may give rise to an ongoing right of occupation on the land in question.<sup>4</sup> It is not clear whether a constructive trust in the Cook Islands would give rise to an ongoing right of occupation in favour of a non-owner, without the support of the wider owners, as this would go against one of the principal purposes of the Cook Islands Act 1915.

[48] In any event, Ms Rokoika is not seeking a permanent right of occupation. In her closing submissions, she seeks the following orders:

- (a) That Edward will vacate the homestead if he is reasonably compensated for the money spent on the loan thus far; and
- (b) Until such time Edward is to stay on the premises until further orders from the Court.

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<sup>4</sup> See *Ratu v Marshall – Whangape Lot 65B Sec 2A* (2023) 2023 Maori Appellate Court MB 115.



[49] The primary remedy sought is an award of damages. Any award of compensation would be in lieu of an ongoing right of occupation not in addition to it. If Edward's claim is successful, he can seek to enforce that award against Gordon and Ani-mara. Any delay by Gordon and Ani-mara to pay may result in interest bearing awarded on top of the damages. This will suitably protect Edward's position. Failure to pay an award of damages does not create an ongoing legal right for Edward to occupy the homestead.

[50] On the other hand, granting an interim injunction could cause an injustice to Gordon and Ani-mara. They will be unable to remove Edward from the homestead until the succession application and the statement of claim have been resolved. That could take some time. They would be unable to take possession of the homestead even though:

- (a) They are entitled to use and occupy it under the occupation right; and
- (b) Edward has no express legal right to occupy it.

[51] For these reasons, the balance of convenience leans against the grant of an interim injunction.

*Where do the interests of justice lie?*

[52] I now consider where the interests of justice lie in this case. The jurisdiction to grant an interlocutory injunction is governed by equitable principles. The prior conduct and dealings of the parties may be relevant to the exercise of the Court's discretion. An applicant should come to the Court with clean hands and delay, acquiescence or other inequitable conduct may go against the grant of an injunction.

[53] In this case, both sides accuse the other of inequitable conduct. Edward accuses Gordon of acting in a violent manner towards him. Gordon and Ani-mara make similar allegations about Edward. Both sides deny the accusations from the other.

[54] It is clear that the relationship between Edward, Gordon and Ani-mara has broken down. That is sad particularly given the recent deaths of Paula, Raymond and Vaieturangi. I am sure that is not what they hoped for when the homestead was built. On the evidence before me, I am unable to determine whether one or both sides have acted badly towards the other. Their relationship with each other is fractious. That division has entrenched over this proceeding. No doubt that has contributed to the way they behave towards each other. Beyond that, I can make no findings of inequitable conduct that would count against either side in relation to an interim injunction.

[55] Standing back to consider this matter overall, I do not consider it is in the interests of justice to grant an interim injunction. Edward is not an owner in this land. He has no right to occupy the homestead. I acknowledge that he may feel aggrieved if he and his wife made significant financial contributions to the homestead and he may now have to leave. However, he can pursue his claim for compensation through the statement of claim he has filed.

[56] I also acknowledge that Beau may disagree with the actions of his aunty and uncle. However, Beau's personal rights are not being infringed. An injunction is not sought against Beau and he is free to use the homestead. The interests of justice do not support the grant of an interim injunction.

#### *Decision*

[57] Application 96/2020 by Edward Flint seeking an interim injunction is dismissed.

#### **Should I grant a permanent injunction?**

##### *What legal principles apply?*

[58] Per s 409(d) of the Cook Islands Act 1915, I can grant a permanent injunction against any person in respect of actual or threatened trespass or other injury to native freehold land. A permanent injunction is different in form and substance to an interim injunction. A permanent injunction is based on the tort of trespass. A different test applies.

[59] Section 19(1)(a) of Te Ture Whenua Māori Act 1993, empowers the Māori Land Court to grant a permanent injunction in similar circumstances. This provides:

- (1) The Court, on application made by any person interested or by the Registrar of the Court, or of its own motion, may at any time issue an order by way of injunction—
    - (a) Against any person in respect of any actual or threatened trespass or other injury to any Māori freehold land [Māori reservation, or wahi tapu]; or
- ....

[60] In *Taueki v Horowhenua Sailing Club* the Māori Appellate Court held:<sup>5</sup>

[15] In applying for a permanent injunction, applicants must also fulfil the legal elements relating to the action of trespass before the Court will exercise its jurisdiction to grant the remedy. These elements are set out below:

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<sup>5</sup> *Taueki v Horowhenua Sailing Club – Horowhenua 11 (Lake) Block* (2014) 2014 Māori Appellate Court MB 60 (2014 APPEAL 60)

The action for trespass to land is primarily intended to protect possessory rights, rather than rights of ownership. Accordingly, the person prima facie entitled to sue is the person who had possession of the land at the time of the trespass. Actual possession consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other persons. Either element alone is not sufficient ...

[16] Once the elements for the trespass action are made out, the Court then considers what remedy is appropriate. The prima facie rule is that a landowner is entitled to an injunction to restrain a trespass. However, the Court still has discretion as to whether to grant the injunction or not. Matters affecting the exercise of the discretion include the parties' conduct.

[61] I adopt this approach. I first consider whether an action in trespass has been established before turning to decide whether to exercise my discretion to grant a permanent injunction.

*Is Edward trespassing?*

[62] The order in 2015 granted a right of occupation to Paula, Gordon and Ani-mara. That right was granted to them jointly. That means all three were entitled to occupy the homestead but they could not exclude each other. Rather, they had a common right of occupation between the three of them.

[63] While Paula was alive she had a right to occupy the homestead. Edward would also have been able to occupy the homestead as her invitee. That did not mean he had his own right to occupy the homestead. He could do so at Paula's invitation.

[64] Paula has now passed away. As noted, the occupation right does not include Paula's successors or descendants. This means that Gordon and Ani-mara are now the sole beneficiaries of the occupation right order.

[65] On this basis, Gordon and Ani-mara are entitled to possession of the homestead. Edward's ongoing occupation of the homestead following Paula's death would, at the most, constitute a bare license. A bare license provides little security. It can be terminated at any time by the person entitled to possession of the land.

[66] Gordon and Ani-mara have served notice on Edward requiring him to vacate the homestead. Any bare license that would have existed would have terminated upon service of that notice.

[67] Edward is now occupying the homestead without any legal right to do so and in the face of those entitled to possession who require him to vacate. This amounts to a trespass.

*Should I exercise my discretion to grant an injunction?*

[68] In *Peihopa v Peihopa* the Māori Appellate Court held:<sup>6</sup>

[4] In determining whether to exercise the discretion to grant an injunction, the following principles apply:

- (a) The starting point is that a landowner is entitled to an injunction to prevent a continuing trespass.
- (b) There is a good working rule to determine whether damages should be awarded, rather than an injunction. Damages may be awarded if the injury to the applicant is small, it can be compensated by a small monetary payment, and it will be oppressive to the respondent to grant an injunction.
- (c) Injunctions are an equitable remedy, so equitable principles are to be considered, balanced against the statutory objectives set out in ss 2 and 17 of the Act.<sup>7</sup>
- (d) There is no exhaustive list of factors that will be relevant to the exercise of the discretion. Examples include whether the intrusion on the land is minimal, the degree of hardship if an injunction is granted, the balance of convenience, whether it will be oppressive to the respondent if the injunction is granted, whether an alternative remedy such as damages may be appropriate, and the conduct of the parties.

[5] The court must assess whether an injunction will cause disproportionate hardship to a respondent. The test is one of oppression, rather than on the balance of convenience. In this context, the following examples were not considered to be oppressive:

- (a) The removal of a shareholder (owner) from a block.
- (b) The removal of an owner of a block who had lived there for his whole life with his father, on the passing of his father.
- (c) The removal of baches from a block.

[69] This starting point is that Gordon and Ani-mara are entitled to an injunction to prevent a continuing trespass. The good working rule does not apply here. This is not a small trespass that can be compensated by a small monetary payment. Gordon and Ani-mara require vacant possession of the homestead.

[70] As noted above, it is clear that the relationship between Edward, Gordon and Ani-mara has broken down. However, the evidence does not demonstrate that Gordon and Ani-mara have acted in a way so as to disentitle themselves from injunctive relief. Importantly, they have served notice on Edward requiring him to vacate and when he failed to do so they filed this application. They are awaiting the outcome of this proceeding to recognise and enforce their legal rights.

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<sup>6</sup> *Peihopa v Peihopa* (2021) 2021 Māori Appellate Court MB 180 (2021 APPEAL 180).

<sup>7</sup> *O'Malley v Wyborn – Orokawa 3C2B* [2010] Māori Appellate Court MB 494 (2010 APPEAL 494).

[71] I do not consider that an injunction will cause disproportionate hardship to Edward. Clearly requiring him to vacate the homestead will cause some hardship. However, that is the nature of injunctive relief. He can continue to pursue his rights as pleaded in the statement of claim to seek compensation for the financial contribution he and Paula made to the homestead.

[72] I also have to exercise my discretion in a manner that supports and promotes the purposes of the Cook Islands Act 1915. In *Tumu v Tumu*, the Privy Council held that one of the principal purposes of the Cook Islands Act 1915 is:

... to protect the indigenous people of the Cook Islands against exploitation, either by their own tribal chiefs or by people of European origin. Freehold native land was in general to be inalienable. Any permitted alienation was to be in writing. Partitions and exchanges were to be subject to the supervision of the Land Court to ensure fairness. These provisions, whether or not they may today seem paternalistic, have always been an essential part of the land law system in the Cook Islands, and in a system of that sort consent, even if assumed to be given freely, is not sufficient to override its operation.

[73] This confirms that one of the principal purposes of the Act is to protect the interests of the owners. Here I am being asked to grant an injunction so that the owners can take possession of the homestead against a non-owner. The grant of an injunction is consistent with the purposes of the Act.

*How long should Edward have to vacate?*

[74] Neither side has addressed me on how long Edward should have to vacate the homestead. Edward has been occupying the homestead since 2019. It will require significant effort to find suitable alternative accommodation and to remove all of his belongings. I consider that a period of three months is reasonable to allow him to achieve this.

*Decision*

[75] Per s 409(d) of the Cook Islands Act 1915, I grant a permanent injunction requiring Edward Beau Flint to vacate the homestead and to remove all of his possessions from that property which is the subject of the occupation right granted by order of the Court on 26 June 2015 in relation to Vaikeri Section 190 0, Avarua, Rarotonga, within three months from the date of this judgment.

Dated at 10:00am (CIT) in Rarotonga on this 6<sup>th</sup> day of October 2023.

M P Armstrong  
**JUSTICE**