

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

UNDER Section 3, Declaratory Judgments Act 1994
Section 50, Cook Islands Amendment Act 1946

**APPLICATION NO. 357/2021
358/2021**

IN THE MATTER OF the land known as **ONEMARU 83E3,
ARORANGI**

AND IN THE MATTER OF an application seeking a declaration to cancel an
existing occupation right and grant a new
occupation right

BETWEEN **DAVID HOEFT**
Applicant

AND **WICHMAN HOEFT**
Respondent

APPLICATION NO. 391/22

IN THE MATTER OF the land known as **MARAMAKIRI 91N1D,
ARORANGI**

AND IN THE MATTER OF an application seeking a declaration to cancel an
existing occupation right and grant a new
occupation right

BY **DAVID CHRISTOPHER HOEFT JUNIOR**
Applicant

Date: 17 April 2024

Appearances: Mr Nicholas for the applicants
Ms Evans for the respondent

JUDGMENT OF ARMSTRONG J

Introduction

[1] Nootoa Wichman had eight children. On 2 November 1979, she and her husband, Charley Hoef, were granted an occupation right over part of Onemaru Section 83E3 in Arorangi (the first occupation right). They built the family home (family home) on that site.

[2] On 27 June 2007, Nootoa's son, David Hoef senior, was granted an occupation right over part of Maramakiri Section 91N1, which is also in Arorangi (the second occupation right).

[3] David now seeks the following orders:

- (a) A declaration cancelling the first occupation right;
- (b) A new occupation right over the family home to David solely;
- (c) A declaration cancelling the second occupation right; and
- (d) A new occupation right over that site to David's son.

[4] David's siblings oppose these applications. They say that:

- (a) The family home should be available to all of them; and
- (b) David already has the second occupation right. He doesn't need the family home as well.

[5] In this judgment, I determine whether these orders should be granted.

What are these applications about?

The first occupation right

[6] Following the grant of the first occupation right, Nootoa and Charley built the family home where they lived raising their youngest daughter Charlene.

[7] In 1995, Nootoa and Charley rented the family home to the Esther Honey Foundation who ran a community veterinarian service from the property. David says they later rented the family home to other residential tenants.

[8] In 2008, Nootoa passed away. Charley returned to the family home. At this time, the family home was in disrepair. David carried out extensive renovations to it. Charley passed away in 2015.

[9] David retired in 2019. He then returned from New Zealand to live permanently in Rarotonga. It appears he initially lived in the family home although this was later rented out on Airbnb.

[10] On 23 May 2021, some of David's siblings held a teleconference to discuss the family home. They had concerns over David's use of the family home and in particular the Airbnb listing. They recognised that David had renovated the family home, but they wanted to see evidence of the costs he spent, and the money he received from the listing. The minutes from that teleconference record the following resolution:

The Attendees unanimously agree that David Hoeft must contact the Attendees to register his intention to vacate the family homestead and to make arrangements to pay \$482,040 to the Hoeft Family Homestead Trust.

[11] This demand prompted David to file the current applications. David's younger brother, Wichman, says this demand does not accurately reflect the discussions during the teleconference and the demand has since been withdrawn.

[12] David argues that:

- (a) The first occupation right required his parents or their descendants to occupy the family home;
- (b) This was breached when his parents rented out the family home;
- (c) I should now cancel the first occupation right;

- (d) Following his parents' death, David has been the only descendant to occupy the family home;
- (e) David carried out extensive renovations to the family home;
- (f) David is supported by a majority of owners; and
- (g) He meets the other requirements and so a new occupation right should be granted to him.

The second occupation right

[13] The second occupation right was initially granted to Nootoa on 5 September 2005. She never built on the site. On 27 June 2007, the second occupation right was changed into David's name. The terms of the order required David to commence building on the site by 5 September 2010 and to complete the build by 5 September 2012.

[14] David says that he did not comply with these conditions as he did not build in time. Despite that, his siblings say that he has now built on this section, albeit out of time.

[15] David argues that:

- (a) As he did not build in time the second occupation right has lapsed;
- (b) I should cancel the second occupation right;
- (c) A new occupation right should be granted to his son;
- (d) A majority of owners support the new occupation right; and
- (e) His son meets the other requirements.

Procedural history

[16] I heard these applications in Rarotonga on 10 October 2022. After hearing the evidence, I adjourned the applications and directed counsel to file closing submissions. I also indicated that I may reconvene by Zoom if I had questions for counsel on their submissions.

[17] Counsel filed closings on 5 December 2022, 7 December 2022 and 30 January 2023. Unfortunately, I did not receive the transcript from the hearing until 9 March 2024. I had no questions for counsel on their closing submissions and so a further Zoom hearing was not necessary.

What legal principles apply?

Making declarations

[18] I can make declaratory orders per s 3 of the Declaratory Judgments Act 1994. The jurisdiction to make declaratory orders is discretionary. I can refuse to make a declaration on any grounds I deem sufficient.¹ No formulaic test applies when deciding whether to exercise this discretion. Whether to do so will depend on the circumstances of the case. There may be a case where the Court has grounds to make a declaration but chooses not to as to do so would be unjust or inequitable.

[19] I take the following approach. I first consider whether Nootoa and Charley breached the first occupation right by renting out the family home. If so, I then consider whether I should exercise my discretion to cancel that occupation right.

[20] Coxhead J's decision in *Apera v Apera*,² is relevant to this assessment. In that case, Coxhead J considered whether to make a declaration cancelling an occupation right where the land was not occupied. He found:

[12] 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.

¹ See Declaratory Judgments Act 1994, s 10.

² *Apera v Apera - Akaoa 6, Arorangi* APP 131/18 & 377/17, 10 July 2018.

[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 of being able to determine who can and who cannot live on the property.

[14] Mr Moore has asked me to take a wider view of occupy and read it within the Cook Islands context. For this I take it, occupy must be seen in the Cook Islands context where many people leave the Island and return after staying away for some time.

[15] Sometimes they leave the Island for personal reasons, for work opportunities, but within that context they frequently return home for holidays, funerals, meetings or just to see family who continue to reside on the Island.

Granting new occupation rights

[21] When determining whether to grant a new occupation right there is a two-step process. First, I have to be satisfied that the grant of the occupation right is supported by a majority of the owners. If I am so satisfied, I then have to determine whether to exercise my discretion to grant the occupation right.³ Whether to exercise that discretion will depend on the circumstances of the case. On 12 May 2022, this Court issued a practice note which sets out, amongst other things, various factors the Court will usually take into account when deciding whether to exercise this discretion.

Did Nootoa and Charley breach the first occupation right?

[22] The relevant terms of the order state:

1. The land shall be used as a site for a dwelling house for the benefit of the said Nootoa Pauline Wichman and Charley Hoeft and their direct descendants through the said Nootoa Pauline Wichman.
2. The Right of Occupation shall be for a term of 20 years and thereafter for so long as Nootoa Pauline Wichman and Charley Hoeft and their direct descendants, as stipulated in clause 1 above or any of them shall occupy.

³ *Bates – Te Raoia Section 12K2, Ngatangiia* APP 483/2010 & 315/2011, 17 October 2011.

3. ...
4. After having erected a dwelling house on the said land, the occupier may, with the consent of the Court first had and obtained, lease the right hereby granted to any other person provided that if the Lessee be not one of the owners of the said land, then the occupier shall pay to the landowners an annual sum to be fixed by the Land Court commencing from the date of the lease.

[23] Both sides agree that Nootoa and Charley rented the family home to the Esther Honey Foundation in 1995. In his affidavit, David said the family home was rented out for seventeen years. When I questioned him about this, David clarified that it was rented out for seven years from 1995 to 2002.

[24] Clause 4 of the occupation right provides that Nootoa and Charley were able to lease the family home provided that it was first approved by the Court. There is no evidence to indicate that the Court approved the family home being rented to the Esther Honey Foundation. However, David does not seek a declaration that his parents breached the occupation right by failing to obtain Court consent. He only argues that the occupation right should be cancelled as his parents failed to occupy the family home over the period it was rented out.

[25] In *Apera*, Coxhead J adopted a wide interpretation of the term occupy. He considered this was not limited to personally residing in the property but also included a person maintaining the property or having control over it. Although Nootoa and Charley were not living in the family home over this period they did rent it out. As the landlord, they would have retained control and been able to determine who could use it pursuant to the tenancy they granted. This comes within the scope of occupying the property as found in *Apera*.

[26] Clause 2 of the first occupation right also has to be read as part of the whole order. Clause 4 expressly allowed Nootoa and Charley to lease the property. It would make no sense if they could lease the family home per clause 4, if that then constitutes a breach of clause 2. As such, clause 2 must be read in light of clause 4 which allows the family home to be leased.

[27] I accept that clause 4 also required consent from the Court which was not obtained. However, failing to obtain Court consent for a lease per clause 4 is a different issue to

occupying the land per clause 2. As noted, David has not argued that his parents breached the order by failing to obtain Court consent to a lease.

[28] It is also significant that the family home was only rented out for a fixed period. After that, Charley (and possibly Nootoa) moved back in and resumed personal occupation. David said his father moved back in 2011, though he lived in a small unit on the same property as the family home was in disrepair. I am uncertain about the timeframes in David's evidence, as he clarified to me that the family home was rented out from 1995 to 2002, not 1995 to 2011. Wichman's evidence was also unclear as he said that his parents lived there from 1990 to 2005, and then his father lived there with Charlene from 2008 to 2010. This doesn't account for the period it was rented out. While the evidence from both sides is unclear, they both agree that at least Charley occupied the property after the Esther Honey Foundation.

[29] The evidence is also in dispute as to who occupied the family home following Charley's death in 2015. David says he was the only person to do so. Wichman says his other siblings, Albert and Charlene, also occupied the family home for periods following 2015. Ultimately, this is a red herring. David seems to argue that, on his account, he was the only person occupying the family home from 2015, and so he became the sole holder of the first occupation right. That is not the case.

[30] The first occupation right was granted to Nootoa and Charley as tenants in common in equal shares. Charley held his half share for life. On remainder, his share went to Nootoa or their issue. Per clause 1, the land was to be used as a house site for the benefit of Nootoa and Charley and their direct descendants. Per clause 2 that was to continue for as long as Nootoa and Charley and their direct descendants, or any of them, shall occupy.

[31] Reading those provisions together, it is clear that the occupation right did not pass to the particular descendant who occupied the family home. Rather, as long as one of them occupied it, the occupation right would continue for the benefit of all the descendants. The fact that David, Charlene and Albert may have occupied the family home at various times following their father's death, only means that they have maintained the occupation right for the benefit of the wider family. This did not transform the occupation right to grant sole rights to the particular descendant in occupation.

[32] For these reasons, I find that Nootoa, Charley, and their descendants, have remained in occupation of the family home and have not breached clause 2.

Should I make a declaration cancelling the first occupation right?

[33] Even if I found that the family home was left unoccupied, I would not exercise my discretion in this case to cancel the first occupation right.

[34] David, and all of his siblings, knew that their parents had rented the family home to the Esther Honey Foundation. Wichman said this was at his mother's request because she loved animals and she wanted to support the establishment of a local veterinarian clinic. David did not object to this at the time nor did he take any steps to challenge his parents' decision. It was not until 20 years later, when he fell out with his siblings over the demand that he vacate and pay compensation, that he raised this issue. David is now relying on this in a very belated attempt to cancel the first occupation right and obtain a new occupation right in his sole name.

[35] I understand his motivation for doing so. The demand from at least some of his siblings that he must vacate and pay exorbitant compensation would have been distressing for anyone. However, that demand has since been withdrawn.

[36] The family home was also listed on Airbnb. David argued that his sister Charlene arranged this and he had nothing to do with it. When confronted with an advertisement which states that the "entire home [is] hosted by David", he denied this referred to him. In response to my questions, David accepted that he was aware the family home was listed on Airbnb, he supported it at least initially, and he received all of the proceeds. Even if David didn't physically list the family home on Airbnb, he was clearly the beneficiary of it. It would be inequitable to cancel the first occupation right, on the basis that David's parents rented out the family home, when David has benefitted from the same thing.

[37] I accept that David has carried out extensive renovations to the property. He said he spent over \$44,000.00 on these renovations.⁴ David has not produced any objective evidence, such as receipts or invoices, to demonstrate the actual amount spent. The only

⁴ David said that Albert contributed \$3,000.00 to the renovations.

evidence on quantum is a handwritten note that David prepared listing the costs he says he spent. Despite that, David produced photos showing the family home before and after this work. These photos demonstrate that the work carried out was extensive. David may be entitled to some form of compensation as a result. However, this does not mean that the first occupation right should be cancelled in favour of a new occupation right in his sole name.

[38] There is no need to make a decision about compensation today. There is no application before me to do so. David can file such a proceeding if he wishes. It may also be possible to resolve this within the family without requiring further Court intervention. During the hearing, Wichman offered to repay David for the costs he spent carrying out the renovations. I encourage this family to talk to each other in good faith to see if agreement can be reached.

[39] Clause 4 of the occupation right also allows the property to be leased if approved by the Court. This could provide a sensible solution. The family could apply to the Court to approve listing the property on Airbnb when the family members are not using it. The proceeds could be applied towards maintenance as well as repaying David for the costs he spent on renovations. I emphasise I have not made any findings on this. I simply raise this as a possible solution in the hope that it may encourage this family to enter into constructive discussions.

[40] Finally, I accept that a meeting of owners supported cancelling the first occupation right in favour of a new occupation right being granted to David. While the views of the owners will always be relevant, it is not determinative in this case. I also consider the owners were reacting to the demand David received from some of his siblings. That demand has been withdrawn.

[41] For these reasons, I do not consider it is in the interests of justice to make a declaration cancelling the first occupation right and granting a new occupation right solely to David. This is the family home and it should remain so for the benefit of the whole family.

[42] As I have not cancelled the first occupation right, I do not need to consider whether I should grant a new occupation right in David's sole name.

Should I grant the orders concerning the second occupation right?

[43] David argues that he did not build on this site within the timeframes required under the second occupation right order. He seeks a declaration that it has lapsed and an order granting a new occupation right to his son.

[44] Ms Evans argues that David only took this step because the 2022 practice note provides that a person can only hold one occupation right. That may well be the case. Ultimately, it is not necessary to make a decision about that.

[45] David holds the second occupation right. I can make a declaration cancelling it with his consent. A majority of the owners support David junior receiving a new occupation right for this site. If David senior seeks these orders, I am happy to grant it. However, it is not clear whether he is still seeking these orders given my decision concerning the first occupation right. Mr Nicholas will need to provide an update on this.

Decision

[46] Applications 357/2021 and 358/2021, which seek to cancel the first occupation right and obtain a new occupation right over the family home, is dismissed. If costs are at issue, I direct that:

- (a) Ms Evans is to file submissions on costs within one month;
- (b) Mr Nicholas is to file submissions in reply within a further month; and
- (c) I will decide costs on the papers.

[47] Application 391/22, which seeks to cancel the second occupation right and obtain a new occupation right in favour of David junior, is adjourned. I direct that:

- (a) Mr Nicholas is to file a memorandum within one month advising whether David still seeks orders concerning the second occupation right.

- (b) I will then decide on the papers whether to grant the orders sought or to dismiss this application.

Dated at 9:30am (NZT) in Whangārei on this 17th day of April 2024.

M P Armstrong
JUSTICE