

**I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE WAIPOUNAMU**

*In the Māori Land Court of New Zealand
Te Waipounamu District*

A20220003864

WĀHANGA
Under

Section 19(1)(a), Te Ture Whenua Māori Act 1993

MŌ TE TAKE
In the matter of

Koukourarata Māori Reserve 874 1C2 Block

I WAENGA I A
Between

GINA-LEE DUNCAN
Te Kaitono
Applicant

ME
And

CRAIG OSBORN
Te Kaiurupare
Respondent

Nohoanga: 17 March 2022, 77 Te Waipounamu MB 157-168
Hearing (Heard at Wellington by AVL)

Whakataunga: 1 September 2022
Judgment date

TE WHAKATAUNGA Ā KAIWHAKAWĀ S F REEVES

Judgment of Judge S F Reeves

Hei kōrero tīmatanga*Introduction*

[1] On 18 January 2007, Gina-Lee Duncan was granted an occupation order of approximately 405m² of Koukourarata Māori Reserve 874 1C2 Block (“the occupation area”).¹

[2] Ms Duncan applies under s 19(1)(a) of Te Ture Whenua Māori Act 1993 for a permanent injunction against Craig Osborn in respect of the occupation area. Ms Duncan seeks an order requiring Mr Osborn to vacate the area, remove his structures and items, and halt work which he has commenced.

[3] The issue is whether I should grant the order and if so, on what terms.

Kōrero whānui*Background*

[4] Koukourarata Māori Reserve 874 1C2 Block (“1C2”) is Māori freehold land comprising approximately 14.4928 hectares. It has 41 owners and a total of 35.8125 shares. Ms Duncan and Mr Osborn each hold shares in 1C2, being 0.5 and 0.32428 respectively. It is vested in Koukourarata Māori Reserve 874 1C2, an ahu whenua trust which has five trustees, Ngaire Waikura Briggs, Meri Crofts, Karla Gamble, Mathias Pitama, and Deon Ruru.²

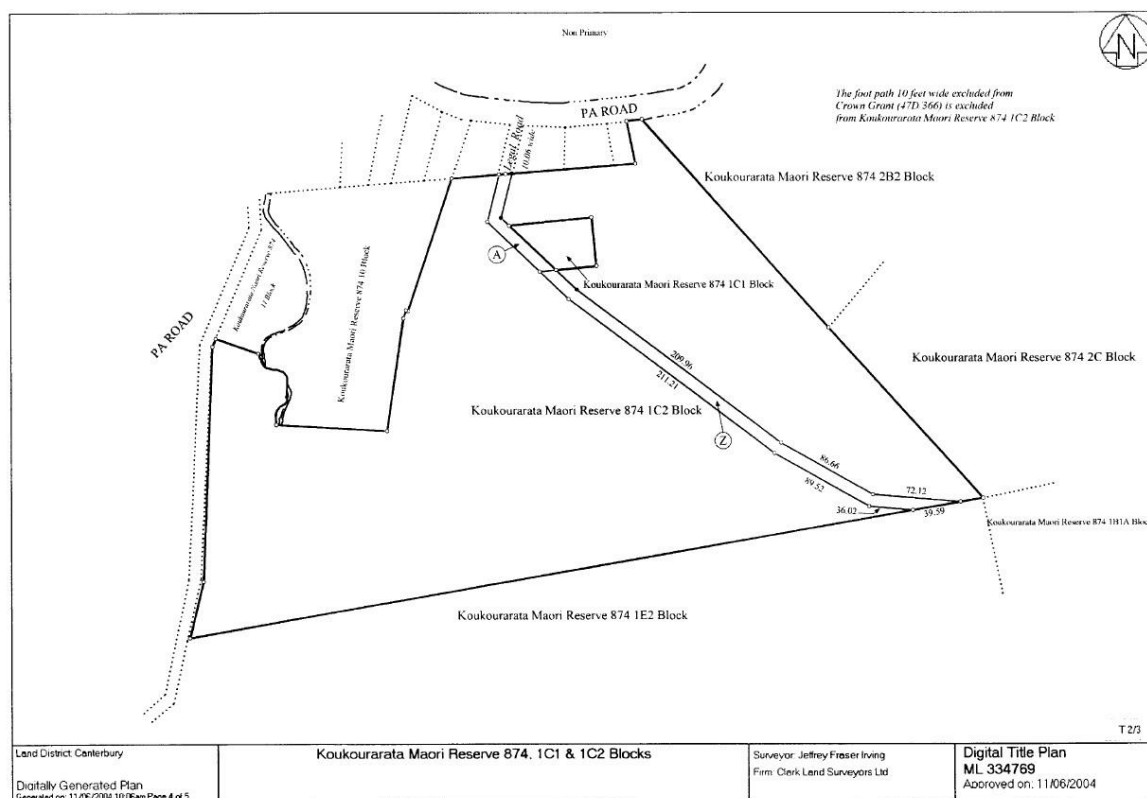
[5] 1C2 was created by partition order dated 2004 which divided Port Levy MR 874 Section 1C into two blocks, being Koukourarata Māori Reserve 874 1C1, and 1C2.³ The partition order depicted the land on a digital cadastral plan, ML 334769, including the relevant easements which provide right of way access to both Koukourarata Māori Reserve 874 1C1 and 1C2 from a legal road toward the west end of 1C1 off Pa Road.⁴ The plan is reproduced below, “A” and “Z” mark the relevant easements which provide access to Koukourarata Māori Reserve 874 1C1 and 1C2:

¹ 26 Nelson MB 239 (26 NE 239).

² 57 Te Waipounamu MB 200-203 (57 TWP 200-203).

³ 6 Te Waipounamu Appellate Minute Book 27-28 (6 APTW 27-28).

⁴ 6 Te Waipounamu Appellate Minute Book 27-28 (6 APTW 27-28).



[6] In 2007 Ms Duncan was granted an occupation order over approximately 405m² of 1C2 for her exclusive use and occupation as a site for a house.⁵ She is the sole owner of Port Levy 9A, which the occupation area runs adjacent to. The occupation area is a triangle shape at the front of 1C2, with the tip starting at the north end of 1C2 and following the boundary of Port Levy 9A on the west. The east side of the occupation area runs parallel to Port Levy Section 2B2, set back from the boundary line by approximately 12.50 metres. In terms of the plan above, the occupation area is located within the part of 1C2 which protrudes out to align with Pa Road on the north-east end of the block; it forms approximately half of this area.

[7] The balance of 1C2 and Port Levy Section 2B2 are currently leased to Tim Coop of Fernlea Farm for grazing.⁶

⁵ 26 Nelson MB 239 (26 NE 239).

⁶ 77 Te Waipounamu MB 157-168 (77 TWP 157-168), at 162.

Ko te hātepe ture o te tono

Procedural background

[8] Ms Duncan filed this application on 7 March 2022 and the application was heard on 17 March 2022 by AVL. Appearing were Ms Duncan and Mr Osborn. Also present were Meri Crofts, Mathias Pitama and Karla Gamble, in their capacity as trustees for both 1C2 and Port Levy 874 Section 2B2 (“the trustees”).

Te kōrero a te kaitono

The applicant's submissions

[9] Ms Duncan submits that the occupation area awarded by the Court is clear. She further submits that land surveys have been conducted to identify the boundaries of the occupation area.

[10] Ms Duncan submits that despite the clear boundaries, Mr Osborn has:

- (a) Continually trespassed onto the occupation area;
- (b) Placed a tractor, boat, two cars and a caravan on the occupation area; and
- (c) Has conducted work on the occupation area to the detriment of the land, such as the removal of trees and excavation activity.

[11] Ms Duncan submits that over the past ten years Mr Osborn has ignored her requests that he vacate the occupation area. She therefore seeks an injunction against Mr Osborn requiring him to vacate the occupation area, remove his structures and items, and halt work which he has commenced.

[12] The trustees filed submissions in support of this application. They submit that although attempts have been made, they have been unable to come to an agreement with Mr Osborn. Further to this, the trustees submit that Mr Osborn is disruptive of plans to develop the land. For example, a water testing plan was arranged for the purposes of locating water on 1C2. It is submitted by the trustees that this plan was unable to progress due to Mr Osborn becoming verbally abusive towards those engaged to undertake the works.

[13] The trustees submit that the tree-felling and excavation work conducted by Mr Osborn are impacting on the stability of the land.

[14] The trustees submit that they are not opposed to Mr Osborn occupying an area which is outside the boundary of the occupation area and within the area leased by Tim Coop.

Te kōrero a te kaiurupare

The respondent's submissions

[15] Mr Osborn submits that the area he is occupying is on Port Levy Section 2B2, that “the farmer fenced an area” for him to occupy, and that the previous occupants of the area have approved him being there.⁷ He further submits that his vehicles are on the Christchurch City Council berm.

[16] In support of his submissions, Mr Osborn filed photographs of the occupation area and a copy of the Gazette for the land. He submits that these documents identify the boundary of the area, that they show Ms Duncan’s caravan goes beyond the boundary, and further, that Ms Duncan’s property extends over the only access to 1C2 which is a “proclaimed roadway”.

[17] Mr Osborn submits that the occupation order held by Ms Duncan was made for the purpose of building a dwelling on the land, and that this has yet to occur. He submits that the Court likely did not anticipate such a lengthy delay in the building of a dwelling, and that this is detrimental as the occupation area is the only access to 1C2. He submits that Ms Duncan has made no attempt to create a roadway to allow other occupants access to 1C2. After five years of no development, Mr Osborn believes that the occupation area “should revert to its original status”.

[18] Mr Osborn submits that his boat, caravan, and tractor were previously parked on 1C2, in which he is an owner, but that he moved them elsewhere on 1C2 to allow for the removal of a tree on the Council berm. He submits that the Council authorised him to place his belongings on the occupation area while the tree was being removed. Mr Osborn submits that he then commenced work to clear the felled tree as it lay on the only access point to 1C2.

⁷ 77 Te Waipounamu MB 157-168 (77 TWP 157-168), at 163.

Te Ture
The law

[19] The Māori Land Court has jurisdiction to grant a permanent injunction pursuant to s 19 of Te Ture Whenua Māori Act 1993 (“the Act”). The relevant parts of s 19 state:

19 Jurisdiction in respect of injunctions

- (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 Maori land or Maori reservation; or
 - ...
 - (ba) requiring any person to—
 - (i) remove any structure or object from any Maori land or Maori reservation; or
 - (ii) reinstate any structure or object that has been removed from any Maori land or Maori reservation; or
 - (iii) restore any Maori land or Maori reservation to the condition it was in before it was modified by any infrastructure work, earthwork, or other means; or
 - (iv) remedy any damage done to any Maori land or Maori reservation; or
 - (c) prohibiting any owner or any other person or persons without lawful authority from cutting or removing, or authorising the cutting or removal, or otherwise making any disposition, of any timber trees, timber, or other wood, or any flax, tree ferns, sand, topsoil, metal, minerals, or other substances whether usually quarried or mined or not, on or from any Maori land;
 - ...

[20] The established principles for granting a permanent injunction have been addressed by the Māori Appellate Court in *Taueki v Horowhenua Sailing Club - Horowhenua II (Lake) Block*.⁸ First, the applicant must fulfil the legal elements relating to the action of trespass, the Court then has a discretion as to whether to grant the injunction.

⁸ *Taueki v Horowhenua Sailing Club - Horowhenua II (Lake) Block* [2014] Māori Appellate Court MB 60 (2014 APPEAL 60), at [15]-[17].

[21] *Donaldson v Hemi* summarised the principles regarding permanent injunctions:⁹

- (a) A permanent injunction may be granted pursuant to s 19(1)(a) of the Act where a trespass has been made out;
- (b) Co-owners cannot ordinarily sue each other for trespass, unless one co-owner has ousted or excluded another co-owner from making normal, and ordinary use of the land as set out in *Hoete v Faulkner* following *Sitarz v Burke* and *Wu v Body Corporate 366611*;
- (c) An injunction is a discretionary remedy and, in the case of trespass, will ordinarily be imposed unless the ‘good working rule’ in *Shelfer* applies or there are other exceptional circumstances;
- (d) The ‘good working rule’ in *Shelfer* provides that damages may be imposed instead of an injunction where the injury to the plaintiff is small so that the applicant has not suffered irremediable damage or irreparable injury, and the applicant has not acted in a way so as to become disentitled to an injunction and the respondent has not acted in a way so as to become disentitled to damages. The question is whether the imposition of an injunction on the respondent would be oppressive; and
- (e) The Māori Land Court must also consider the purposes and principles of the Act when considering whether to grant an injunction as set out in *O’Malley v Wyborn*.

[22] I adopt these principles and apply this approach.

Kōrerorero

Discussion

[23] To grant an injunction I must first be satisfied that Ms Duncan has actual possession of the occupation area; she must demonstrate an intention to possess the land, and exercise control over it to the exclusion of others.¹⁰

[24] I am satisfied that Ms Duncan lawfully possesses the occupation area by virtue of the occupation order granted by the Court in 2007. When granting an occupation order, the Court must be satisfied that the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider the application. This is in part because the granting of an occupation order will prevent other owners of the land from making use of the occupation area. In this regard, Ms Duncan has

⁹ *Donaldson v Hemi - Whaanga IDID Roadway* (2021) 230 Waikato Maniapoto MB 168 (230 WMN 168), at [51].

¹⁰ *Taueki v Horowhenua Sailing Club - Horowhenua II (Lake) Block* [2014] Maori Appellate Court MB 60 (2014 APPEAL 60), at [15] – [16].

exclusive use and occupation of the area to the exclusion of others, including owners of 1C2. Her intention to possess the occupation area is also clear.

[25] Having found that Ms Duncan lawfully possesses the occupation area, I now turn to the second legal element relating to the action of trespass; that Mr Osborn has trespassed upon the land. Trespass occurs by:¹¹

- (a) The act of a person entering or remaining,
- (b) Upon the land that is in the lawful possession of another,
- (c) Without lawful justification; and
- (d) Is actionable without proof of actual damage.

[26] Mr Osborn has entered and remained on the occupation area, which is lawfully possessed by Ms Duncan, including by placing objects on, and conducting work on the land. Mr Osborn, however, argues that Ms Duncan's use of the occupation area causes access issues to 1C2, resulting in an inability of himself and other owners accessing 1C2. He also submits that he was required to conduct work on the occupation area to clear the only entrance to 1C2. In essence, Mr Osborn is submitting that he is lawfully justified to enter the occupation area.

[27] The issue of access to 1C2 was discussed in the 2006 hearing prior to the occupation order being granted.¹² Ms Duncan's original application for an occupation order sought approximately 602m², amounting to the entirety of the area of 1C2 that aligns with Pa Road on the north-east end of the block. During the course of the hearing, the Court commented that the area sought by Ms Duncan was valuable "because it is closest to the road and to the sea and it cuts off access options further back in [1C2]".¹³ In response, it was noted by supporters of the application that there is existing access to 1C2 through a legal road.¹⁴

¹¹ *Te Hokowhitu v Proprietors of Matauri X* (2010) Maori Appellate Court MB 566 (2010 Appeal 566), at [31].

¹² 115 South Island Minute Book 77-86 (115 SI 77-86), and 116 South Island Minute Book 132-133 (116 SI 132-133).

¹³ 115 South Island Minute Book 77-86 (115 SI 77-86), at 82.

¹⁴ Above n 13, at 82.

[28] The Court subsequently conducted a site visit, following which, directions were made for Ms Duncan to amend her application to decrease the size of the proposed area to allow access to the back of 1C2.¹⁵ The occupation order was granted over approximately 405m² which provided a strip of land approximately 12.50 metres wide between the occupation area and the neighbouring block.

[29] Ms Duncan's exclusive use and occupation is limited to the 405m² granted by the Court and it does not extend to the strip of land that was intentionally excluded from the occupation area for access reasons. Her activities are restricted to the area granted. However, I also find that Mr Osborn has entered onto Ms Duncan's occupation area and placed his structures and items upon the land. He has no lawful justification for doing this and I am satisfied that Mr Osborn would or should have known that his actions were unauthorised. His actions amount to trespass.

[30] I am satisfied that the elements for a permanent injunction have been made out; Ms Duncan lawfully possesses the occupation area and Mr Osborn has trespassed upon the land. Ms Duncan is *prima facie* entitled to an injunction to restrain Mr Osborn from trespassing and I accordingly exercise my discretion to grant the application for a permanent injunction.

[31] I should also note that the trustees stated that they would not be opposed to Mr Osborn occupying an area outside of the occupation order. If Mr Osborn is minded to, he can apply to the Court pursuant to s 328 of the Act for an occupation order in his favour.

Kupu whakataunga

Decision

[32] An order of permanent injunction is granted regarding the occupation area which the Court ordered in favour of Gina-Lee Duncan in 2007. Craig Osborn is prevented from occupying or using the occupation area in any way, including but not limited to accessing the land. Mr Osborn is ordered to vacate the area, remove his structures and items, halt any work which he has commenced on the occupation area and restore or remedy any damage he has done to the land by earthworks or other means.

¹⁵ 116 South Island Minute Book 132-133 (116 SI 132-133), at 133.

I whakapuaki a te whā karaka i Pōneke o te rā kotahi o Mahuru te tau 2022.

S F Reeves
JUDGE