

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

IN THE MATTER of the Land (Facilitation
of Dealings) Act 1970
Section 52
AND IN THE MATTER of Section 50 of the Cook
Islands Amendment Act 1946

AND

IN THE MATTER of the land known as **TUORO**
SECTION 87A1B2

AND

IN THE MATTER of Application Nos. 513/94 to
516/94 inclusive

Mr Lynch for the Applicants
Mrs Browne for the Objector, Mr Harry Napa
Date of Judgment : 30th day of January 1996

JUDGMENT OF DILLON J.

On 13 April 1995 the Court reviewed the evidence and the comprehensive and detailed submissions filed by both Counsel in support of the applications and the opposition to those applications.

A final decision was not made by the Court pending identification of the Occupation Right boundaries in the name of Mr Harry Napa, and for the securing of further affidavits to confirm whether or not the applicants intended to personally occupy and develop the sections which were the subject of the various applications. This information has been filed by Mr Lynch and the Court is now able to proceed to finalise the applications. It is relevant to refer to an unfortunate delay that has occurred between the date of the previous interim judgment, namely 13 April 1995, and this present decision. Confusion occurred as to whether Mrs Browne required to file further submissions. The very detailed submissions originally filed by Mrs Browne were dated 1 March 1995 prior to the interim judgment. While Mr Lynch filed supplementary submissions as required by the Court in order to provide the additional

supplementary submissions in reply. Just prior to Christmas this uncertainty was resolved and no further submissions were to be lodged by either Mr Lynch or Mrs Browne.—The Court apologises for the delay in delivering this final decision due to the misunderstanding regarding subsequent submissions.

It is not proposed to traverse in detail the evidence that has been given and the conclusions that have been reached as evidenced by the interim judgment dated 13 April 1995. It is the objector's stance that he has clearly indicated from time to time an intention and a desire to consolidate his interests in Rarotonga lands in the Tuoro section, the subject of these applications. Mrs Browne summarised her client's position in paragraphs 30 and 31 of her submissions, in the following way :

"The Court has on several occasions commented on the value of this land. The Court has viewed the objection as being unreasonable and commented that if the objector was to retain the land then other owners who are rightfully entitled to their interests would miss out.

The thrust of the objection is Tauei in the late 1920's gave this land to one of his sons, Tetevano, who lived on it until he died. He also gave other lands to his other children. The Court made a decision in 1969 that it was Tetevano land. Two subsequent meetings of the family acknowledged that it was his and for 14 years (1976-1990) Harry Napa (by arrangement with his brother Alex) has had uninterrupted occupation of it.

The Court ought not, it is submitted, displace long occupation and disregard family arrangements unless there are no other lands available to the applicants."

That is a very fair summary of the present situation facing the Court. There are, however, two factors which have not been identified by Mrs Browne in her submissions. These two factors can be identified as follows :

1. This Tuoro section is located on the lagoon and reasonably central to the township of Avarua. Mrs Browne, in Clause 29, identifies various blocks but none of these have been identified as fronting the lagoon and as such comparable to the Tuoro property.
2. Mrs Browne refers to the 1969 decision; to two subsequent family meetings; and this matter has been before the Court on at least four occasions over the last ten years. While there has been a clear intention by Mr Harry Napa to consolidate his interests in this section, there has not, as far as the Court can recall, been any indication of steps

being taken to effect that consolidation which has been so loosely talked about over the last twenty years. One would have thought that at least some effort would have been made by Mr Harry Napa to initiate the consolidation process about which he speaks. This Court cannot recall any evidence of such a step being taken and the outcome. There has been, in the course of Court hearings and in the submissions, reference to family arrangements. However no results have been referred to; no agreement has been identified and no details of the consolidation process, presumably by exchange of interests, has been evidenced or referred to.

The Court has always encouraged consolidation of fragmented interests. Part interest in a large number of blocks of land on Rarotonga or the outer islands preclude development and the utilisation of, in some cases, very valuable interests. So while the Court has been ever mindful to encourage such development by way of consolidation and exchange, nevertheless the Court must be ever mindful of the interests of the other owners of those blocks, the subject of consolidation or exchange to the extent as such other owners are not prejudiced by an expressed intention upon which review is nothing more than an intention and is not a determined objective. To this extent the Court is left with the quite clear view that the objector on this occasion has from time to time expressed an intention to consolidation his interests on this block in order to stifle and object to other owners securing an identified interest in the land in which they are owners. It is clear that the objector has been able to prevent other owners from securing an identifiable interest in this particular section. It is abundantly clear, however, that the objector has never pursued his intention of consolidation - certainly no evidence of that has been forthcoming in order to lend substance to the claim that he makes. These claims have been pursued for the last twenty years without any identifiable result and the Court believes that the owners are entitled to ask - just how long does the objector want in order to secure the consolidation of interests that he has so often professed?

Mrs Browne's submissions refer to a number of Court hearings where she believes that there is confirmation and identification that the whole of this section between the main road and the lagoon should be allocated to the objector. She relies in particular to the 1975 decision where there was an application by Maria Cowan to partition her share of the land and to be located on the seaward portion. Mr Short acted for Mr Napa and Mrs Browne summarises part of his submissions as follows :

- “1. Tetevano has had undisputed occupation of this land for many, many years and a substantial building is on the land.
3. The injunction issued against Maria Cowan in 1969 is a clear indication that this portion belongs to Tetevano.
4. It is custom that those who have been absent for so long should reside on a portion not occupied.”

The underlining of those three submissions is the Court's. They indicate, in my opinion, that Tetevano's house and the land on which it is built is identified and protected.

Of course it has been further protected by Mr Napa having an Occupation Right over the house built by Tetevano and the land on which it is sited - this Occupation Right was granted in spite of the objections to the application. There has therefore been no question but that Mr Napa, the objector in these proceedings, has always followed on from Tetevano as the person rightfully entitled to the house and the land upon which the house is built. The Court has recognised that in the past. The Court has further recognised that by granting Mr Napa an Occupation Right. But the Court records do not extend to the grant of the total block and recognition of such. Rather there has been a clearly defined recognition of the house and section and an oft repeated statement by Mr Napa that it is his intention by family arrangement to exchange and consolidate on the balance of the land which statement of itself recognises that he does not have an interest in the balance of the land, rather he has an interest only in the house and section.

Finally I turn to paragraph 28 of Mrs Browne's submissions. She states as follows :

“It is submitted that the Court should encourage and uphold arrangements made by the families. If the Court were not to uphold those arrangements then, it is submitted, that (1) it would encourage fragmentation of land; and (2) it would encourage owners to seek out their strict entitlements irrespective of what may have been agreed to by their ancestors.”

The Court endorses those sentiments but on this occasion it is left with the clear impression that the objector has taken no steps to acquire the entitlements which he seeks. If there has been family arrangements then why have these not been presented to the Court in support of exchange applications in order to test the adequacy or otherwise of such arrangements and the fairness of them. At least twenty years have passed since the objector first indicated his

intentions, which intentions were used to block owners in this very block from acquiring separate interests in the same way as the objector has.

Taking all those factors into account, the Court is left with the very clear impression that either the objector has failed to promptly pursue his intentions of consolidation or alternatively he has failed to obtain the agreement to such a process from the other owners. In either case it would seem most unfair to the other owners of this land that the applications now being considered should be disallowed.

Accordingly the four resolutions in favour of each of the four applicants are confirmed. There will be a right of way laid off as shown on the Plan. The four applicants will pay the survey costs, including any survey costs relative to the present Occupation Right owned by Mr Napa.

There is a previous application No. 276/92 for an Occupation Right in favour of Luina Adam Lynch in respect of Lot 4 and shown on the Plan as "Oakirangi". This application is still outstanding and is therefore dismissed.

Leave is reserved to apply to the Court for further directions in the event that Counsel consider this should be necessary.



Dillon J.