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

**APPLICATION NO: 204/17, 205/17**

IN THE MATTER of Sections 429 and 430 of the Cook Islands Act 1915 and Rule 348 of the Code of Civil Procedure 1981

AND
IN THE MATTER of the land named **TUAPU 12D2E NGATANGIIA**

AND
IN THE MATTER of Applications for Partition, Declaratory Order and Occupation Right by **IRITI MAOATE**

Applicant

AND
IN THE MATTER of an objection by **RUTA SHORT**

Objector

**APPLICATION NO: 349/15, 354/15**

IN THE MATTER of Section 52 of the Land (Facilitation of Dealings) Act 1970

AND
IN THE MATTER of the land named **TUAPU 12D2E NGATANGIIA**

AND
IN THE MATTER of Applications for Confirmation of Resolutions by **RUTA SHORT**

Applicant

AND
IN THE MATTER of an objection by **IRITI TAIRI**

Objector

Hearings: 25 and 26 May 2017

(Heard at Rarotonga)

Counsel: Mrs T Browne for Applicant (349/15 & 354/15)
Mr T Moore for Applicant (204/17 & 205/17)

Decision: 7 February 2018

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**RESERVED JUDGMENT OF ISAAC J**

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**Introduction**

[1] This decision concerns two sets of applications in relation to Tuapu 12D2E Ngatangiia ("Section 12D2E"):

a) Applications by Iriti Maoate for a partition (pursuant to ss 429 and 430 of the Cook Islands Act 1915), declaratory order, and occupation right; and

b) Two applications by Ruta Short for confirmation of resolutions in regard to two leases agreed to at a meeting of assembled owners held on 22 February 2017, pursuant to s 52 of the Land (Facilitation of Dealings) Act 1970.

[2] Ruta Short objects to Iriti Maoate's application, and Iriti Maoate objects to Ruta Short's application.

**Background**

[3] In 2000, the landowners came to an agreement regarding how the land at Ngatangiia would be distributed between the various branches of the family ("the 2000 Agreement"). They applied to the Court for a partition order to reflect this agreement and presented a map which marked out the sections that would be allocated to each family line in accordance with the 2000 Agreement. The map was signed by representatives of each family.

[4] Those applications were heard on 6 March 2004 before Judge Hingston. The Court issued its decision on 16 March 2004, granting the partition order on the basis of the 2000 Agreement, subject to a survey to be completed to finalise the order.

[5] In accordance with the 2000 Agreement, section 12D2E was allocated to the Pekamu and Tairi families. I note that it appears that the two families intended to further partition this section between them at a later date. Mrs Short (the applicant for applications 349/15 and 354/15) currently holds an occupation right order over Section 12D2E for 1630m².

[6] There are discrepancies between the partition order granted by the Court in its decision dated 16 March 2004 and the survey which followed, specifically in regard to the land area accorded to Section 12D2E. It is these discrepancies that are now at issue in this case.

[7] The map which the landowners presented to the Court in 2004 to represent the 2000 Agreement (and on the basis of which the partition orders were granted) showed Section 12D2E as having a total area of 1630m². This reflected the occupation right order in favour of Mrs Short. The survey plan, however, recorded Section 12D2E as 2817m². I note that there were a number of survey plans presented to the Court, but it appears that the survey plan which followed the partition order is the plan SO1881 (referred to as "Plan 7b" in the Tiro Report).

[8] Section 12D2E borders a creek. In 1999, Mrs Short filled in part of the creek to counter coastal erosion from storm surge and prevent the area from flooding. Mrs Short later filled in the remaining creek area. The reclaimed land from the creek area accounts for the increase in the area of Section 12D2E, adding 486m² in survey Plan 6 to an area of 2116m². A further 700m² was added in Plan 7, increasing the area to 2817m². The Chief Surveyor noted this in his report, where he explains that survey Plan 7 took into account the fact that the creek no longer existed due to the improvements to the beach area and that "in consultation with the Chief Draughtsman, the area was re-calculated to 2817m²".

[9] On 22 February 2017, a meeting of owners was held for Section 12D2E. At this meeting, the owners allegedly approved two lease applications by Mrs Ruta Short on the Pekamu family's land, including a lease over an area of 2817m² at Section 12D2E. Mrs Short claims that she also requested permission at this time to commercially develop the land. She later amended one of the leases to a commercial lease of the land to Moana Sands Lagoon Resort. Mrs Short now seeks confirmation of the resolutions to grant her the two leases.

**Procedural History**

[10] This matter came before me on 25 and 26 May 2017. At the conclusion of the hearing, I reserved my decision in relation to all applications and directed the Registrar to obtain a report from the Chief Surveyor explaining the discrepancies between the 2004 partition order and the sealed survey plan.

[11] The Chief Surveyor completed a report dated 22 June 2017. The relevant survey plans discussed in the Chief Surveyor's report are attached to the end of this decision.

[12] On 24 July 2017, I directed the parties to file submissions in relation to the report. The Court received the following submissions:

a) a memorandum from Mr Moore dated 14 August 2017;

b) a memorandum in response from Mrs Browne dated 21 August 2017; and

c) a further memorandum from Mr Moore dated 30 August 2017 with an affidavit of Georgina Keenan-William.

**Submissions from Mr Moore**

*Memorandum dated 14 August 2017*

[13] Mr Moore submitted that:

a) The Chief Surveyor's report dated 22 June 2017 is largely based on the report by surveyor Ken Tiro dated 2 June 2017 ("Tiro Report") which was "hardly comprehensible" and provided no explanation of the documents used.

b) Although the Chief Surveyor's report provides some additional information about the documents used, it still does not explain their origin or establish their authenticity.

c) Nonetheless, both the Tiro Report and the Chief Surveyor's Report confirm that the sealed order is inconsistent with the order made by the Court as the area of Section 12D2E increased by 478m² in 2004 and a further 700m² in 2010, some 6 years after the partition order was made.

d) The re-calculation of Section 12D2E to an area of 2817m² is not legitimate as the Chief Draughtsman had no authority to recalculate the area following the granting of the Court order except for minor adjustments to the area on actual survey.

e) Only one of the survey plans was put before the Court during the hearing which was Plan 6 from the Tiro Report.

f) There are anomalies in respect of Plan 7(a) and 7(b). Both plans have effectively been half redacted, having only had half of the plan copied. Plan 7(a) is not dated and Plan 7(b) has some "mysterious" backwards handwriting and a note from 17/6/10 that the plan had been amended.

g) There can be no doubt that the sealed partition order is contrary to the Court order made by Judge Hingston in March 2004, as Judge Isaac acknowledged through various comments during the hearing.

h) The owners could not have approved the leases at the meeting of owners held on 22 February 2017. During this meeting, the landowners approved a partition plan vesting an area of 1630m² in the Pekamu and Tairi families on the beach side of the main road, and vesting the rest of the beach-side portion to the Maoate family (approximately 1187m²). The lease purportedly encompassed an area of 2817m², but the owners of Section 12D2E had by that point established that their land only had an area of 1630m². Additionally, the lease presented at the meeting did not include survey plans. The decisions regarding the lease approval therefore cannot be confirmed by the Court.

i) The Court should consider allowing Mr Tito and the Chief Surveyor to be examined on their reports and the documents used to come to their conclusions.

j) If the partition plan is amended, the two applications should be dismissed and Mrs Short could then call a new meeting of owners.

*Further memorandum dated 30 August 2017*

[14] Mr Moore filed a further memorandum on 30 August 2017 with some additional evidence and an affidavit of Mrs Georgina Williams. He noted that Mrs Williams (who was the spokesperson for the Pekamu family during the 2000 negotiations and a witness during the hearing) had received a letter from Mr Short which she believed was intended to influence her to withdraw her evidence by threatening to challenge the title to the property where her family home is located.

[15] Mrs William's affidavit also noted that the landowners had not previously seen the sealed partition order until the hearing on 26 May 2017, and some of the owners who were present at the meeting of assembled owners on 22 February 2017 now question the validity of the sealed order and consider that the meeting should be reconvened. Mrs Williams attached a short statement with signatures from members of the Tairi and Pekamu families requesting that the meeting be held again.

[16] Mrs Williams also noted in her affidavit that Mere Roti has filed an application challenging the partition order under s 390A of the Cook Islands Act 1915.

**Submissions from Mrs Browne**

[17] Mrs Browne made the following submissions in her memorandum dated 21 August 2017:

a) The 2004 order is a valid order of the Court and is therefore binding.

b) When the Miro, Tau and George families partitioned their portions of the land in accordance with the 2000 Agreement, they requested that Lots 1 and 43 be set aside as a reserve but did not request this for the creek. The balance of the land was then left for the Pekamu and Tairi families, including the creek, and the entire beach section was allocated to the Pekamu family.

c) Mr Moore argued that the creek area was meant to be left as a reserve for the entire family, but the Court records show that this was not the case. Even if Mr Moore was correct, the fact that other branches of the family were present at the meeting of owners held on 22 February 2017 shows that they consented to both of Mrs Short's lease applications, which included the creek area.

d) The Miro, George and Tau branches of the Maoate family were also present at the meeting and confirmed that they are not owners in the balance of the land (i.e. the creek area). They confirmed the earlier decision under the 2000 Agreement whereby the creek was included in the balance of the land allocated to the Pekamu and Tairi families.

e) The Chief Surveyor's explanation in his report of the difference between the plan which the landowners presented to the Court in 2000 and the final survey plan makes sense.

f) Pursuant to s 390A(10), the 2004 order cannot be amended except in relation to relative interests, as it relates to a partition.

g) Rule 221 of the Code of Civil Procedure of the High Court 1981 is not available in this case as the 2004 order was made 13 years ago.

h) The approval of the lease from the meeting of owners was legitimate; the Tairi and Pekamu families were entitled as owners to attend the meeting, and formal lease plans for both sections were shown. The only objection at the meeting was from Iriti Maote.

i) There was no confusion about what was being discussed at the meeting, as the objector attempted to argue in his submissions. This is proven by the Court records from the 2004 hearing and the minutes from the meeting of owners.

j) The story reflected in Georgina Williams' affidavit is not consistent with her actions at the meeting of assembled owners where she did not object to the granting of the two leases requested by the Mrs Short.

[18] Mrs Brown therefore seeks confirmation of the resolutions of assembled owners from 22 February 2017 to grant two leases to Mr and Mrs Short.

**Discussion**

[19] The order of partition dated 16 March 2004 is clear and unambiguous. It provides for a partition in accordance with the 2000 Agreement between the owners, setting aside Section 12D2E to the Pekamu and Tairi families with an area of 1630m², subject to survey.

[20] The words "subject to survey" are merely stating that the order is conditional upon a survey being completed. They do not provide any ability for any party, or the Survey Department, to alter the fundamentals of the Court order.

[21] There is no Cook Island precedent relating to a similar case, however the Māori Land Court in New Zealand has previously dealt with a similar situation in *Chase-Seymour – Paenoa Te Akau.*[1] The parties in that case had applied for a partition order to reflect boundaries agreed by the whānau in the 1930s. The Court granted the partition order subject to survey within 6 months. The survey was later completed but did not accurately reflect the partition order, in that the boundaries shown on the survey plan did not align with the agreed boundaries on the basis of which the partition order had been granted. Judge Savage considered that the survey plan "was not sufficient to give effect to the true intentions of the partition orders…to partition out the block in accordance with the whānau boundaries".[2] As a result, his Honour considered that the survey condition had not been met.

[22] In the *Paenoa Te Akau* case, Judge Savage directed that a surveyor's report be completed with recommendations to the Court as to how to best reconcile the discrepancies between the partition order and the survey. A hearing was then held to allow parties to make submissions on two proposals put forward by the surveyors. Following the hearing, Judge Savage amended the original partition order by replacing the survey plan reference with a plan which accurately reflected the boundaries agreed between the whānau. His Honour then determined the partition order finalised; the survey condition having now been met.

[23] In the present case, the area set aside in the partition order has been radically altered, almost doubling the original partitioned area from 1630m² to 2817m² without reference to the parties or the Court.

[24] As previously mentioned, neither party nor the Survey Department has the ability to alter a court order once made. This can only be done by a further court order which has not happened.

[25] As set out in the *Paenoa Te Akau* decision, I do not consider that the final survey plan was sufficient to give effect to the true intentions of the original partition order as it did not reflect the 2000 Agreement which was the basis of the partition.

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[1] *Chase-Seymour – Paenoa Te Akau* (2015) 114 Waiariki MB 195 (114 WAR 195).
[2] Above n 1 at [21].

Therefore the survey conditions in my view have not been met and the matter should be referred back to the Court to consider the views of all parties.

[26] I am therefore not prepared to finalise the partition order until the matter has been referred back to the Court.

[27] The Registrar is to set this matter down for hearing before me in April 2018 with notice to the parties and also to the Chief Surveyor.

*Confirmation of Resolutions*

[28] It is my view that the applications for confirmation (349/15 and 354/15) are dependent on the partition. As a result, these applications are adjourned until the outcome of the partition application.

Dated at Wellington, New Zealand this 7th day of February 2018.

W W Isaac
**JUSTICE**

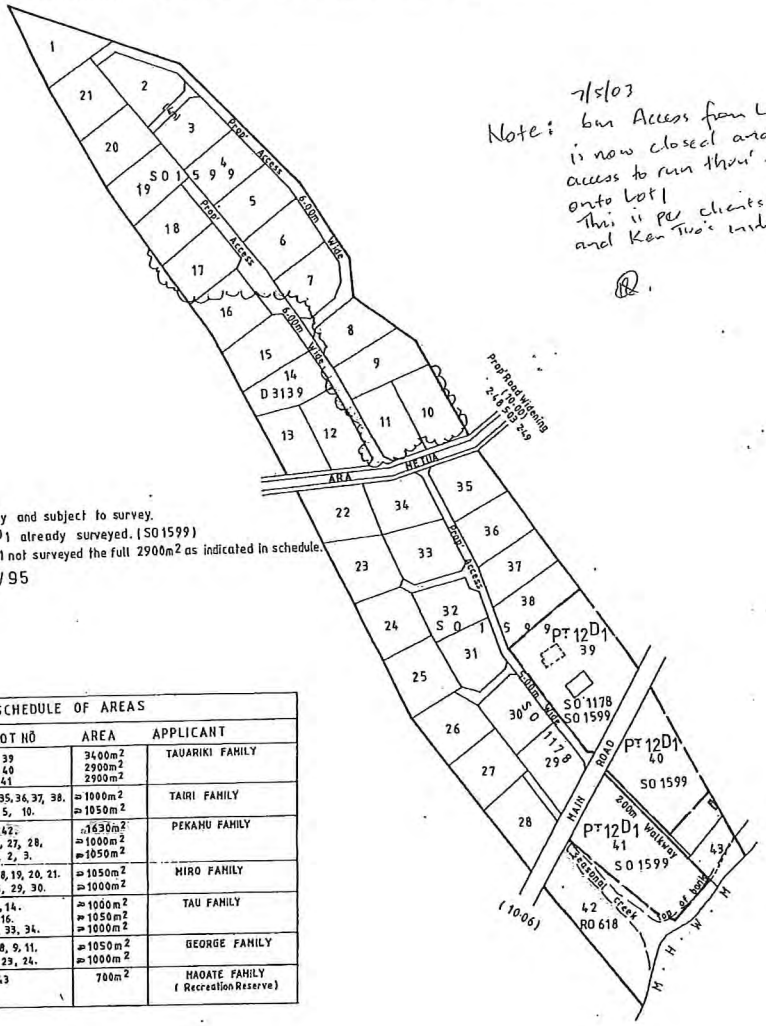
# DEPARTMENT OF SURVEY

Plan 4.

Scheme Plan No.
A3/574

**Land:** TUAPU PT SEC 12D2

**Tapere:** MAII **District:** NGATANGIIA **Island:** RAROTONGA




Note: 7/5/03
bm Access from Lot 2-7 is now closed and middle access to run thru' + connect onto Lot 1
This is per clients (Imere Rati) and Ken Tua's instructions

NOTE: Areas approx only and subject to survey.
: Partition of 12D1 already surveyed. (SO 1599)
: Lot 40 of PT 12D1 not surveyed the full 2900m² as indicated in schedule.
Ref nö 453/95

| SCHEDULE OF AREAS | | | |
|---|---|---|---|
| SEC | LOT NÖ | AREA | APPLICANT |
| 12D1 | 39<br>40<br>41 | 3400m²<br>2900m²<br>2900m² | TAUARIKI FAMILY |
| 12D2 | 31, 35, 36, 37, 38.<br>4, 5, 10. | ≈ 1000m²<br>≈ 1050m² | TAIRI FAMILY |
| 12D2 | 42.<br>26, 27, 28,<br>1, 2, 3. | ≈1630m²<br>≈ 1000m²<br>≈ 1050m² | PEKAHU FAMILY |
| 12D2 | 17, 18, 19, 20, 21.<br>25, 29, 30. | ≈ 1050m²<br>≈ 1000m² | MIRO FAMILY |
| 12D2 | 12, 13, 14.<br>15, 16.<br>32, 33, 34. | ≈ 1000m²<br>≈ 1050m²<br>≈ 1000m² | TAU FAMILY |
| 12D2 | 6, 7, 8, 9, 11.<br>22, 23, 24. | ≈ 1050m²<br>≈ 1000m² | GEORGE FAMILY |
| 12D2 | 43 | 700m² | MAOATE FAMILY<br>( Recreation Reserve) |

**Purpose:** PROPOSED SUBDIVISION

**Applicant:** MAOATE FAMILY

**Surveyed:** ..../..../.... **Schemed:** .....

**Drawn:** L.ANDREW 11./9./95 **Checked:** ..... 12.9.95

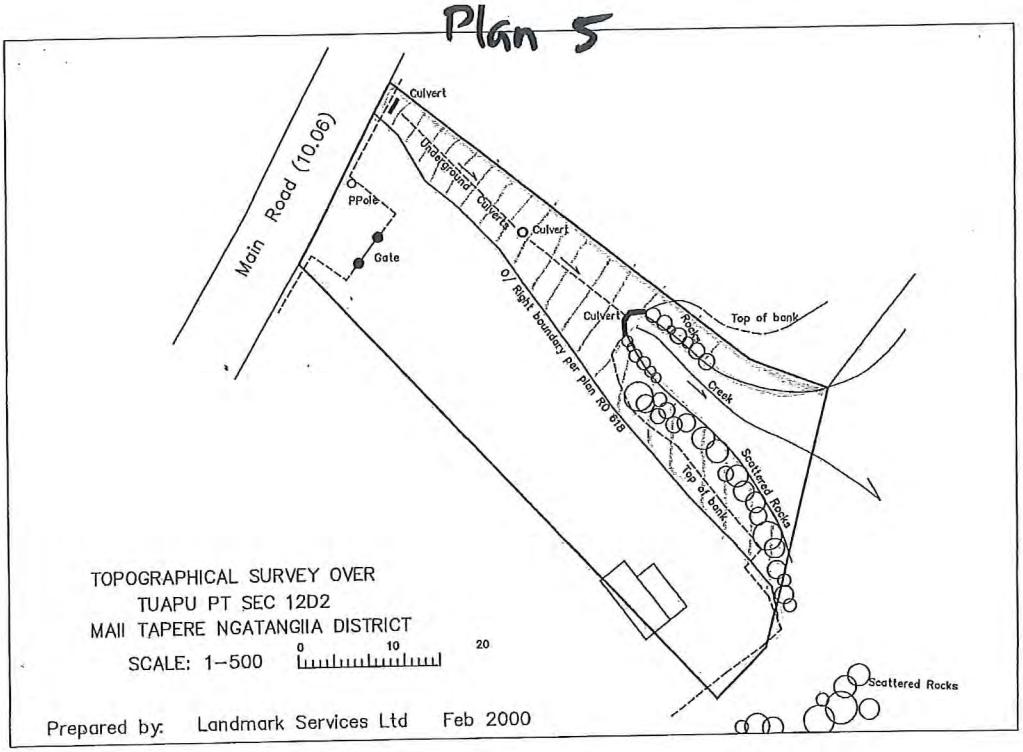
**Approved:** ..... 12/9/95
for CHIEF SURVEYOR

**Scale:** 1:2000

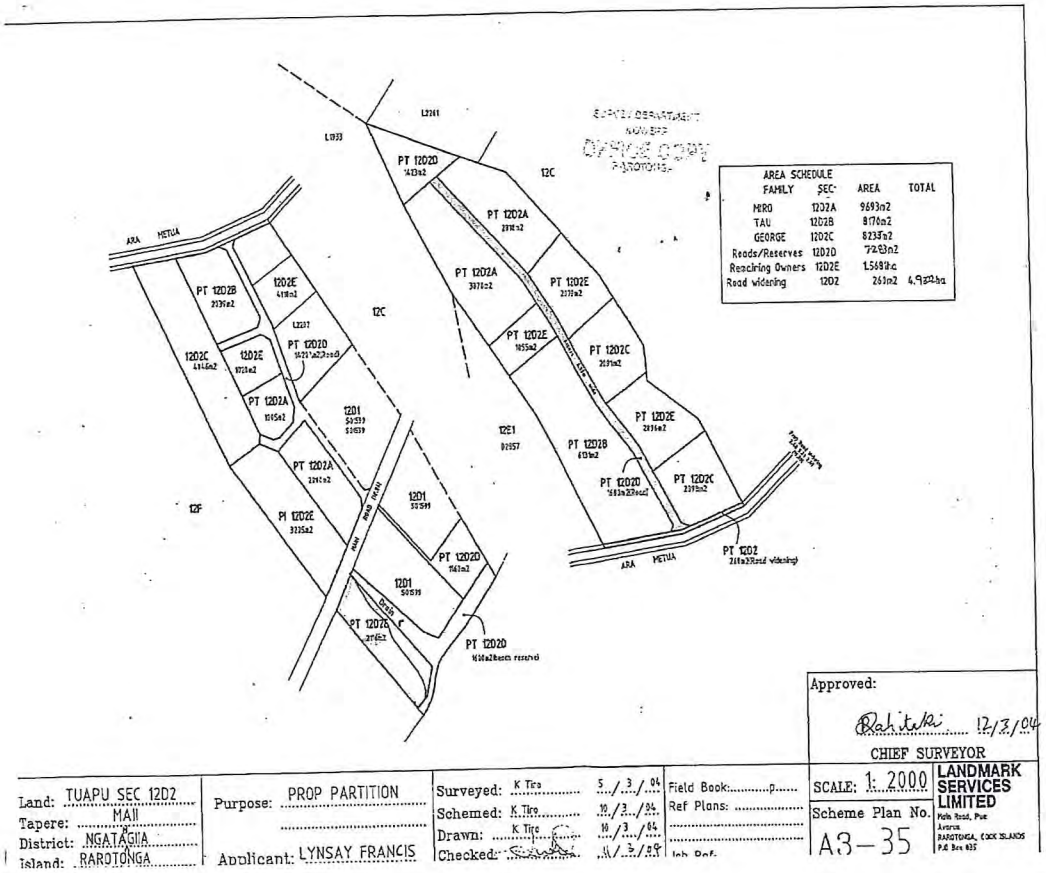
DEPARTMENT OF SURVEY Rarotonga, Cook Islands

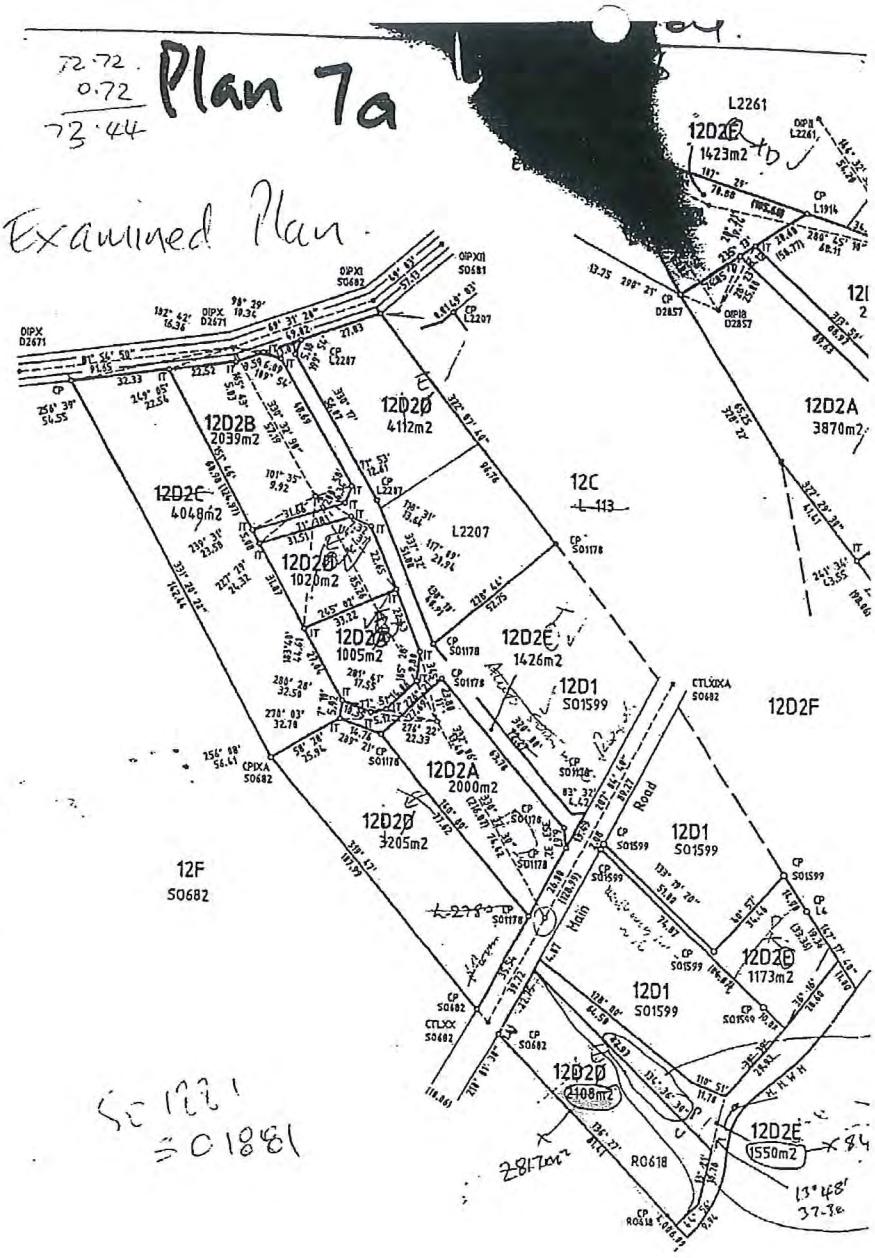
A3/574

Plan 5


Culvert
Underground Culverts
Culvert
PPole
Gate
Main Road (10.06)
O/ Right boundary per Plan RO 618
Culvert
Rock
Top of bank
Creek
Top of bank
Scattered Rocks
Scattered Rocks
TOPOGRAPHICAL SURVEY OVER
TUAPU PT SEC 12D2
MAII TAPERE NGATANGIIA DISTRICT
SCALE: 1–500
0
10
20
Prepared by: Landmark Services Ltd Feb 2000

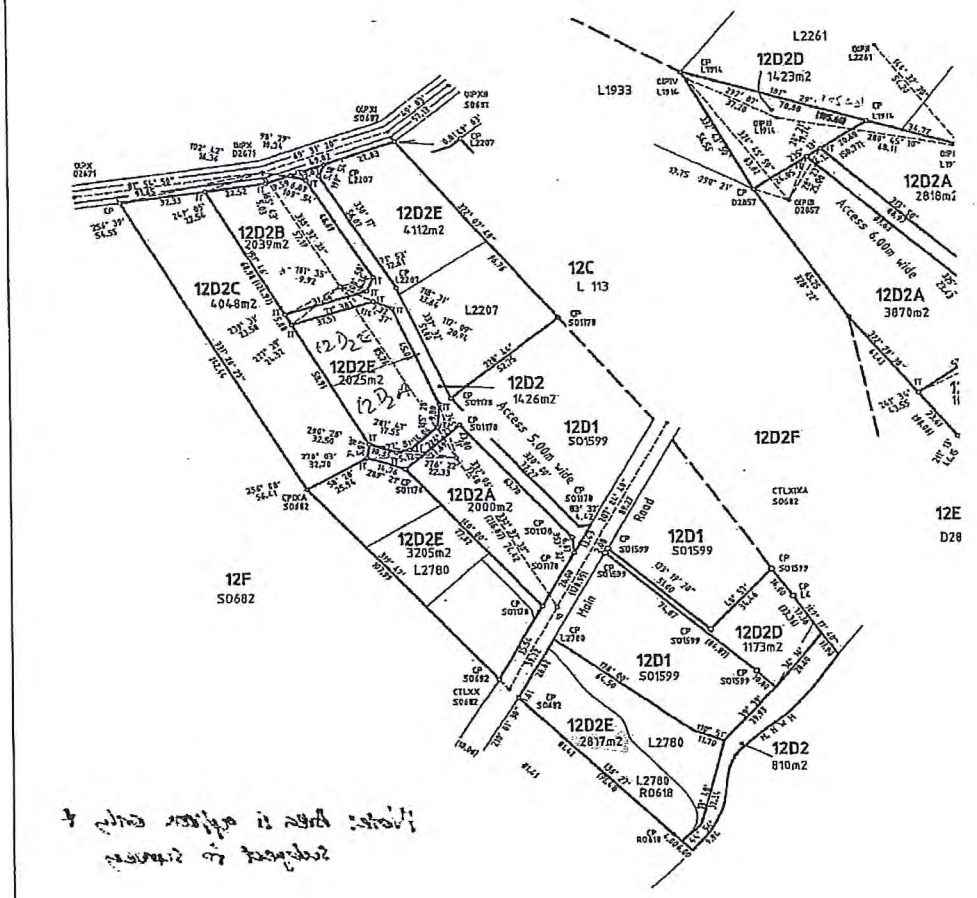
Plan 6.


AREA SCHEDULE
FAMILY SEC AREA TOTAL
MIRO 12D2A 9693m2
TAU 12D2B 8170m2
GEORGE 12D2C 8235m2
Roads/Reserves 12D2D 7263m2
Reacriring Owners 12D2E 1.5681ha
Road widening 12D2 263m2 4.9432ha
PT 12D2D
PT 12D2A
PT 12D2E
PT 12D2C
PT 12D2B
PT 12D2
12C
12E1
12F
12D1
ARA METUA
Approved:
12/3/04
CHIEF SURVEYOR
Land: TUAPU SEC 12D2
Tapere: MAII
District: NGATANGIA
Island: RAROTONGA
Purpose: PROP PARTITION
Applicant: LYNSAY FRANCIS
Surveyed: K Tiro 5/3/04
Schemed: K Tiro 10/3/04
Drawn: K Tiro 10/3/04
Checked: 11/3/04
Field Book: p
Ref Plans:
SCALE: 1: 2000
Scheme Plan No. A3–35
LANDMARK SERVICES LIMITED
Main Road, Puaikura Avarua RAROTONGA, COOK ISLANDS P.O Box 635


72.72
0.72
73.44
Plan 7a
Examined Plan.
L2261
12D2E
1423m2
12D2A
3870m2
12D2B
2039m2
12D2C
4048m2
12D2D
1020m2
12D2D
1005m2
12D2D
4112m2
12C
L 113
L2207
12D2E
1426m2
12D1
S01599
12D2F
12D2A
2000m2
12D2D
3205m2
12F
S0682
Road
Main
12D2E
1173m2
12D1
S01599
12D2D
2108m2
12D2E
1550m2
R0618
SC 1221
= C1861

Plan 7b

S.O.1881




LAND TUAPU
TAPERE MAIN
ISLAND OF RAROTONGA

SECTION 12D2
DISTRICT NGATANGIIA

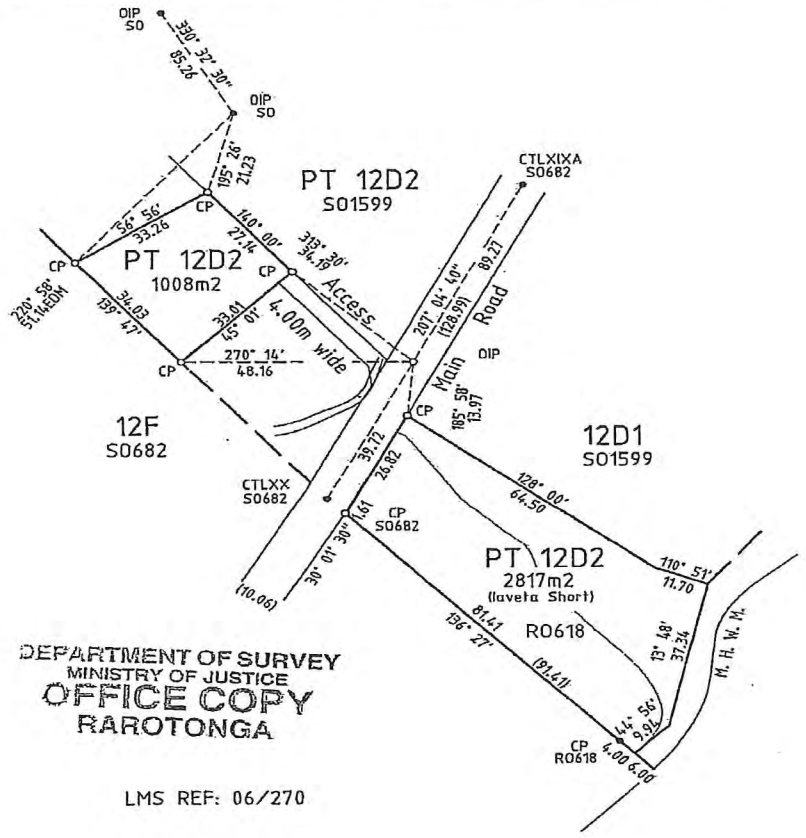
PARTITION SURVEY

DEPARTMENT OF SURVEY

Plan 8.

Land Tuapu Pt Sec 12D2 L DIAGRAM No: 2780

Tapere Maii District Ngatangiia Island: Rarotonga




DEPARTMENT OF SURVEY
MINISTRY OF JUSTICE
OFFICE COPY
RAROTONGA

LMS REF: 06/270

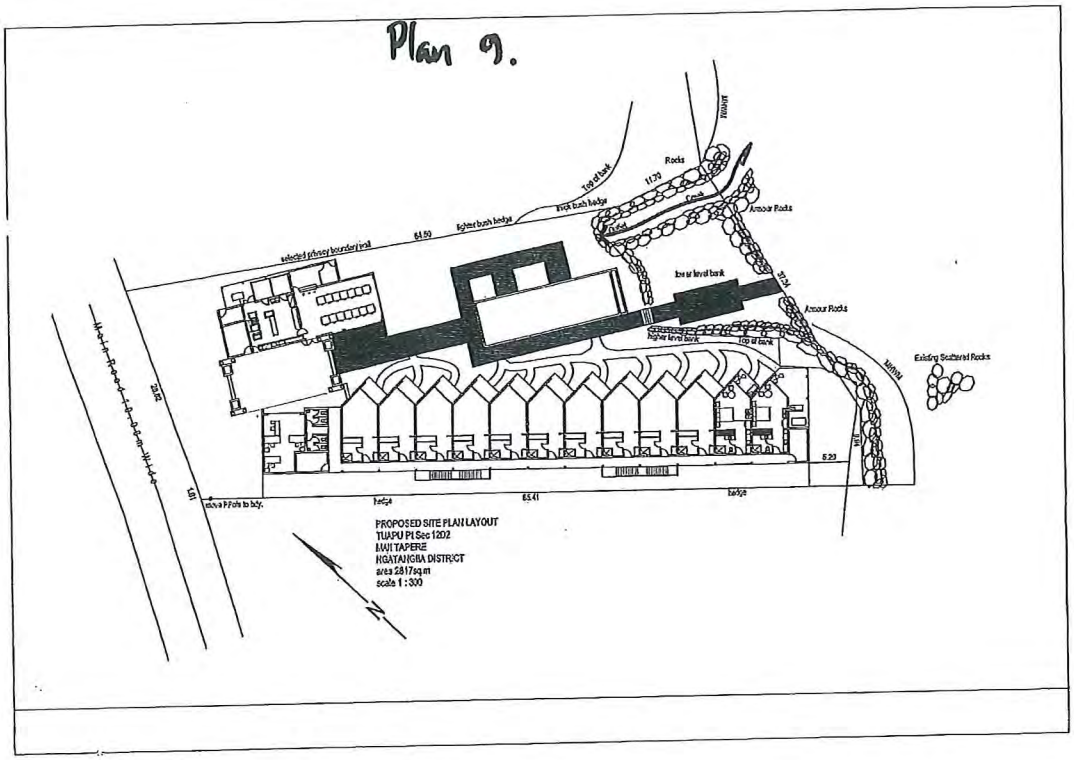
Surveyed By: W. Samuel. Date: 7. 9. 06. Scale: 1:1000

Field Book No: 407 Page 46 Plan No: Drawn By W.S. Date 7. 9. 06.

Checked and Recorded: Draughtsman Date

Approved as to Survey: Chief Surveyor Date

Plan 9.


Rocks
Top of bank
Rock bush hedge
Fence
Armour Rocks
selected privacy boundary wall
64.59
lighter bush hedge
lower level bank
Armour Rocks
higher level bank
top of bank
Existing Scattered Rocks
hedge
65.41
hedge
PROPOSED SITE PLAN LAYOUT
TUAPU Pt Sec 1202
AKUI TAPERE
NGATANGIA DISTRICT
area 2817sq.m
scale 1 : 300
N