

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

APPLICATION NO. JP 1/21

UNDER Section 76(1) of the Judicature Act 1980-
81

AND
IN THE MATTER of the land known as **TUTAKIMOA
SECTION 20, AVARUA**

BETWEEN **MEREANA PAPER**
Appellant

AND **TAKAI HOWARD AND TAPU
HOWARD**
Respondents

Hearing date: 8 and 9 July 2021

Appearances: Mason for Applicant
Brown for Respondent

Decision: 28 April 2023

DECISION OF JUSTICE WW ISAAC

Introduction

[1] This appeal was filed on 5 March 2021 by Mereana Papera (“the appellant”). The appellant seeks to appeal a decision of Rima David, a Justice of the Peace, dismissing an application to recall her previous decision.

[2] On 6 December 2019, Ms David made an order for a right of occupation regarding Tutakimoa Section 20 in favour of Tapu Howard and Takai Howard (“the respondents”). On 19 November 2020, the appellant made an application seeking to recall Ms David’s decision granting the occupation right. Ms David heard and dismissed the recall application on 12 February 2021.

[3] The appellant submits that Ms David erred in law when dismissing the application for recall as she failed to consider a decision of higher authority, and she gave no opportunity for the appellant to respond.

[4] The respondents oppose this appeal on the basis that Ms David did not err in law when dismissing the recall application. The respondents submit that the Court does not have jurisdiction to recall the occupation order and accordingly seek that this application be dismissed.

Issues

[5] The appellant seeks clarification from the Court as to whether Ms David erred in law by dismissing the application for recall. Before addressing this question, I must also address two jurisdictional matters.

[6] The issues to determine are:

- (a) Does a Justice of the Peace have jurisdiction to recall their decisions?
- (b) If a Justice of the Peace does have that jurisdiction, does the High Court have jurisdiction to hear an appeal against the Justice of the Peace’s decision?
- (c) Did Ms David err in law by failing to consider a decision of higher authority?

Does a Justice of the Peace have jurisdiction to recall their decisions?

Submissions of the appellant

[7] Counsel for the appellant submits that a Justice of the Peace has jurisdiction to recall their decisions. This is despite counsel acknowledging that a Justice of the Peace derives their jurisdiction entirely from statute, and that there is no statutory power to recall decisions.

[8] In terms of jurisdiction, counsel essentially submits that a Justice of the Peace acquires their jurisdiction due to the inherent jurisdiction of the High Court; that Justices of the Peace are included within the definition of “High Court”. In terms of the power to recall, counsel submits that the power is inherent to ensure that matters are dealt with properly and justly. Therefore, counsel submits that Justices of the Peace have inherent jurisdiction and inherent power to recall decisions. Counsel refers to various legislation and case law in support of their submissions, as detailed below.

[9] Section 7 of the Judicature Act 1980-81 states that the practice and procedure of the High Court “shall be such as the Court thinks in each case to be the most consistent with natural justice and convenience.” Counsel for the appellant submits that this is supported by s 616 of the Cook Islands Act 1915 which provides that all rules of common law or equity relating to the jurisdiction of the Courts in England shall relate to the jurisdiction of the High Court of the Cook Islands.

[10] In terms of the Cook Islands Constitution, counsel for the appellant submits that the following supports their submissions:

- (a) The definition of “High Court”, which counsel submits as including “Justices of the Peace acting in a judicial capacity”;
- (b) Article 47(2), which provides that the Court shall have all such jurisdiction “as may be necessary to administer the law in force in the Cook Islands”; and
- (c) Article 62(3), which provides that an Act shall “prescribe the jurisdiction and powers of Justices of the Peace... and for appeal to lie to the High Court from a final judgment of a Justice of the Peace.”

[11] Counsel refers to *R v Smith*, submitting that the Court found that the Court of Appeal has an inherent power to revisit its decisions in exceptional circumstances when the interests of justice requires it, and that this power is part of the implied powers necessary for the Court to maintain its character as a Court of justice.¹ Counsel also refers to the decision of *Stephens v Stephens*, which stated that the inherent jurisdiction of the High Court belongs to the Court and is not personal to a judge.²

[12] Counsel for the appellant submits that it is therefore evident that Justices of the Peace have inherent jurisdiction and inherent power to recall decisions. They further submit that the ability to recall an order is an inherent power which does not relate to inherent jurisdiction; whether or not Justices of the Peace have inherent jurisdiction, they do have inherent powers, and the power to recall is one which they may use to deal properly and justly with matters within their jurisdiction. Counsel submits that there is no dispute that Justices of the Peace have jurisdiction to determine occupation rights orders.

Submissions of the respondents

[13] Counsel for the respondents submits that Ms David, as a Justice of the Peace, had no jurisdiction to recall her previous decision.

[14] Counsel for the respondents submits that the specific jurisdiction of Justices of the Peace is set out in the Judicature Act 1980-81. Counsel identifies that the powers of a Justice of the Peace were expanded upon in the 1998 amendment of that Act, however, they did not include the jurisdiction to recall.

[15] Counsel submits that the Cook Islands position is consistent with the jurisdiction of inferior courts in New Zealand in that they do not have inherent jurisdiction, but rather, that jurisdiction must be established on the face of proceedings or in some other way. Counsel for the respondents refers to the article “Inherent jurisdiction and inherent powers in New Zealand” by Rosara Joseph in support of their submissions.³

¹ *R v Smith* [2003] 3 NZLR 617.

² *Stephens v Stephens* [1991] 1 NZLR 633.

³ R Joseph, “Inherent jurisdiction and inherent powers in New Zealand” (2005) 11 Canterbury Law Review 220.

[16] Counsel for the respondents submits that where there is no jurisdiction to recall, there cannot be a power to recall as the existence of the power is dependent on there being a substantive jurisdiction to recall. Counsel submits that this is because jurisdiction and power must be viewed separately; that jurisdiction is a substantive power to hear and determine a matter, whereas power is that which enables a Court to give effect to its jurisdiction. Counsel therefore submits that the existence of ancillary powers is parasitic on the Court possessing jurisdiction. Rosara Joseph is again relied on by counsel when making these submissions.⁴

Discussion

[17] The jurisdiction of Justices of the Peace is set out in the Judicature Act 1980-81:

Jurisdiction of Justices of the Peace

19. Jurisdiction of High Court presided over by a Justice –

The High Court presided over by one Justice may exercise jurisdiction to hear, determine, and, in the case of a criminal offence, pronounce sentence -

- (a) In criminal proceedings, -
 - (i) In respect of any offence punishable by fine only;
 - (ii) In respect of any other offence specified in Part I of the Second Schedule to this Act;
 - (iii) In respect of any offence other than those herein before specified for the purpose only of receiving from a defendant a plea thereto;
 - (iv) In any case where the enactment creating the offence expressly provides that jurisdiction may be exercised by the Court presided over by a Justice;
- (b) In civil proceedings, -
 - (i) In actions for the recovery of any debt or damages not exceeding \$200;
 - (ii) In actions for the recovery of chattels not exceeding in value \$200;
 - (iii) Where by any other enactment civil jurisdiction is expressly given to a Justice;

⁴ Above n 3.

- (c) In proceedings under the Transport Act 1966 in respect of offences punishable by fine only or by a term of imprisonment not exceeding 3 months;
- (d) In proceedings under Part XX of the Cook Islands Act 1915 (relating to maintenance and affiliation);
- (e) In proceedings under section 409(e) of the Cook Islands Act 1915, to grant an interim injunction pending disposal of the proceedings by the Court;
- (f) In proceedings under section 448 of the Cook Islands Act 1915, to make succession orders that are unopposed;
- (g) To give a direction under section 43 of the Land (Facilitation of Dealings) Act 1970 as to a meeting of assembled owners;
- (h) Any application for an order under section 141 of the Cook Islands Act 1915 (relating to judgment summonses);
- (i) In proceedings under section 589 of the Cook Islands Act 1915 relating to the custody of persons of unsound mind arrested under that section.

20. Jurisdiction of Court presided over by three Justices –

The High Court presided over by 3 Justices sitting together may exercise jurisdiction to hear, determine and, in the case of criminal proceedings, pronounce sentence,-

- (a) In criminal proceedings, -
 - (i) In respect of any offence specified in Part II of the Second Schedule to this Act;
 - (ii) In any case where the enactment creating the offence provides that jurisdiction may be exercised by the Court presided over by three Justices;
- (b) In civil proceedings, -
 - (i) In actions for the recovery of any debt or damages, exceeding \$200 but not exceeding \$1,000;
 - (ii) In actions for the recovery of chattels exceeding in value \$200 but not exceeding in value \$1,000;
- (c) In proceeding under Part VIII of the Cook Islands Act 1915 relating to extradition;
- (d) In proceedings under the Fugitive Offenders Act 1969, to hear a case and commit a fugitive to prison to await his return in the manner prescribed in that Act;
- (e) In any case where by any other enactment civil jurisdiction is expressly given to three Justices sitting together.

...

[18] Section 19(b)(iii) of the Judicature Act 1980-81, which refers to the civil jurisdiction of a Justice of the Peace, includes, “where by any other enactment civil jurisdiction is expressly given to a Justice.” This is suggestive of an express statutory power being required.

[19] A general reading of the Judicature Act 1980-81 demonstrates that the powers of a Justice of the Peace are limited, for example, to considering only unopposed succession orders. This suggests that broader or fuller powers are reserved for Judges. Justices of the Peace having inherent jurisdiction or powers does not align with this interpretation.

[20] The Judicature Act 1980-81 has been amended various times. The sections set out above were amended by the Judicature Amendment Act 1986, which expanded the jurisdiction of Justices of the Peace to include the ability to deal with larger sums of money. This was again amended by the Judicature Amendment (No 2) Act 1986, whereby the sum was increased further. The Judicature Amendment Act 1998 substantially broadened the powers of Justices of the Peace as follows:

4. Jurisdiction of High Court presided over by a Justice –

- (1) Section 19 of the principal Act is hereby amended by deleting the word "months" in paragraph (c) and substituting thereof the word "years."
- (2) Section 19 of the principal Act is hereby further amended by deleting altogether the words "that are unopposed" after the word "orders" in paragraph (f).
- (3) Section 19 of the principal Act is hereby further amended by inserting after paragraph (i) the following:
 - "(j) In proceedings under Part XV of the Cook Islands Act 1915 (relating to adoption of children by natives);
 - (k) In proceedings under Part XXA of the Cook Islands Act 1915 (relating to adoption of children by Europeans and native spouses of Europeans);
 - (l) In proceedings under section 50 of the Cook Islands Amendment Act 1946, to make Occupation Right orders;
 - (m) Any application for an order under section 54 of the Land (Facilitation of Dealings) Act 1970 (relating to confirmation of resolution of meeting of assembled owners)."

[21] No jurisdiction to recall decisions was conferred on Justices of the Peace despite the various amendments to the Judicature Act 1980-1981. This is indicative of a continued limitation on the powers of a Justice of the Peace, which should be specifically prescribed by statute.

[22] Also, counsel for the appellant referred to various sections of the Judicature Act 1980-1981, the Cook Islands Constitution, and the Cook Islands Act 1915, which say that the High Court has inherent powers or jurisdiction. Counsel then noted that “High Court” is defined in the Cook Islands Constitution as including “Justices of the Peace acting in a judicial capacity”. However, “Court or High Court” is defined in the Judicature Act 1980-1981 as meaning “the High Court of the Cook Islands”.

[23] In the Cook Islands Constitution, with amendments up to 2004, s 2 defines “High Court” as “the High Court of the Cook Islands established under this Constitution”. It is the definition of “Judicial Officer” which includes Justices of the Peace:

“Judicial officer” means the Chief Justice or a Judge of the Court of Appeal or of the High Court, or a Justice of the Peace who acts in a judicial capacity.

[24] The references to sections provided by counsel for the appellant provide for the jurisdiction of the “High Court” not a “Judicial Officer”. I also note that in the Cook Islands Act 1915 there are some amendments to older legislation where references to a Justice of the Peace are to be read as a reference to a Judge of the High Court, such as in s 632, but the reverse is not provided for. This further supports the proposition that Judges have wider powers than those of a Justice of the Peace.

[25] Having regard to the above, I conclude that Justices of the Peace do not possess inherent jurisdiction or powers to recall their own decisions.

Does the High Court have jurisdiction to hear an appeal against a Justice of the Peace’s decision?

Submissions of the appellant

[26] Counsel for the appellant submits that the High Court has the power to hear an appeal of a decision by a Justice of the Peace determining not to recall an order.

[27] Counsel refers to s 76(1) of the Judicature Amendment Act 1980-81, which provides that on the determination of any “proceedings”, any party thereto may appeal that decision to a Judge. Counsel submits that “proceedings” is not defined in the Code of Civil Procedure

1981 or in the Judicature Amendment Act 1980-81, however, counsel submits that it includes any application to the Court regardless of its nature.

[28] Counsel for the appellant submits that *In the Matter of L and B (Children)* and *Steward v William* are examples where various courts have heard an appeal of a decision to recall.⁵

Submissions of the respondents

[29] Counsel for the respondents submits that if the Court finds that Justices of the Peace have no jurisdiction to recall their decisions, there is no right of appeal. However, counsel for the respondents submits that if a Justice of the Peace is found to have jurisdiction to recall their decision, then the right of appeal is provided for in s 76 of the Judicature Act 1980-81.

Discussion

[30] Section 76(1) of the Judicature Act 1980-81 provides:

Except as expressly provided in any enactment, where on the determination of any proceedings, civil or criminal, by a Justice sitting alone or by Justices sitting together any party thereto is not satisfied with the decision therein, he may appeal from that decision to a Judge.

[31] A plain reading of this section is that where a person is not satisfied with any decision of a Justice of the Peace, that decision can be subject to appeal. In this case the Justice of the Peace made a decision to recall, and that decision can be the subject of appeal.

[32] Accordingly, I find that the High Court has jurisdiction to hear an appeal against the decision of a Justice of the Peace.

Did Ms David err in law by failing to consider a decision of higher authority?

Submissions of the appellant

[33] The appellant seeks to appeal Ms David's decision dismissing the application to recall the occupation order granted to the respondents in regard to Tutakimoa Section 20.

⁵ *In the M of L and B (Children)* [2013] UKSC 8 [2013], and *Stewart v Engel* [2000] EWCA Civ 362.

[34] The appellant submits Ms David erred in law by failing to recognise the High Court decision of *Puipuirangi*, and therefore should not have dismissed the application for recall.⁶ The appellant submits that *Puipuirangi* determined that to ascertain a majority support for an occupation order, the Court must consider the views of the descendants of all deceased persons who have not yet been succeeded to.

[35] Consequently, the appellant submits that the views of the descendants of Teinakore Teinakore, Kimi Tairi Mapuapua Teinakore, and Tairi were not obtained, and therefore a majority of support for the occupation order was not established as required by s 50 of the Cook Islands Amendment Act 1946. As a result, the appellant submits that Ms David should have recalled her decision, and by omitting to do so, she has erred in law.

[36] By overlooking *Puipuirangi*, the appellant submits that Ms David failed to recognise a decision of higher authority. The appellant refers to *Horowhenua County v Nash* in support of their submission that recalling a decision is justified in the circumstances where a judicial decision of relevance and higher authority was not recognised.⁷ The appellant further submits that pursuant to s 80 of the Judicature Act 1980-81, this Court can rehear the application of an order for recall.

Submissions of the respondents

[37] The respondents submit that because Ms David did not have jurisdiction to recall the occupation order, she did not err in law when dismissing the application for recall.

[38] The respondents also submit that the appellant failed to appear at the hearing where the occupation order was granted.

[39] The respondents refer to *Baudinet v Tavioni and Macquarie*, in support of their submission that the jurisdiction to recall a decision is to be exercised only sparingly, that it is not a rehearing in disguise, and nor is it an opportunity for reframing the arguments previously presented or presenting fresh arguments.⁸ The respondents also identify that *Baudinet v Tavioni and Macquarie* referenced *Horowhenua County v Nash*, noting that cases which qualify for recall include those where:

⁶ *Moeirea 101 Mauke, Re* [2020] CKLC 7; Application 8 of 2019 (31 August 2020).

⁷ *Horowhenua County v Nash (no.2)* [1968] NZLR 632 (SC).

⁸ *Baudinet v Tavioni & Macquarie* [2010] CKCA, 18 June 2010.

- (a) There has been a major legislative change or decision of high authority since the hearing;
- (b) Counsel formerly failed to direct the Court to a plainly relevant legislative provision or decision of high authority; or
- (c) There is some other very special reason for recall.

[40] The respondents therefore submit that the current matter does not fall within the circumstances defined in *Horowhenua County v Nash*, as proposed by the appellant. It is further submitted that recalling the occupation order would require the Court to rehear evidence previously presented by the appellant regarding the Court's jurisdiction to grant occupation orders and the exercise of the Court's discretion pursuant to s 50 of the Cook Islands Amendment Act 1946.

[41] The respondents submit that this appeal should be dismissed. They refer to *Bates v Mateara* in support of their submission, whereby the Court found that recall is a remedy which will not be granted lightly, and that in the absence of any error by the judge or authority which would change the original decision, the Court could not exercise its jurisdiction to recall the orders.⁹

[42] The respondents submit that the statements in *Puipuirangi* which the appellant relies on are obiter and were stated by the Court merely to record how owners who have died but remained on the title should be dealt with when succession had not yet occurred. The respondents submit that the Court found that s 447 of the Cook Islands Act 1915 operates in a way in that the shares of a deceased owner pass by operation of law immediately upon death to those entitled to succeed and without the need for a succession order for the purposes of establishing the number of owners.

[43] Further, the respondents submit that although the Court noted that there is no contrary view of this reading of s 447, the Court also found that if it lacked jurisdiction then any other comments on the matter would simply be obiter. The respondents identify that the Court in *Puipuirangi* dismissed the applications on the basis that it lacked jurisdiction.¹⁰

⁹ *Bates v Mateara* [2018] CKLC 8; Application 319 of 2018 (9 November 2018).

¹⁰ *Moeirea 101 Mauke, Re* [2020] CKLC 7; Application 8 of 2019 (31 August 2020).

[44] The respondents also submit that if the comments were not treated as obiter, they would not apply to the current matter as the decision was made in the High Court and *Puipuirangi* is therefore not of a higher authority to Ms David's decision.

Discussion

[45] As determined, the High Court has jurisdiction to hear an appeal of a Justice of the Peace's decision.

[46] The High Court's powers on appeal are wide as set out in the Judicature Act 1980-81:

80 Powers of Judge on appeal from Justices

- (1) On any appeal from a determination of a Justice or Justices, a Judge may affirm, reverse, or vary the judgment appealed from, or may order a new trial, or may make such order with respect to the appeal as he thinks fit, and may award such costs as he thinks fit to or against any party to the appeal.

[47] I will therefore address the following issues:

- (a) Did Ms David err in law by dismissing the application for recall?
- (b) If so, should the occupation order be recalled?

Did Ms David err in law by dismissing the application for recall?

[48] As determined, Justices of the Peace do not have jurisdiction to recall their decisions. Although Ms David correctly dismissed the application seeking to recall her previous decision, she failed to acknowledge that she lacked jurisdiction to hear an application for recall. Rather, she found that her decision granting the occupation order was correct and therefore should not be recalled. On this point, Ms David erred in law.

[49] The appellant's substantial claim is that Ms David should have considered the decision of *Puipuirangi* when granting the occupation order, and by failing to do so she erred in law and should have consequently recalled the occupation order.

[50] *Puipuirangi* is a High Court decision determined by Justice Savage in 2020.¹¹ The question for determination was whether a majority of owners supported the proposed occupation order, in particular, the Court was faced with the issue of how to deal with owners

¹¹ *Moeira 101 Mauke, Re* [2020] CKLC 7; Application 8 of 2019 (31 August 2020).

who have died but not been succeeded to. The Court needed to identify how many owners there were, because without doing so, it would be impossible to calculate a majority and therefore it could not proceed.

[51] The Court suggested that:¹²

s 447 of the Cook Islands Act 1947 meant that shares passed by an operation of law immediately upon the death to those entitled to succeed and without the need for a succession Order for the purposes of establishing the number of owners.

[52] The Court acknowledged that this view of s 447 may be contrary to those previously held, and therefore sought submissions from the parties and the Cook Islands Law Society. In response, the Court stated:¹³

There is no contrary view to my reading of s 447 but the parties rightly point out difficulties that then arise.

The temptation is to respond to those ancillary matters but I think the short point is, if I have no jurisdiction, then anything that I might say further would simply be obiter.

...

I am not satisfied as to the requisite wish of the majority of owners in either of these cases and they are dismissed for want of jurisdiction.

[53] Justice Savage dismissed the applications for want of jurisdiction. The case did not require the Court to determine the matter with regard to the interpretation of s 447, however Justice Savage made his reasoning available to future courts for when a matter arises requires it.

[54] In short, Justice Savage's comments were obiter, the appellant cannot rely on *Puipuirangi* in submitting that the views of the descendants of deceased owners who were not succeeded to should have been obtained. Therefore, Ms David did not err in law by failing to consider *Puipuirangi* when granting the occupation order.

[55] I find that Ms David's decision granting the occupation order is sound.

¹² At [3].

¹³ At [6]-[9].

Should the occupation order be recalled?

[56] I have determined that:

- (a) Ms David erred in law by failing to recognise that she had no jurisdiction to hear an application to recall her previous decision; however,
- (b) Ms David did not err in law when granting the occupation order.

[57] Therefore, the occupation order should not be recalled.

Decision

[58] I have determined that:

- (a) Justices of the Peace do not have the jurisdiction to recall their decisions;
- (b) The High Court has jurisdiction to hear an appeal against the decision of a Justice of the Peace; and
- (c) Ms David did not err in law when granting the occupation order.

[59] The appeal is accordingly dismissed.

[60] A copy of this decision is to be distributed to all parties.

Dated at Gisborne this 28th day of April 2023.

W W ISAAC
JUSTICE