IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 8/06

BETWEEN **METUANGARO VAETERU**

Appellant

AND **NGAMETUA EMI**

Respondent

Before: Fisher JA (Presiding)
Paterson JA
Weston JA

Counsel for appellant:: Mrs T Browne
Counsel for respondent: Mr J McFadzien
Date of Hearing: 30 November 2006
Date of Judgment: 1 December 2006

JUDGMENT OF THE COURT

Introduction

1. This is an appeal from a judgment of Justice N F Smith given in the Land Division of the High Court on 7 September 2006. By that judgment the Judge upheld the appellant's application 30/06 revoking a 1984 succession order but refused her application 41/05 for a vesting order with respect to 680m2 of the land in Arerenga Section 13, Arorangi.

Background

2. The appeal is from an abbreviated one page judgment. We are grateful to both counsel for their assistance in unraveling its meaning. For cases of this complexity a fuller judgment would have been helpful. Possibly that is not practicable in the Land Division of the High Court.

3. By way of background we adopt the following account which is taken largely from uncontested portions of the submissions of Mrs Browne.

4. By an Order on Investigation of Title made on the 06 August 1907 (MB 3/351) the land Arerenga Section 13, Arorangi was vested in:

1.	Ringiao Pakau – Atu enua	m.a.	for an Occupation Right

Subject to payment by the owner of the Occupation Right to Pakau and his successors of one shilling on the 01 January in each year. Upon the death of Ringiao and failure of his direct descendants the land to revert to Pakau or his successors. (Register of Titles, MB 3/351, and for sealed order of the Court).

5. The relevant part of the sealed Order on Investigation of Title provides:

> *"It is hereby ordered that the native whose name is set out in the first column of the schedule endorsed hereon, is and is hereby declared to be together with his direct descendants the owner of an Occupation Right or residential right in the parcel of land to be called or known as Allotment 13, Arerenga, Arorangi containing 48 ars, and delineated in the plan numbered 886 subject to payment to Pakau owner of the land and his successors of the sum of one shilling on the 01 January in each year. or his And it is further declared that upon the death of Ringiao and failure of his direct descendants the said land shall revert to the said Pakau successors."*

The said schedule refers to:

Ringiao m.

6. By Succession Order dated 29 September 1958 (MB 24/102) Ringiao's interest was vested in:

1.	Emi Te Ina	m.a.	
2.	Tauri Tei	m.a.	equally

7. By a succession order dated 26 November 1984 the interest of Emi Te Ina was vested in:

1.	Metuangaro Emi Te Ina	f.a.	
2.	Ngametua Mamanu Emi Te Ina	m.a.	
3.	Matangaro Emi Te Ina	f.a.	equally

Metuangaro Emi Te Ina is the appellant. Ngametua Mamanu Emi Te Ina is the respondent.

8. By certain orders made on 15 January 1998 (RB 12/90) the Court granted occupation rights to the respondent and his adopted sister, Matangaro, on part of the said land. The respondent had in fact filed three applications for occupation rights, the third one being for his five year old son. However the Court declined to grant an occupation right for the respondent's son as he was only five years old.

9. The appellant applied to the Court pursuant to Section 390A of the Act (Application 05/01) to rehear the said orders on the grounds that the orders were made in error in that her consent, as the direct descendant of Emi Te Ina, had not been sought.

10. On 24 July 2001 the Chief Justice directed pursuant to s 390A(3) that the application be referred to the court for an inquiry and report.

11. The matter came before Smith J on the 18 March 2002. Evidence was given by the appellant and by the respondent.

12. In his report to the Chief Justice, Smith J referred to the agreement between Emi Te Ina and Tauri Tei whereby they divided the land equally. By agreement Emi Te Ina built his home and occupied the northern half of the land and Tauri Tei built his home and occupied the southern half. Smith J said:

> *"The applicant claimed that the house on the land was built by her natural father, Emi Te Ina and that he had left the house to her. She also gave evidence that Ngametua and Matangaro Emile were adopted by the said Emi Te Ina, but despite their adoption, she sought Succession Orders in respect to her father's lands in favour of all three of them equally."*

13. The appellant also gave evidence, albeit disputed, that she had arranged for Ngametua to occupy the family home until he had built his own home on other land which she had acquired for him. The respondent confirmed that he did build his home on the land acquired for him by the appellant.

14. In his evidence the respondent acknowledged that Emi Te Ina was the appellant's father and that she had arranged to include him and his sister in the succession to Emi Te Ina. Nevertheless he had seen no need to advise her of his applications for occupation rights on the land.

15. In his report to the Chief Justice, Smith J considered that if the persons whose consent were required for the grant of the occupation rights were the direct descendants of Emi Te Ina, this would have included the appellant. He went on to say:

> *"But she was excluded from consideration. In fact, had the Court made the three Occupation Rights sought by Ngametua Emi in his application in 1997, then Metuangaro would have been excluded from the land entirely and would have lost her heritage. Fortunately, the Court declined to make an order in favour of the five year old child, an area of 660m2 was left by the Court. The fact remains however that Metuangaro is the sole blood descendant of Emi Te Ina, and ought to have been included in the hearing, or at the very least been given notice. The failure of Ngametua to give such notice is a breach of the principles of natural justice, and she is entitled to have the matter reviewed."*

16. Having concluded that the orders made in 1998 were not dependent upon compliance with s 50 of the Act, Smith J further stated:

> *"An Occupation Right was created by the Court over this land on the 06 August 1907. That right enures for the benefit of the direct descendants of Ringiao as stated in the Order. Metuangaro Vaeteru claims to be the only blood descendant of Emi Te Ina, who was one of the successors of Ringiao, and in the absence of any evidence to the contrary, was a direct descendant of Ringiao. Therefore she must have a right to this occupancy right."*

17. Smith J recommended that the occupation rights granted to the respondent and his sister be set aside having also concluded that the Court in 1998 did not have jurisdiction under s 50 of the Act to grant occupation rights over an existing occupation right. He recommended that the 1998 occupation applications of the respondent and his sister be referred to the Court for a rehearing.

18. On 27 June 2002 the Chief Justice adopted the report by Smith J and cancelled the occupation rights of the respondent and his sister. He referred their occupation applications to the Court for a rehearing. At the rehearing on 05 September 2003 their occupation applications were dismissed.

19. On 18 January 2005 the appellant filed application 41/05 seeking a vesting order pursuant to s 23 of the Act.

20. On 10 February 2005, before the appellant's vesting application (41/05) could be heard, the respondent and Aporo Dean as Pakau Mataiapo (the Atu Enua) executed a deed of lease of the entire land to the respondent.

21. When the appellant's application for a vesting order (41/05) came to be heard on 07 March 2005 Smith J said:

> *"While the land is the subject of an Occupation Right the owners are the holders of that right and they are the three parties concerned. The rights of the underlying owner will only arise when the Occupation Right has been cancelled or expired through the absence of any proper direct descendants. The atu enua (landowner) in this instant would have no authority to sign the Lease."*

22. In adjourning the application he added:

> *"This Court does not believe that Section 23 of the Cook Islands Amendment Act 1960 is an appropriate vehicle to dispose of this matter. Section 409(a) of the Cook Islands Amendment Act 1915 would appear to be the more appropriate section to resolve these problems. This application is adjourned to the next Court and meanwhile Counsel are directed to file and exchange memorandum directed towards the possible resolution or determination of these matters under Section 409(a) of the Cook Islands Act 1915."*

23. The appellant subsequently filed an application (30/06) under s 450 of the Act seeking to revoke the succession order made on 26 November 1984. The ground advanced was that the order was made in error in that the rightful successor should have been Emi Te Ina's direct descendant, namely the appellant.

24. The two applications came before the Court on a number of occasions but were finally heard on 7 September 2006. Evidence was given by the appellant, the respondent and other witnesses on behalf of the respondent.

25. On the same day, 7 September 2006, Smith J delivered his judgment on both applications (41/05 and 30/06) in the following terms:

> *"The Court had before it the following applications when the hearing commenced on the 23rd August 2006.*

30/06 application by Metuangaro Vaeteru to revoke the Succession Order to Emi Te Ina on 26th November and 15th October 1984.

41/05 application by Metuangaro for a Vesting Order in respect to the land Arerenga Sec. 13.

Application 30/06 must succeed since genealogies produced reveal that two of the successors namely Ngametua Te Ina and Matangaro Te Ina were adopted by the deceased and are not of the blood line.

Order Sec. 450/53 revoking the Succession Order in so far as they relate to those persons to the intent that Metuangaro Vaeteru is the sole successor.

Application 41/05 relates to the proposed vesting of 680m2 of Arerenga S. 13 in Metuangaro Vaeteru. But this area of land is an area set apart as an occupation right for Ringiao deceased and the direct descendants of Ringiao following the death of Ringiao and Emi Te Ina, the successor, the land has until now been occupied by Ngametua Emile an adopted child of Emi Te Ina. The Occupation Right is for a term expiring when none of the direct descendants reside on the land.

The Penguin English dictionary defines "descendants" as "somebody or something descending or deriving from somebody or something". " Descend" is defined as "to derive or come from, to have as an ancestor". "Direct" is defined as passing in a straight line of descent from parent to offspring. Offspring is defined as "the progeny of a person. "Progeny" is defined as "descendant or children".

It follows therefore that a adopted child is not a "direct descendant" and the occupation right is at an end and the land reverts to the "Atu Enua" who has granted approval for the occupier, Ngametua Emile to remain in the house. Metuangaro Vaeteru has no interest in the land capable of being vested in terms of S. 23/60. The application is dismissed."

Effect of the judgment

26. The judgment of 7 September 2006 is not easy to understand without reference to other documents.

27. The Judge determined that "Application 30/06 must succeed". In the application in question, dated 16 January 2006, the appellant had sought an order "revoking the Succession Order made by the Court on 26th November 1984 to the interests of EMI TE INA". The succession order of 26th November 1984 is recorded in the Register of Titles as:

"SUCCESSION ORDER vesting the interest of EMI TE INA (m.a) as from 26th January 1984 in the following persons: -

1. Metuangaro	*Emi Te Ina*	*f.a*	
2. Ngametua Mamanu	*Emi Te Ina*	*m.a*	
3. Matangaro Emile	*Emi Te Ina*	*f.a*	*EQUALLY"*

28. In itself that might have suggested that the entire succession order was revoked. However the Judge went on to refer to Ngametua Te Ina and Matangaro Te Ina and added "Order Sec 450/53 revoking the Succession Order in so far as they relate to those persons to the intent that Metuangaro Vaeteru is the sole successor".

29. The Judge's intention therefore appears to have been that the appellant's status as the successor to the occupation right of her deceased father would be preserved. On the other hand this is not easy to reconcile with his further finding that there was no longer any occupation right to succeed to.

30. On that subject the Judge said that application 41/05 was dismissed. In application 41/05 the appellant sought an

> *"ORDER pursuant to Section 23 of the Cook Islands Act 1960 vesting ALL THAT PARCEL OF LAND containing SIX HUNDRED AND EIGHTY SQUARE METRES (680m2) in the applicant".*

31. It was common ground that the 680m2 referred to in application 41/05 formed part of the larger property dealt with in the 1907 order granting occupation rights to Ringiao and his direct descendants. As earlier noted, the property had since been informally divided in half, Emi Te Ina occupying the northern half and Tauri Tei the southern. The northern half had been further divided on an informal basis into three parts of which the 680m2 is the one closest to the road. It has Emi Te Ina's home on it. It is not presently the subject of any partition order or other legal form of subdivision but is identifiable in a Department of Survey plan of Arerenga Pt Sec 13 drawn on 1 October 1997.

32. The southern portion of the same area continues to be occupied by the descendants of Tauri Tei, now deceased. No succession orders appear to have been made for that line of descent with the consequence that they are not presently shown in the Register of Titles.

33. The application to "vest" the 680m2 in the appellant (41/05) appears to have been a request that the Court confer upon the appellant the exclusive right to occupy a specifically identified portion of the larger property.

34. The immediate effect of the Court's dismissal of application 41/05 was therefore no more than to deny the appellant the exclusive right to occupy a particular portion of the whole property. In itself that was not inconsistent with continuation of those occupation rights which stemmed from the 1907 order. However it was in the reasons for his decision that the Judge appears to have intended something more far-reaching. He appears to have concluded that all occupation rights stemming from the 1907 order were at an end. Only in that way could he have concluded that "the land reverts to the 'Atu Enua' who has granted approval for the occupier, Ngametua Emile, to remain in the house" and that the appellant "has no interest in the land capable of being vested in terms of Sec.23/60".

35. We are not aware of any legal demarcation between the northern and southern portions of the property, as distinct from informal agreement between the two branches of the family. In those circumstances it seems arguable that on the Judge's reasoning the whole of the property, including the southern portion presently enjoyed by the descendants of Tauri Tei, has reverted to the Atu Enua.

The appeal

36. The present appeal is limited to the Judge's dismissal of the appellant's application for the right to occupy the 680m2 referred to. The appellant asks that this Court now confer upon her an exclusive right to occupy approximately one sixth of the property (the one third of the northern half of the property closest to the road).

37. We have real reservations about the appropriateness of conferring an exclusive right of that kind without hearing from the other parties potentially involved. Nevertheless we can see the importance of the more fundamental question which is whether the original occupation order of 1907 has lapsed due to non-occupation.

38. In our view the starting point in the latter inquiry must be that the 1907 order granted an occupation right to Ringiao and his direct descendants without apparent qualification. It is not disputed that there continue to be direct descendants. The appellant is an example. Presumably there are others, for example the direct descendants of Tauri Tei. Prima facie one might expect that those descendants would now enjoy the occupation right granted in 1907. That would seem to follow from the terms of the order itself.

39. In his reasoning the Judge appears to have introduced the additional requirement that for the occupation right to continue, one or more of the direct descendants must have continuously occupied the property. He did not state the source of that requirement. Counsel on the appeal, who were also counsel in the court below, were unable to recall any argument to that effect during the hearing before the Judge.

40. Mrs Browne took us through the early decisions associated with the 1907 grant in this case and other cases of its kind. It is plain from these decisions that continuation of the occupation right did not turn on continuity of occupation. On the contrary, the grantees and successors of the right were permitted to lease the right to others. Much emphasis was placed upon the strength and inalienability of the occupation right, the grantees being described as "the absolute owners" who could lose their rights only "in the event of the family dying out" (see, for example, Minute Book 1/67 and Minute Book 4/47A).

41. But it is not necessary to go to those further sources. The 1907 order itself granted the occupation right to Ringaiao "together with his direct descendants". It makes no reference to continuity of occupation.

42. Mr McFadzien did not suggest that a relevant continuity of occupation requirement was introduced by any legislative provision before or since the 1907 order. Nor did he suggest that the order itself contains any express requirement to that effect.

43. The one argument Mr McFadzien felt able to advance was built upon on the fact that the 1907 order granted to Ringiao "an occupation or residential right". He submitted that this might be interpreted to mean that there must be continuity of residential occupation. We are unable to take that meaning from the words used. In that phrase "occupation" is an alternative to "residential". Nor does either word introduce a continuity requirement.

44. We conclude that the occupation rights of the direct descendants of Ringiao were not dependent upon continuity of occupation. So long as there were one or more direct descendants, the right to occupy continued.

45. That makes it unnecessary for us to explore the question whether there has in fact been continuity of occupation. We simply observe that had that been the issue, consideration would have to have been given to the role of a number of persons including the appellant, the descendants of Tauri Tei, and potentially the respondent.

46. We mention the respondent as a potential direct descendant only because his status as such was not argued before us. There has been

no cross-appeal challenging the Judge's conclusion that as an adoptee the respondent does not qualify as a direct descendant of Ringiao. At least theoretically, there remains the possibility that the respondent may yet apply for leave to appeal against that conclusion out of time. We would not want this to be taken as encouragement to make such an application, or to indicate that any appeal which might follow would succeed. However it should not be thought that this Court has considered, and supports, the Judge's decision on that topic.

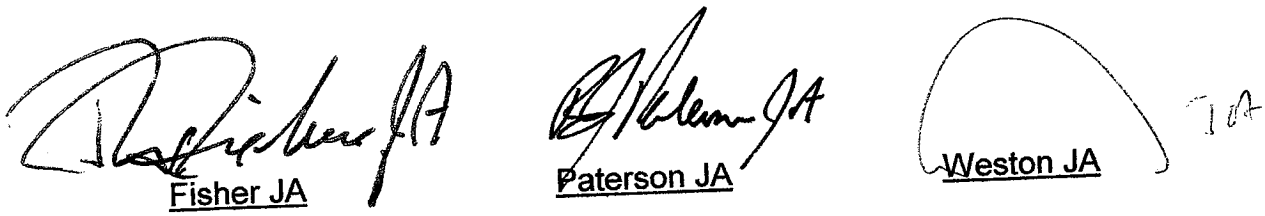
Conclusion

47. The appeal is allowed. Application 41/05 is remitted to the Land Division of the High Court for rehearing. The rehearing is to be conducted on the basis that the direct descendants of Ringiao continue to enjoy those occupation rights granted by the 1907 order MB 3/351.

48. At the rehearing all interested parties will need to be given the opportunity to be heard. These include the appellant, the descendants of Tauri Tei, and potentially the respondent.

49. The current Pakau Mataiapo holds the Pakau title as Atu Enua, that is to say as the owner of the underlying freehold. Strictly speaking the owner ought to have been joined as a party to this appeal given that the value of the Atu Enua's interest is inversely proportional to the value of any continuing occupation right. Technically, the effect of this appeal must be limited to rights as between the immediate parties to the appeal, although we would be surprised if the Mataiapo sought to relitigate the same issue in separate proceedings brought for that purpose.

50. It being agreed that each party to this appeal will bear his or her own costs, there will be no order as to costs.



Fisher JA Paterson JA Weston JA