

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

PLTNO.18/2015

IN THE MATTER of Section 66A(3) of the Constitution,
the Marine Resources Act 2005, and
Part 1A of the Judicature Act 1980-81

AND

IN THE MATTER of an Application for judicial review

BETWEEN **WILLIAM FRAMHEIN** as Apai Mataiapo
Komono for the Aronga Mana of Te Au O
Tonga
First Applicant

AND **TE IPUKAREA SOCIETY**
INCORPORATED an incorporated society
Second Applicant

AND **ATTORNEY-GENERAL** sued on behalf of
the Crown
First Respondent

AND **MINISTER OF MARINE RESOURCES**
Second Respondent

AND **SECRETARY OF MARINE RESOURCES**
Third Respondent

Date: 11 May 2017

Counsel: Mr I Hikaka for Applicants
Mr D James, Solicitor-General for Respondents

DECISION OF THE HONOURABLE JUSTICE DAME JUDITH POTTER

[2:57:40]

[1] The Crown objects to the inclusion in the evidence before the Court of three affidavits filed in reply.

[2] The affidavits have been filed in reply pursuant to a Minute of the then Chief Justice which provided to the Applicants the opportunity to file in reply by a given date. It appears that the timetable has not been met, but that is not the essence of the Crown's objection.

[3] Initially the Crown's objection focussed on five affidavits but the objection has been withdrawn in respect of two of those, leaving objections to the Second Affidavit of Takingaiva Etiare dated 20 March 2017 of Aitutaki, the Second Affidavit of Manavaroa Philip Marama Nicholas of Rarotonga dated 20 March 2017, and the Affidavit of Henry Marama Maka Ngamaru Ariki dated 7 March 2017 of Atiu, all of Aronga Mana in their areas.

[4] After helpfully outlining the two broad actions in the case, Mr James articulated the Crown's central objection, namely that these affidavits do no more than add the voice of more people to bolster evidence that has gone before. He described it as a case of "I'll put my hand up too".

[5] He submitted that if this evidence is relevant it should have been filed with the initial case and should not now be admitted by the Court under the guise of reply evidence.

[6] The Applicants contend that the affidavits are relevant and appropriate as reply evidence. They refer to extracts from two of the Respondents' affidavits from Retire Puapui, one of the Aronga Mana of Aitutaki, who states at paragraph 14:

"It is my understanding of the customary authority and continuing influence of the Aronga Mana that it exists to manage the uses of the land up to the point of the reef which ends at the sea facing the particular district which an Aronga Mana speaks for."

[7] Secondly, from the affidavit of Makiuti Tongia who states at paragraph 93:

"All human activity within the reef and lagoon is controlled by traditional leaders. All human activity outside the reef, like fishing, is free of the control of the traditional leaders."

[8] The Applicants say that the affidavits simply and importantly respond to those claims.

[9] The affidavits, Mr Hikaka pointed out, also attempt to take into account the recent decision in *Browne v Munokoa* (CA No.1/16), a decision of the Cook Islands Court of Appeal on 14 February 2017 where the Court said that in every case, evidence ought to be adduced as to the particular custom applicable to the island, village or family concerned, and:

"If evidence can be given as to the opinion of the Aronga Mana of the island or vaka to which the custom tradition or value relates, it will be final and conclusive."

[10] Mr Hikaka said that the affidavits are a further attempt, consistent with the earlier affidavits, to meet the requirement to adduce evidence of the particular custom applicable in this case and to respond to assertions about the fishing activity outside the reef. In the case of the Nicholas Affidavit that appears at paragraphs 13 and 14. In the case of the Étiare affidavit, that appears at paragraph 17. And in respect of the Ngamaru Ariki affidavit, that appears mainly in the statement attached as Exhibit NA1 in paragraphs 9 to 13;

[11] I am satisfied that the affidavits do more, and indeed considerably more, than reiterate what has gone before. I am satisfied they reply to relevant points of evidence in certain affidavits of the Respondents. To the extent they do not and are reiterative, they have little value, and that is no doubt a matter upon which counsel for the Crown will make submissions to the Court in due course, if such is the case. That is not to say the Court, of its own instigation, will not be aware of the lack of value of evidence that simply repeats what has gone before, albeit said by more people.

[12] I therefore admit to evidence, the reply affidavits which are the subject of this application.

[13] If the Crown wishes to file further response evidence, the Applicants have stated they do not object to this, but it would need to be filed by 30 May 2017.

Timetable orders

[14] As to timetabling orders, this trial has been set down as a firm fixture for 3 days commencing Monday, 3 July 2017.

[15] The Applicants are to file and serve an agreed or their statement of issues, their submissions and a paginated common bundle of affidavits and exhibits by 19 June 2017.

[16] The Respondents are to file and serve their statement of issues (if not agreed), and their submissions by 26 June 2017.



Judith Potter, J