

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

APPLICATION NO: 96/2017

IN THE MATTER of Sections 3 and 9 of the Declaratory
Judgments Act 1994 and Section 26 of the
Cook Islands Amendment Act 1960

AND
IN THE MATTER of the land known as **TUORO
SECTION 87A4A, ARORANGI**

AND
IN THE MATTER of a Deed of Lease dated 20 February
2013 and a Vesting Order made on 12
October 2010 to **DANIEL LESLIE
KLINKHERT**

Applicant

Hearing date: 23 and 26 May 2017

Appearances: Mr Scowcroft for the Applicant

Decision: 18 October 2018

DECISION OF THE HONOURABLE JUSTICE WILSON ISAAC

Introduction

[1] This decision relates to an application by Daniel Leslie Klinkhert for declaratory orders in relation to the land known as Tuoro 87A4A, Arorangi.

[2] The applicant, Daniel Klinkhert, holds a vesting order in Tuoro section 87A4A, Arorangi. The order granted on 12 October 2010 pursuant to s 23 of the Cook Islands Amendment Act 1960 vests a freehold interest of an area of 930m² in Daniel Leslie Klinkhert and his direct descendants. The applicant later granted a lease jointly to himself and his wife, Nicola Janet Klinkhert.



[3] Importantly, Daniel Klinkhert was neither a landowner himself nor related to a landowner prior to the granting of his vesting order in 2010.

[4] The applicant now wishes to build a family home on the land and seeks the Court's direction in the form of declaratory orders regarding what will happen to his interests in the land following his death, namely his freehold interest pursuant to the vesting order and the leasehold interest held jointly by himself and his wife. Specifically, Mr Klinkhert wishes to receive confirmation from the Court regarding whether either or both of these interests will pass to his wife and their children upon this death.

Procedural History

[5] I heard oral submissions for this application in Court on 23 and 26 May 2017 and adjourned proceedings to allow for counsel to file further submissions.

[6] In a memorandum of directions dated 22 June 2018, I raised a number of matters in relation to the Court's jurisdiction to hear the application and invited counsel to file further submissions in respect of those matters. Counsel for the applicant filed further submissions dated 30 July 2018.

[7] I also note that Mr Moore filed a memorandum dated 27 July 2018 stating that he had been instructed by clients in an unrelated matter to also file an application seeking declarations on these matters. He cited the importance of the questions put before the Court in this application as novel and far-reaching issues and sought involvement in these proceedings on behalf of his clients who were facing similar issues regarding the rights of non-landowner vestees.

[8] Mr Scowcroft opposed Mr Moore's involvement in these proceedings on the basis that he did not represent any party to the proceedings and had failed to show any interest of his clients sufficient to join the proceedings.

[9] The Court received a further memorandum from Mr Moore dated 7 September 2018 on behalf of members of the applicant's family, the Caldwell's, who object to the application. Mr Moore submits that the vesting order should never have been granted to include the applicant's direct descendants, and the lease held by the applicant and his wife must expire upon the applicant's death along with the vesting order. After setting out his view of the relevant law,



counsel also notes the wide-ranging implications that the declaratory order may have if granted and submits that, while some family members may have been contacted by counsel for the applicant, they should have been advised to seek legal advice if the Court was going to make binding orders which affect their rights.

Application

[10] The applicant seeks declaratory orders in relation to the interpretation of s 26 of the Cook Islands Amendment Act 1960 and whether a vesting order endures upon the death of the vestee for the benefit of their children.

[11] Specifically, the applicant seeks determination of the following questions:

- a) Does section 26 of the Cook Islands Amendment Act 1960 allow the natural children of a person to whom a vesting order is granted to succeed to the vestee's interest in the vested land notwithstanding that the vestee was not a landowner in the vested land, nor related to a landowner in the vested land, immediately before the vesting order was made?
- b) If the freehold estate in the vested land returns to the original landowners or their descendants on the death of the vestee (or, alternatively, if the original landowners or their descendants are entitled to have the freehold estate in the land vested in them notwithstanding that the original vestee had natural children), does a lease granted on the vested land by the vestee to himself survive the vestee's death, or does it terminate on the vestee's death?
- c) Does the answer to question B change if the lease is granted to the vestee and another party jointly?

[12] Counsel for the applicant submits that the requirements of s 3(1) of the Declaratory Judgments Act 1994 have been met as the applicant seeks to do an act, namely building a house on the land, and the validity of that act depends on the construction of s 26 of the Cook Islands Amendment Act 1960.

[13] The vested land was given to the applicant by the sole landowner, Julia Margaret Miimetua Williams (known as Mii), the daughter of the applicant's feeding mother, Ngametua Tanga. Counsel asserts it was given without conditions to the applicant "and his direct

descendants". Counsel submits that this therefore was a gift of Native land where the donor clearly intended that the gift endure for the benefit of the applicant's descendants. Furthermore, the Courts have upheld succession to gifts of land by natives in multiple cases discussed in counsel's written submissions, and this should apply similarly in the present case as the donor was the only landowner and has no issue or siblings other than an adopted brother who lives in New Zealand. Counsel therefore submits that the applicant's children should therefore be entitled to succeed to the vesting order upon the applicant's death and requests that the Court confirm this.

[14] Counsel noted that, in dealing with this application, the Court may be required to make a binding order on the interpretation of s 466 of the Cook Islands Act 1915 regarding how custom would apply to the applicant's interests.

Law

[15] Section 3(1) of the Declaratory Judgments Act 1994 provides:

- (a) Where any person...desires to do any act, the validity, legality, or effect of which depends on the construction or validity of any enactment...

...such person may apply to the High Court by originating summons for a declaratory order determining any enactment...or any part thereof.

[16] Section 10 of that Act specifies that the Court's jurisdiction to give declaratory orders is discretionary and the Court may refuse to exercise it on *any grounds*:

10. Jurisdiction discretionary – The jurisdiction hereby conferred upon the High Court to give or make a declaratory judgment or order shall be discretionary, and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

[17] Section 26 of the Cook Islands Amendment Act 1960, which the applicant seeks a declaratory order determining the interpretation of, states that:

The persons entitled on the death of a Native or a descendant of a Native to succeed to any interest acquired under a vesting order in any land shall be the same persons who would, under Native custom, be entitled to succeed to any interest owned by the deceased in the same land before the making of the vesting order:



Provided that, where the Land Court is satisfied that the land or interest in land could be more conveniently or economically held by one or more owners, the Court may, with the consent of the majority of the persons beneficially entitled to the interest owned by the deceased, make an order vesting the interest of the deceased in one or more of the persons beneficially entitled thereto:

Provided further that, if the person to whom any land is transferred under a vesting order did not at the time the vesting order was made have any beneficial interest therein, the Land Court shall determine the succession to that land in the manner prescribed by section 446 of the principal Act.

Discussion

[18] The jurisdiction to grant a declaratory order is wholly discretionary. As noted above, s 10 of the Declaratory Judgments Act 1994 provides the Court with the widest discretion to refuse to grant a declaratory order “on any grounds which it deems sufficient”.

[19] This discretion was discussed by the New Zealand Court of Appeal in *Gazley v Attorney-General* where the Court stated “the [Declaratory Judgments Act] confers broad jurisdiction to make rulings on questions of law and legal rights, but it matches that with a broad discretion to refuse to give the declaration”.¹

[20] In deciding whether or not to grant the orders sought, I must consider the fact that there are parties other than the applicant who may be affected by the declaratory order sought, but not all of those affected were present or represented during these proceedings.

[21] Counsel sought the views of various of Mii Williams’ family members in order to give the Court an idea of the opinion of the wider family. After receiving responses from Mii’s adopted brother, Cedric; two of Mii’s first cousins, Frank Caldwell and Carol Anderton; and Mereana Tanga, the only family member living in the Cook Islands, counsel’s conclusion as to the opinion of the wider family is that some are in support of the applicant’s family succeeding to his interests in the land, and some are opposed. Counsel submits that this range of views is inevitable and, ultimately, the opinion of the wider family is of limited relevance.

[22] Nonetheless, there may be other family members or persons affected who might wish to come forward and be heard by the Court in the event of the applicant’s death. The Courts

¹ *Gazley v Attorney-General* (1996) 10 PRNZ 47 at 51.



have exercised caution when declaratory orders are sought without all affected parties present and have generally declined to grant declarations *in rem* which would be binding on other parties.²

[23] Counsel for the applicant recognised that the result of this application may have wide-ranging implications for other lands that are the subject of vesting orders and yet stated that it was not intended that this application create a rule of general application to all vesting orders where the vestee is not related to the original landowners, other than to say that s 26 of the Cook Islands Amendment Act 1960 allows children of vestees who are not related to the original landowners to succeed.

[24] This logic seems somewhat contradictory as the declaratory orders sought by the applicant would inevitably apply to other vesting orders where the vestee is unrelated to the original owners.

[25] Furthermore, it is not the Court's role to provide "a free or subsidised opinion service" to the applicant or the public in general, which is in essence what is being requested in this application.³ Counsel intends that, if successful, the declaratory orders would be binding in respect of succession to the applicant's vesting order upon his death.

[26] The purpose of declaratory orders is to make a declaration of right, not to interpret Acts or other instruments in the abstract or give "advisory opinions".⁴ I disagree with counsel's assertion that the questions asked in this application are not purely advisory because they are "grounded in a particular set of facts" and are necessary to determine whether the applicant's children can succeed to his vesting order.

[27] In my view, what is being sought in this application is not a proper exercise of the Court's jurisdiction to grant declaratory orders. As I see it, the applicant is asking the Court to determine a case which is not yet at issue and bind the Court as to its decision in that future case. I am very reluctant to grant such an order as one cannot predict the parties involved, the evidence that may be presented and the legal submissions that may be made at a future date.

² See for example *Coburn v Human Rights Commission* [1994] 3 NZLR 323.

³ *Simpson v Whakatane District Court* (2006) NZAR 247.

⁴ *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344 at 353.

[28] Furthermore, the Court's limited time and resources should not be overrun by persons attempting to secure a future judgment in their favour when the events in question have not yet occurred. While the questions posed to the Court in this application may yet be undecided, it is not the Court's role to provide legal advice or grant declarations to bind its decisions in future cases.

[29] The application is therefore dismissed.

Dated at Wellington, New Zealand this 18th day of October 2018.

A handwritten signature in black ink, appearing to read 'W W Isaac', with a horizontal line underneath it.

W W Isaac
JUSTICE