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

**APPLICATION NO: 319/2018**

| | |
|---|---|
| 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<br>IN THE MATTER | of the land known as **KAINGANUI 92G3 ARORANGI** |
| AND<br>IN THE MATTER | of an application for Recall |
| BETWEEN | **TEUPOO BATES** of Arorangi<br>**First Applicant** |
| AND | **TEREMOANA TAIO** of Arorangi<br>**Second Applicant** |
| AND | **MERE JOHN MATEARA** of Arorangi<br>**Respondent** |

Hearing date: 13 and 16 July 2018

Appearances: Mr B Marshall for the First Applicant
Mrs T Browne for the Second Applicant
Mr T Moore for the Respondent

Decision: 9 November 2018

---

**DECISION OF COXHEAD J**

---

**Introduction**

[1] This is an application to recall a partition order granted by Justice Dillon in 1996. The order partitioned the land previously known as Kainganui Section 92G3, in Arorangi, into two sections for use by two kin groups: Ngati Anau and Ngati Pera.

**Background**

[2] The 1996 partition order was granted conditional on counsel for the two kin groups filing a list of owners for the two sections: Mrs Browne for section 92G3A and Mrs Lynch for section 92G3B. Despite the fact that these terms were eventually complied with, the order was never sealed and remains unperfected some 22 years later.

[3] After the lists of landowners were filed by respective counsel, a series of meetings were held between the Deputy Registrar of Land Titles, the first and second applicants and the respondent, along with their counsel to discuss the distribution of landowners between the two sections. It appears that there may have been some landowners who were not included in either of the lists filed by counsel and the applicant submits that they were later added to the list of owners in section 92G3B by the Deputy Registrar when they should properly belong in section 92G3A.

[4] When asked by the first applicant to amend the orders, the Deputy Registrar stated that she was unable to change the allocation of owners as she recalled that the Court had made contemporaneous orders at the time of the partition to allocate the land between the two sections. There is dispute between the parties about whether or not such orders were made.

[5] The applicant therefore seeks to recall the partition order to the extent of the directions to counsel for Ngati Anau and Ngati Pera to provide a list of owners so that the Court could then grant further orders re-distributing the landowners between the two sections.

**Procedural History**

[6] The application for recall was filed on 25 May 2018. I heard oral arguments in court in Rarotonga on 13 and 16 July 2018 and reserved my decision.

[7] I note for clarity that, in its initial pleadings, the first applicant sought among other things the exchange of two small pieces of land between sections 92G3A and 92G3B. The applicant noted this would result in fairer allocation of land and better reflect the usage of Ngati Anau and Ngati Pera. Counsel for the first applicant noted in a memorandum dated 11 July 2018, however, that his client no longer wished to pursue the "land swap" remedy included in the application as it had distracted from the applicant's main concern, being the distribution of landowners between the two sections. Accordingly, I have proceeded with this decision on the

basis that the applicants do not seek to alter the boundaries drawn under the partition in any way.

**Application**

[8] The applicants seek recall of Justice Dillon's 1996 judgment on the following grounds:

a) The judgment has not been perfected or finalised;

b) There are very special reasons that the judgment should be recalled;

c) Uncertainties and discrepancies have prevented the sealing of the orders for some 22 years; and

d) Justice requires that the judgment be recalled.

[9] Counsel for the first applicant argues that the fact that the orders have remained unsealed for some 22 years has created significant uncertainty in regard to who is an owner in which block. This has prevented access and use of the land. Counsel considers that it would be an error to leave the allocation of owners as is, and argues that recall is the easiest way to deal with this uncertainty.

[10] In terms of "very special reasons" for recall, counsel claims that the conflict between the Deputy Registrar's recollection of the orders made during the course of the 1996 proceedings and the applicant's interpretation of the Court's orders actually granted creates unavoidable difficulties which have prevented the orders from being sealed for 22 years. The Deputy Registrar maintains that the Court made contemporaneous orders allocating the owners between the two partitioned sections in 1996, but has been unable to locate the alleged orders. Counsel for the applicant submits that such orders would have been contrary to the terms of Justice Dillon's decision in which he directed counsel for the parties (Mrs Browne and Ms Lynch) to go away and formulate lists of owners of their respective partitioned sections to be filed with the Court.

[11] Counsel also submits that the importance of land tenure and ownership in the Cook Islands, as recognised by the Privy Council in *Baudinet v Tavioni* and *Tumu v Tumu*, is a "very

special reason" which weighs in favour of recall in this case.[1] The special significance and character of land in Cook Islands culture means that it is "vitally important" to ensure that orders in regard to land are made correctly. Counsel contends that the courts have been willing to disregard the passage of long periods of time, often decades, to reverse succession orders, for this very reason.

[12] Furthermore, the fact that applications for partition are unable to be reheard due to the statutory bar set out in s 390A(10) supports the need to ensure that accuracy is achieved in the granting of partition orders. Judge Savage commented on the unavailability of s 390A for partitions in his reserved judgment of 2010 under a prior related application.[2]

[13] The applicant therefore considers that a partial recall to remove the judge's direction for counsel to file lists of owners is the best way to achieve finality and accuracy. The Court may then grant orders by consent to apportion the landowners between the two sections before sealing the partition order. The applicant proposes the owners be apportioned as follows:

a) The landowners listed number 1-14 and 19-24 on the original landowners list on the partition of 16 September 1913 become the landowners of section 92G3B; and

b) The balance of the landowners from the aforementioned list become landowners of section 92G3A, along with the names added by hand to the list of landowners of section 92G3B.

[14] For completeness, counsel recognised the existence of a prior related decision of Judge Savage dated 22 June 2010, but submits that the doctrine of *res judicata* does not prevent the Court from making the orders sought. That application, also by the first applicant, sought to set aside the original decision on the grounds that the landowners had refused to contribute to the survey costs necessary to seal the partition order and accordingly the first applicant's son had been unable to obtain leases or occupation rights on the land. Counsel argues there is a distinction between the prior application to set the order aside on the basis that it had not been

---

[1] *Baudinet v Tavioni* [2012] CK-UKPC 2 at [61]; *Descendants of Utanga and Arerangi Tumu v Descendants of Iopu Tumu* [2012] CK-UKPC 1 at [2].
[2] *Bates – Kainganui* [1996] CKHC, 25 September 1996, App 392/1996 at [8].

acted upon, and the current application to recall the order. The issues being dealt with in the present application are, on Counsel's submission, entirely distinct from the previous one.

[15] Finally, counsel responds to a suggestion by the respondent that an application for mandamus would be a more appropriate application. Counsel for the applicant does not consider this to be the best approach, considering it is an unnecessary and "very heavy-handed approach" to take against the Deputy Registrar, particularly when counsel cannot preclude the possibility that her recollection of the orders was correct due to the passage of time and the unreliability of court records.

**Grounds of Opposition**

[16] The recall application is opposed by Mere John Mateara. Counsel for the respondent argues that the order made by Justice Dillon in 1996 is clear and precise. It unequivocally sets out the area of land to be allocated to each set of owners. The Judge leaving the parties to produce the lists of persons to be vested in each of the land titles created by the partition is standard practice for the Court.

[17] Counsel disputes the grounds put forward by the applicant as being "very special reasons" to recall the order. Judge Savage found in his 2010 judgment that the failure to seal the partition order was not relevant. In the respondent's view, there has been no uncertainty at all with regards to the distribution of land. Any uncertainty which may have previously existed has been resolved by the parties. There is also no discrepancy between the orders granted by the Court and the consent upon which orders were made. The failure to seal the partition order is not a result of uncertainties but rather the applicant's failure to act on the 1996 order by obtaining a survey and producing its list of owners, and the applicant's attempts to recall the decision in 2010 and then again in the current application. Finally, recalling the order would result in injustice by completely altering the position of the landowners.

[18] The fact that the partition order has not yet been sealed is, in Counsel's submission, not a valid reason to recall it. Counsel notes that the Cook Islands court has a history of failing to seal or perfect orders to the extent that Chief Justice Weston created a committee with the mandate to identify and seal all of the unperfected partition orders from decades of Court hearings.

[19] Counsel also notes that Judge Savage discussed the issue of the unsealed order in his 2010 decision dismissing the applicant's previous application for recall. Judge Savage did not consider the failure to seal the order as being of any particular relevance and noted that the legislation itself contemplates that an order in any particular case may not be sealed for some time, if at all.[3] Despite not being sealed, Judge Savage noted that the partition order created legal rights through creating title for the two kin groups, and he was reluctant to take away those rights by recalling the order. Judge Savage characterised the partition as "a judgment complete in itself, subject to sealing, which has simply not been acted upon by those bound by it".[4]

[20] Furthermore, Counsel disputes the applicant's attempt to frame the previous 2010 application as anything other than a recall application. That application was filed pursuant to the same legislative provisions as the current application and Judge Savage clearly treated it as an application for recall in his written decision. Counsel contends that *res judicata* therefore prevents the applicant from relitigating this issue.

[21] The respondent also questions the applicants' intent in bringing this application and suggests that the applicants simply want a different result to that from the "absolutely clear and unequivocal" order granted by Justice Dillon in 1996. Despite this, the applicants have failed to bring any new evidence which was not before Justice Dillon or cite any new legislation which may have altered the legal position to warrant grounds for recall.

[22] Accordingly, counsel considers this an administrative issue. The respondent takes no issue with the lists already before the Court from the previous proceedings and submits that the Court should recognise those lists and seal the order. In summary, counsel seeks dismissal of the application on the grounds that it is prohibited by the principle of *res judicata*, it is an abuse of process, and the application is misconceived. Counsel also seeks leave to address the Court on costs.

**The Issue**

[23] The issue for determination is whether the Court should exercise its jurisdiction to recall the 1996 partition order.

---

[3] See Judicature Act 1980-1981, s 43.
[4] Above n 2 at [17]-[18].

## The Law

[24] The High Court has inherent jurisdiction to recall its own decisions, as a superior court of record. However, the power to recall is only used in limited circumstances.[5]

[25] The Cook Islands Court of Appeal discussed the Court's recall jurisdiction in *Baudinet v Tavioni & Macquarie.* The Court took significant guidance from New Zealand authorities which establish three categories of cases where recall may be used:[6]

a) Where there has been an amendment of a relevant statute or regulation or a judicial decision of relevant and high authority since the hearing;

b) Where counsel failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and

c) Where for some other very special reason justice requires that the judgment be recalled.

[26] The general principle is that, once a judgment has been granted, it is final and may not be altered except on appeal or review. The Court of Appeal recognised this in *Baudinet* when it concluded that:[7]

> The jurisdiction is to be exercised only sparingly. A recall application is not a rehearing in disguise. Nor is it an opportunity for reframing the arguments previously presented, presenting fresh arguments which ought to have been advanced but in the event were not, or traversing fresh legislative provisions, authorities or arguments which could not have affected the overall result.

## Discussion

[27] As noted earlier, I must determine whether there is sufficient reason to justify the exercise of the Court's jurisdiction to recall the partition order from 1996.

---

[5] *Bank of New Zealand v Mullholland* [1991] 4 PRNZ 299.
[6] *Baudinet v Tavioni & Macquarie* [2010] CKCA, 18 June 2010 per Barker P, Smellie JA, and Fisher JA; citing principles from the New Zealand cases of *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC), *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49 (CA) and *Faloon v Commissioner of Inland Revenue* High Court Tauranga CIV 2005-470-508, 20 March 2006.
[7] Above n 6.

[28] Counsel for the first applicant suggested in written submissions that all parties agreed to the changes sought by the first applicant in regard to the lists of owners. The Court could therefore grant orders by consent to allocate the landowners between the two sections following partial recall of the 1996 decision. It became clear to me during the hearings, however, that there is in fact significant dispute between the parties as to the allocation of owners and exactly what was ordered by Justice Dillon in 1996.

[29] The respondent, Deputy Registrar and second applicant appear to believe that the Court made orders in 1996 to the effect of accepting that the landowners listed in the ROT as 1 to 24 would become landowners in section 92G3B, and the balance become owners in section 92G3A. On the other hand, the first applicant considers that Justice Dillon ordered counsel to provide their respective lists of owners and made no further orders as to the allocation of owners.

[30] The main reasons for the recall sought by the first applicant are the continued inability of counsel to agree on the lists of landowners for each partitioned section, and the conflicting recollections of what was ordered in 1996. Counsel also notes the unavailability of a s 390A application or an appeal to remedy this situation.

[31] As set out earlier, it is well accepted that recall is a remedy which will not be granted lightly. There must be "very special reasons" to recall a decision which is otherwise final. Furthermore, recall is most commonly used to correct a slip or failure to express what was decided or intended by the Court. It cannot be used where parties later find a more convenient form of order, nor can it be used to substantially change the decision or improve a judgment obtained.[8]

[32] In this case, the applicant seeks recall of Justice Dillon's 1996 decision so that they can further amend the list of owners and achieve an allocation of owners which they are happy with. This does not amount to mending a "slip", but rather changing a perfectly valid order.

[33] When questioned during the hearing, counsel for the first applicant accepted that there was no error made by the judge in the original proceedings, but rather the issue was that counsel were now unable to agree on their lists of owners and there was confusion amongst the owners. However the respondent and second applicant do not dispute the orders or the lists of owners

---

[8] *Wilcocks v Teat* Rotorua, CIV-2008-463-784, 15 March 2011, as cited in *Manahi v The Maori Trustee* [2018] 184 Waiariki MB 168 (184 WAR 168) at [51].

and are content to let the partition order lie. This does not suggest to me that there is such confusion as to justify recall.

[34] I do not consider that this application meets the criteria of "very special reasons" for recall. In the absence of any error by the judge or authority which would change the original decision, I therefore conclude that the exercise of the Court's jurisdiction to recall the orders is not justified.

[35] I also note that Judge Savage previously declined to recall this partition order in 2010, stating that the Court's jurisdiction to recall orders did not extend to cases where a party to the proceedings had since become unhappy with the judgment. I consider that this is also the case in the present application.

**Decision**

[36] The application for recall is dismissed.

[37] I direct the Registrar to seal the partition order as granted in 1996.

Dated at Rotorua, New Zealand this 9th day of November 2018.



C T Coxhead
**JUSTICE**