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

APPLICATION NOS. 450/2021 & 451/2021

UNDER	Section 52 of Land (Facilitation and Dealings) Act 1970
IN THE MATTER	of the land known as PAEPAERAUKURU 94L ARORANGI
AND	
IN THE MATTER	of an application for Confirmation Resolution of Assembled Owners
BETWEEN	NOOROA KATUKE of Rarotonga **Applicant**
AND	KATHLEEN TIAMARAMA BERGIN of Rarotonga **Respondent**
AND	
IN THE MATTER	of an application for Confirmation Resolution of Assembled Owner
BETWEEN	TOM KIMI MATAROA of New Zealand **Applicant**
AND	NAPA HARRY NAPA of Rarotonga **Respondent**

Hearing date: 5 July 2022

Appearances: Mr T Nichols for the Applicants
Ms C Evans for the Respondents

Decision: 15 May 2023 (NZT)

JUDGMENT OF JUSTICE C T COXHEAD

Introduction

[1] The applicants seek confirmation from the Court of a resolution of a meeting of assembled owners to approve a deed of lease for each of the applicants.

[2] The applicants are Nooroa Katuke and Tom Kimi Mataroa of the Ema Napa family line.

[3] The respondents are Kathleen Tiamarama Bergin and Napa Harry Napa of the Tauei Napa family line. They have built houses on each of the respective parcels of land which the applicants are seeking to lease. They have filed their respective objections to the applications for confirmation of the resolution.

Background

[4] The leases in question are smaller parcels of land within a large land block. The entire section of land was leased to William McBirney in 1909 for a term of 99 years. The lease expired on 24 August 2008.

[5] In 1953, it was determined that the land was divided into four shares held equally between the Tauei Napa, Enua Napa, Ema Napa and Rangi Napa family lines, with one share per family.

[6] Since 1962, Napa Tauei Napa, Harry Tauei Napa and Henry Tauei Napa held the lease. The lease expired on 24 August 2008. Upon the expiry of the 2008 lease, rights to the land reverted back to Ngati Napa as landowners of the block.

[7] In early 2008, just before the lease expired, the respondents, along with other children of Harry Tauei Napa, started construction of houses on the land. Other landowners, concerned about construction on the land prior to the expiry of the lease, called a meeting of landowners in June 2008. At this meeting, it was resolved that an injunction would be applied for to stop further construction on the land by all landowners. The injunction was granted by the Court on 3 July 2008. The case was appealed by the respondents. The appeal was dismissed and the injunction remained in place.

[8] In late 2018, the respondents applied to the Land Division to convene a meeting of assembled owners to ask the Ngati Napa family for a lease on this land. The majority of landowners objected.

[9] An informal meeting of the landowners was held on 19 June 2020. In this meeting, majority support was given to approve the leases of Nooroa Katuke and Tom Kimi Mataroa. A formal meeting of assembled owners was convened by the Court on 24 September 2021. At this meeting 91% of the landowners approved the respective leases being granted to the applicants.

[10] The application was heard before me on 5 July 2022. I received the transcript for this matter on 2 September 2022.

Applicants' submission

[11] The applicants argue that leases they have applied for comply with the relevant legislation and have overwhelming support of the other landowners, as demonstrated at the two meetings held on June 2020 and September 2021.

[12] The applicants submit that they have conformed with the requirements of s 482(2) of the Cook Islands Act 1915.

[13] The applicants argue that the current allocation of the land, in proportion to the share allocation between the four family lines, is inequitable. While all the lines technically have equal shares in the land, the Tauei line occupies more land than any of the other lines, and the Ema line, to which the applicants belong, is undersubscribed by about 50%.

[14] The applicants have received overwhelming majority support of the landowners for their respective leases. Therefore, it is equitable to award the leases to the respective applicants.

[15] The applicants argue that they have at all material times acted in good faith. They have not received any of the shares of the land they are entitled to, and when claiming their share they have made sure to follow the proper processes and seek approval from the other landowners.

[16] In terms of the interests of the persons alienating the land the applicants state that if the land is further alienated from the Ema line, their share would be further reduced relative to the Tauei Napa line's share. If their leases are not granted, and the Ema line has to alienate this land, they will be left with an even smaller percentage of the overall land and the Tauei's portion of the land will become even more disproportionate. In contrast, the Tauei line will still retain rights over a larger portion of land than the Ema line even if the leases are granted to applicants.

[17] The applicants point to the overwhelming support of the landowners, the fact that they have complied with legislative requirements, and to the fact that the Ema line have exceeded their shares. They argue that this shows that it is in the public interest to grant their application.

[18] On the requirement for adequate consideration, set out in s 482(2)(c) of the Cook Islands Act 1915, the applicants ask for an exemption on the grounds that this is a family-type lease.

Custom

[19] Much of the respondents' case relies on assertions of custom. The applicants reject the respondents' interpretation of Ngati Napa custom, which says that the Tauei family have a right to the land in question and the other families are not allowed to encroach upon this right. In the affidavit of Mr Mataroa he claims that, on the main road Titikaveka side, the piece of land is rightfully held by the Ema family.

Respondents' submission

[20] The respondents do not want the Court to approve the applicants' leases. They request that the Court uses its discretionary powers, as set out in s 482(2) of the Cook Islands Act and s 54 of the Land (Facilitation of Dealings) Act 1970, and not confirm the resolution which arose from the meeting of assembled owners.

Customary law

[21] The respondents claim that they have a right to the land under customary law. They point to the principles of customary law, and the need to honour the traditions, usage and values of the Cook Islands people.

[22] The respondents argue that occupying large blocks of land was an accepted practice in the Ngati Napa family. Each of the family lines occupy their area of land solely. To best give effect to the custom, the respondents argue that the titles of the other families in this land should be extinguished.

[23] The respondents submit that the Tauei Napa kopu have lived on and used these sections of land for over four decades. In the affidavit of Kathleen Tiamarama Bergin, she draws upon the custom passed down from her grandfather to her father. She claims that the custom is that this particular land is for the Tauei Napa family, that they were not to interfere in the land of the other kopu, and that those kopu should not interfere in their land. In Napa Harry Napa's affidavit, he asserts that the historical background of custom and tradition needs further inquiry. He also argues that the evidence given by Mr Mataroa confirms that there is a custom which was told to them of the families having different rights to different areas of land.

[24] Over time an understanding developed in Ngati Napa that this area of land was theirs, and they were instructed to only go onto land that no one else had spoken for or already started clearing.

[25] In 1997, their father gave Ms Bergin and her siblings verbal permission to choose a piece of unused land from the land previously used by Napa Tauei Napa for planting. With the 2008 expiry date of the lease in mind, the Napa family had the land surveyed in 1997. It was the understanding of the family that after the lease expired in 2008, as landowners, they would be able to remain on the land.

[26] From 1997, the Napa siblings occupied the land, cleared it, levelled it, landscaped and started building in 2004. Ms Bergin states that two houses and a freestanding storage/laundry building were built by the end of 2006. In 2018, she moved another house onto the land.

Cook Islands Act 1915

[27] In terms of the s 482(2) requirements set out in the Cooks Islands Act 1915, the respondents argue that there is insufficient evidence for this Court to properly be satisfied of the s 482(2)(b) grounds which it must assess in the exercise of its discretion.

[28] Firstly, the respondents state that they were not given adequate notice of the meeting of assembled owners where the votes were cast in favour of the applicants' leases. They submit that this is a breach of the principles of natural justice and all of the s 482(2)(b) requirements. The respondents were not summoned to the meeting of the landowners in which the vote was held even though this vote directly affected them. However, it is worth noting that there was public notice of the September 2021 meeting of the assembled landowners posted in the Cook Islands News, which Ms Bergin saw, and therefore was able to attend the meeting and vote to object.

[29] If the applicants succeed in their application, Ms Bergin submits that the resulting alienation would be inequitable, as she has invested time and money in the land for her children on the belief that she would be entitled to the land when the lease expired. Conversely, she says that the applicant has not invested any time or money in the land. It is in the public interest that someone who invests in the land should be secure in their knowledge that the property would not be alienated from them.

[30] If the Court does grant the application to lease the land to the applicants, the respondents submit that there needs to be compensation given to them for the value of the buildings and other improvements they have made to the land in question.

[31] The respondents argue that the Enua, Ema and Rangi lines have interfered with the Tauei lines customary rights to the land and have not acted in good faith by obtaining leases and occupation rights on Tauei Napa. Furthermore, they state that the applicants' application for leases over lands in which the respondents have clearly invested does not reflect good faith behaviour.

[32] They also dispute the applicants' claims that they have continued building illegally after the injunction, and in fact point to members of other family lines who have done so, while they have tried to respect the injunction in good faith.

[33] Regarding the public interest requirement, the respondents state that a finding for the applicants would result in Mr Napa not being able to complete building his house or live on the land he grew up in. This would lead to a culture of insecurity of tenure for landowners who have invested in developing land. It is in the public interest that a landowner (or landowner in

waiting) who has invested time and money into property of the kopu tangata should be secure in the knowledge that the property will not be alienated from them without evidence that the fellow landowner has no other land or rights to other land.

[34] The respondents argue that the injunction should be dismissed on the grounds of ineffectiveness. Other families have ignored the injunction and continued building with no consequences. There has been no move to enforce the injunction therefore, they claim, it is ineffective.

The Law

[35] The applicants make their application under s 482 of the Cook Islands Act 1915. Section 482 of the Cook Islands Act 1915 provides a number of conditions which the Court must be satisfied of in order to exercise its discretion to confirm an alienation. The relevant subsections are set out below:

> **482. Conditions of confirmation –**
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> (1) Subject to the provisions of this section, the confirmation of an alienation shall be in the discretion of the Court.
>
> (2) No alienation shall be confirmed unless the Court is satisfied as to the following matters:
>
> (a) That the mode of execution of the instrument of alienation is in conformity [to] this Act;
>
> (b) That the alienation is not contrary to equity or good faith or to the interests of the [persons] alienating or to the public interest; and
>
> (c) That the consideration (if any) for the alienation is adequate.

[36] Therefore, no alienation can be confirmed unless the Court is satisfied that it is not contrary to equity or good faith or to the interests of the persons alienating the land. A similar provision was once in force in New Zealand in s 227 of the Māori Affairs Act 1953.[1] In discussing this section, the Māori Appellate Court confirmed that the exercise which the Court must undertake to confirm an alienation is of an "inquisitorial character and only faintly

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1 This section was repealed by the Māori Affairs Act 1967.

resembles a proceeding inter partes", and accordingly the Court must make "all such enquiries" as will enable it to be satisfied that the conditions of alienation have been met.[2]

[37] This application is also made pursuant to s 54 of the Land (Facilitation of Dealings) Act 1970. The Court of Appeal in *Piri v Nicholas* set out that the matters specified in s 482(2) apply to the land division when determining whether to confirm a resolution for alienation under s 54(1) of the Land (Facilitation of Dealings) Act 1970.[3]

[38] Section 54(1) of the Land (Facilitation of Dealings) Act 1970 sets out the powers of the Court:

> **54. Court may confirm, modify or disallow resolutions –**
>
> (1) On application for the confirmation of any resolution the Court subject to the provisions of this Act may –
>
> (a) Confirm the resolution either absolutely or subject to any conditions that it is authorised by this Act to impose; or
>
> (b) Disallow the resolution.

[39] The Court is not obliged to confirm resolutions with majority support from the landowners but must look to all relevant factors and the overall equity of the matter to determine whether confirmation should be granted. This approach can be seen in *Terai Ama*[4] and *Tutara Teatuairo Terei*,[5] where the Court considered deeds of lease supported by a majority of the landowners and declined to confirm them in both cases as a result of other considerations.

Decision

Wider Context

[40] The wider context of these applications relate to a 99-year lease that has come to an end. The entire section of land was leased to William McBirney in 1909 for a term of 99 years. Since 1962, Napa Tauei Napa, Harry Tauei Napa and Henry Tauei Napa held the lease. The lease expired on 24 August 2008.

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2 *Wilson v Herries and others* (1913) NZLR 417 (CA) at 423-424; and *Douglas v Heni Koru Koru* (1920) 39 NZLR 87, as cited in *In Re Pokuru 3G2 and Pokuru Lands Limited* (1958) 28 Waikato MB 375 (28 APWM 375).

3 *Piri v Nicholas* CA 4/19, 24 March 2021 at [97].

4 *Terai Ama nee Joseph – Ekeua Section 25, Vaipae, Aitutaki* (2007) Application No. 382/05.

5 *Tutara Teatuairo Terei – Tikioki 47C*, Takitumu, JP Appeal No. 3/11 (Applications 48/2009, 91/2010).

[41] The Tauei Napa family have had a long history on the land, which Ms Bergin details in her affidavit. On or around 14 February 1962, the 99-year lease was brought by Napa Tauei Napa (the respondent's grandfather), Harry Tauei Napa (Ms Bergin's father) and Henry Tauei Napa (Mr Napa's father). Napa Tauei Napa planted produce on the land, and it became important to the Napa family, as many of them were employed to work on this land. The produce was then sold for export, and to the local Greggs Island food plant.

[42] Having had possession of the land for a number of years, it is unfortunate that no arrangements were made in anticipation of the lease coming to an end.

[43] I would hope that, given a number of 99-year leases in the Cook Islands have expired or are about to expire, owners and lessees would take time to consider arrangements prior to the leases coming to an end. Otherwise similar situations to what has occurred in this case may unfortunately end up in Court.

[44] In this case, the respondents seem to have had an expectation that given they had resided on the land for so long, through the lease, that the lease would either be extended or some other arrangement would be made to allow them to continue their occupation on the land. That has not occurred, and the respondents are now in the position of not having legal authority to occupy the land. Further, the applicants are seeking confirmation of resolutions of assembled owners for those areas occupied by the respondents. As I have noted the ideal outcome would have been that a long time before the lease expired in 2008 all kopu members would have discussed, met and came to an arrangement that was satisfactory to all kopu. Rather we find ourselves before the Court.

[45] To complicate matters further, the respondents find themselves in a position where they have constructed houses, or are in the process of constructing houses, with the knowledge that the lease was to expire and their legal authority to reside on the land was at risk. Despite the lack of certainty to reside on the land, knowing the lease was at an end and a Court injunction was in place, one of the respondents, Tia Bergin-Napa, continued to build on the land.

Is there a custom in relation to these lands?

[46] It is clear that prior to 1962 a number of kopu have lived on and used Paepaeraukuru Section 94L. The Court records shows that in 1953, it was determined that the land was divided into four shares held equally between the Tauei Napa, Enua Napa, Ema Napa and Rangi Napa family lines, with one share per family.

[47] It is also clear that from 1962, Tauei Napa kopu had the lease assigned to them.

[48] The respondents say that it has been agreed, by arrangement or by custom, that the Tauei line can exceed an equal distribution of the lands on Section 94L on the basis that they would obtain less shares in other lands. It is clearly not a case where they are given this area exclusively in exchange for not going onto other kopu lands but rather that Tauei Napa family would have areas on this land that exceeds their share, on the basis that they would not interfere with other family lines in other lands.

[49] There is no clear evidence of any such arrangement or custom. Or that such an arrangement or custom is known outside of the respondents and their kopu.

[50] The respondents say that prior to the lease expiring in 2008 there had been attempts to formalise their occupation. Then from 2008 to 2014 the respondents' father had continued to try and resolve issues by offering to exchange his shares on other lands. It is unclear why Mr Harry Tauei Napa would need to exchange shares if, as submitted by the respondents, there was a clear family arrangement and custom with regard to this land.

[51] Further, there is even uncertainty from the respondent's side as to the custom with Napa Harry Napa asserting that the historical background of custom and tradition needs further inquiry.

[52] It is noted that there appears to have been arrangements in terms of some lands which the kopu have interest in. For example, in Akaoa 72 Teariki, Mataora, only the Ema and Enua lines occupy those lands. However, I find no evidence of an arrangement to suggest that because of the exclusive use of an area by one or two kopu the Tauei Napa line would therefore have more area in Paepaeraukuru Section 94L land.

[53] What does appear certain is that given the Tauei Napa line had a lease they have looked to utilise that situation and have been fortunate to occupy more of Paepaeraukuru Section 94L than the other family lines. At the same time the evidence shows that the Tauei Napa line have also occupied other kopu lands outside of Paepaeraukuru Section 94L.

[54] In short, I am not convinced that there is some custom or kopu arrangement whereby the Tauei Napa line would have more shares in Paepaeraukuru Section 94L on the basis that they would obtain less shares in other lands.

Should the resolutions be confirmed?

[55] At the formal meeting of assembled owners convened by the Court on 24 September 2021 the landowners have agreed by considerable majority (91%) that the land block in question should be allocated to the Ema line from which the applicants are descended. The owners are clearly of the view that there should be an equitable distribution of lands, and this must have been taken into consideration when they did not support these areas being allocated to Tia Napa and Napa Tauei Napa II at the meeting of landowners on 19 June 2020, and then supported the applications of Nooroa Katuke and Tom Kimi Mataroa of the Ema Napa family line at the assembled owners meeting of 24 September 2021. Further, the landowners were aware, when approving the leases for the applicants, that the sections of land were those upon which the two respondents had built houses, or were in the process of building on.

[56] Prior to the meeting of assembled owners convened by the Court on 24 September 2021 there was an application by the respondents (around 2018-2019) to convene a meeting of assembled owners for the purpose of seeking a lease to the sections now the focus of these applications. The majority of owners objected. The respondents were unsuccessful in obtaining support for leases.

[57] Following the respondents' attempts to convene a meeting, there have been two meetings regarding these sections. There was an informal meeting of landowners on 19 June 2020 where a majority of landowners at that meeting supported leases to the applicants. The second meeting, being the meeting of assembled owners convened by the Court on 24 September 2021, clearly supporting the applicants being given leases for these sections.

[58] The requirements of s 482(2)(b) are important safeguards when land is alienated in the Cook Islands. The Court of Appeal in *Piri v Nicholas* set out the broad protective principles that underpin this section. Of particular relevance to the matter at hand is that the Court must exercise this jurisdiction even if it contradicts the wishes of the majority of landowners. The relevant passages are set out below:[6]

> [98] The requirement for the land division to be satisfied that the alienation is "not contrary to equity or good faith or to the interests of the persons alienating or to the public interest" is of paramount significance. Each of these considerations reflects the protective role of the Court, especially the Land Division, when considering confirmation of alienations of native land in the Cook Islands. As the Privy Council pointed out in *Tumu v Tumu*, this was one of the principal purposes of the CI Act and even the consent of all of the landowners to an alienation will not override the operation of the land law system of the Cook Islands. The considerations in s 482(2)(b) reinforce the responsibility of the Court to ensure fairness between all landowners and to take into account the wider "public interest" ramifications of the proposed alienation.
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> [99] As a matter of principle, these considerations are relevant whenever the Court is evaluating an alienation of native land whether in the context of confirming an instrument under the CI Act or a landowners' resolution under the LFDA. Indeed these considerations are likely to be particularly important when the Court is evaluating a majority resolution of landowners because the interests of the minority may require special protection. As Savage J recognised in his report, the Land Division is not obliged to confirm resolutions with majority support from landowners.

[59] The applicants have received overwhelming majority support for their respective leases from the landowners in attendance at the 24 September 2021 meeting. Some 91% of people at the meeting were in favour of the leases being awarded to the applicants. That is important in terms of kopu support for matters. But the wishes of the majority are not the only factor to be taken into consideration.

[60] The applicants have followed proper processes in seeking approval from the landowners.

[61] There also appears to have been attempts by the applicants and the kopu to resolve the issue with the respondents. For many years, the landowners have been trying in good faith to resolve the Paepaeraukuru land allocation and the issue of the Tauei family exceeding their shares, especially those lands with houses built on them. Maps have been attempted to be drawn up, and the final map was approved by the majority of the family on the principle that if any

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6 *Piri v Nicholas* CA 4/19, 24 March 2021.

family member from the Tauei line had built houses without approval they were entitled to keep their house if they were living in it. However, the applicants submit that Ms Bergin and Mr Napa did not reside in their houses. Under the family arrangement, this meant that they would lose these sections of land.

[62] I do get a sense that the applicants and owners do have an issue with kopu having houses on the land but using those houses, not to live in, but for rental and accommodation for non-kopu members. It is noted that Tia Bergan-Napa has not used the buildings for her accommodation but has rented those units out for a number of years. It is also noted that the respondents' siblings Piltz Napa and Akeriko Napa have decided to live in the houses they built without approval and have agreement from the owners that they keep their houses. Tia Napa and Napa Tauei Napa II seek to retain their houses but not live in the houses they have built.

[63] While all the family lines have equal shares in the land, from the evidence provided to the Court the Tauei line occupies more land than any of the other lines. The evidence also shows that the Ema line, to which the applicants belong, is undersubscribed by about 50%. If the respondents received rights to the land that is the subject of this application this inequity would increase, with the division of the land covered by the leases being 1600m^2 for the Ema line and 12,951m^2 for the Tauei line.

[64] In my view the applicants have acted in good faith. They have made sure to follow the proper processes and seek approval from the other landowners. The applicants' kopu, along with other kopu, have tried to resolve the issues. In contrast, the respondents have constructed houses on the land in question when they knew that alienations in their names had not been granted, and have constructed buildings on the land after an injunction had been put in place.

Other kopu members on the land

[65] The Court was made aware of the fact that there are other kopu members on the land who do not have formal Court authority, by way of occupation order or a lease, to reside on the land. But the kopu has not complained about those residences. Firstly, I can only deal with the applications before the Court. I do not have applications before me with regard to other land areas on Paepaeraukuru 94L.

Compensation

[66] The respondents have submitted that if the Court does grant the application, to lease the land to the applicants, there needs to be compensation given to the respondents for the value of the buildings and other improvements they have made to the land in question.

[67] That is not a matter that I can decide based on this application. Clearly there will need to be a further application if the kopu are unable to resolve this issue. It may be that the prior lease provided for compensation for improvements at the termination of the lease and that may provide some guidance to the kopu.

Decision

[68] I am satisfied that the mode of execution of the instruments of alienation conforms with the requirements of the Act.

[69] For the reasons noted above, I am also satisfied that the granting of the leases is not contrary to equity or good faith or to the interest of the persons alienating or to the public interest.

[70] The deeds of lease have been approved by the Lease and Approval Tribunal on 15 October 2021.

[71] Given these are family type leases, the Court grants exemptions for valuations.

[72] The Court therefore confirms the resolutions of assembled owners of 24 September 2021 confirming deeds of leases in respect of the two applicants.

[73] A copy of this decision is to be sent to all parties.

Dated at Rotorua, New Zealand this 15th day of May 2023.

C T Coxhead
JUSTICE