

**IN THE COURT OF APPEAL NIUE  
(LAND DIVISION)**

**Application No. 1189/62/6**

IN THE MATTER      Section 3 Block III Alofi District (Part Tapeu), Fo:  
Plan 1308, Volume N 21 Folio 65

BETWEEN            CHARLIE FUKU TONGAHAI  
Appellant

AND                    SONIA TAFATU, STANLEY TAFATU  
AND MORRIS TAFATU  
Respondents

Hearing:            25 March 2015

Coram:              PJ Savage, CJ  
C T Coxhead J  
S F Reeves J

Appearances:      Romero Toailoa, for the Appellant and  
Phillip Allan, for the Respondents

Judgment:         27 October 2015

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**DECISION OF THE COURT OF APPEAL**

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## Introduction

[1] The respondents, Sonia Tafatu and Stanley Tafatu, were granted a partition order on 1 October 2007. Ms Tafatu is a blood member of the mangafaoa associated with the land, being the niece of the appellant and a granddaughter of Tuiolo Tongahai, the matriarch of the mangafaoa.

[2] At the time the respondent's application for partition and for appointment as leveki mangafaoa were made relations with the mangafaoa were harmonious. Mr Tongahai, as the leveki mangafaoa of the parent title, supported the partition application. Following the grant of the partition, the respondents built and developed a restaurant business on the land that is currently in operation.

[3] Disputes have recently arisen between the respondents and the mangafaoa, with the appellant alleging that the respondents have offended the mangafaoa and breached Niue custom, sufficient to warrant their eviction from the mangafaoa land and the cancellation of the partition order. On 16 December 2014 Isaac J declined to grant such orders.

[4] Charlie Fuku Tongahai appeals the judgment of Isaac J in the High Court of Niue dated 16 December 2014. In that judgment Isaac J:<sup>1</sup>

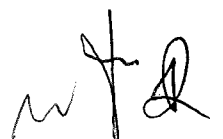
- (a) Dismissed the application to cancel the partition order in relation to Section 3 Block III Alofi District (Part Tapeu), Fonuakula Plan 1308, Volume N 21 Folio 65 ("the land"); and
- (b) Dismissed two related applications concerning the eviction of the respondents from the land.

## Procedural History

[5] The applicant filed the notice of appeal on 13 January 2015. Shortly thereafter, on 27 January 2015, the Chief Justice issued directions for notice and service of the proceedings and set the matter down for hearing. The hearing was subsequently held on 25 March 2015.

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<sup>1</sup> *Tongahai v Tafatu – Section 3 Blk III, Alofi District (Part Tapeu)* (2014) Land Court Minute Book, Volume 20, Folio 2



## The Lower Court Proceedings

[6] As mentioned, in the Lower Court Mr Tongahai sought an order from the Court rescinding the partition order made on 1 October 2007 as well as the order appointing the respondents as leveki mangafaoa.<sup>2</sup> Mr Tongahai also filed applications seeking the eviction of the respondents from the land and to reinstate Mr Tongahai as the leveki mangafaoa.

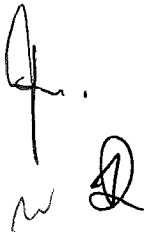
[7] Before the Lower Court, Mr Tongahai argued that, while there was no specific provision relating to the cancellation of a partition, s 47 of the Niue Amendment Act (No.2) 1968 (“the NAA”) provided the Court with the general jurisdiction to hear and determine his applications. He submitted that the mangafaoa is the core unit of ownership and once that ownership is determined it cannot be altered. As such, the members of the mangafaoa can only enjoy occupational and possessory rights, by either sharing in the use of the land in undivided shares, by way of formal occupation order, or by way of partition.

[8] Mr Tongahai further argued that in order for a member of the mangafaoa to enjoy and retain such rights they must be loyal to the mangafaoa and remain an active member, by continuing to perform their customary obligations. He contended that the respondents had rebelled against the mangafaoa, in particular disrespecting both the elders of the mangafaoa and the leveki mangafaoa. He claimed that in Niuean custom such misconduct would justify the severance of the right of the respondents to use and occupy the mangafaoa land and thereby justify their eviction.

[9] The respondents opposed the application. They agreed that the Court had jurisdiction to make partition orders and amend them as necessary and accepted that Niuean custom is an aid to statutory interpretation. However, the respondents argued that the tenor of s 36 of the Land Act 1969 (“the Land Act”) allowed the Court to separate out the totality of interests of the mangafaoa through partition, for subsets of mangafaoa to enjoy. That section, they submitted, specifically makes provision for partition to occur where there were irreconcilable family disputes. The respondents argued that the Land Act did not however provide for revocation of partition orders due to a dispute, nor did it provide for complete removal from the membership of mangafaoa.

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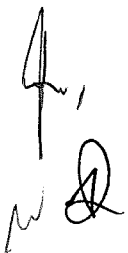
<sup>2</sup> Land Court Minute Book, Volume 13, Folio 244.

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[10] In dismissing the application, Isaac J first noted that the granting of the partition order was not being questioned; the main issue to be determined was whether the Court has jurisdiction to rescind the order for partition. He then continued on to examine the jurisdiction of the Court per s 47 of the NAA and s 34 of the Land Act. Isaac J noted that per s 34, the Court has exclusive jurisdiction to partition Niuean land and importantly can exercise its discretion where the leveki mangafaoa wishes to allocate a portion of land to a member of the mangafaoa, where the mangafaoa has become unduly large, or where irreconcilable family disputes occur. He noted that once a partition is granted, the effect of the order is essentially to determine a new title from the parent block. Isaac J also considered that although the partitioned land remains mangafaoa land, the common ancestor can change and new or additional leveki mangafaoa can be appointed. In essence, Isaac J determined that the partition order creates a new title where new rights and obligations can arise.

[11] Isaac J did not accept however that the new title created could be cancelled in terms of s 47 of the NAA where members of the mangafaoa had breached Niuean custom. He considered that s 47 of the NAA provides the Court with general jurisdiction to hear and determine any application relating to the ownership, possession, occupation or utilisation of Niuean land, but, this is only utilised when there are no specific provisions set out in the Land Act. He continued on to note that the Land Act contains specific provisions in relation to partitions but does not provide the ability to cancel or revoke the newly partitioned title. In fact, he pointed out, that s 52 of the NAA reinforces that all orders of the Court affecting title shall bind all persons having an interest in that land. Isaac J observed that the only mechanism available to annul orders of the Court is contained in s 54 of the NAA, where orders can be annulled if obtained by fraud.

[12] In terms of the dispute between the mangafaoa and the respondents, Isaac J pointed out that such disputes are not uncommon in Niuean custom and close family members often challenge each other for rights to land. He did not accept the applicant's argument that the dispute necessitated the removal of the respondents from the partitioned land, especially given the provision in s 36 of the Land Act, which suggests the solution to irreconcilable family disputes, can in fact be the partition of land. He noted that even where relationships between members of the mangafaoa have broken down, they are still linked by blood to land and that link cannot be broken. To do so would be contrary to Niuean custom.



[13] In any case, Isaac J determined that the respondents had expended time and capital in developing a business on the land based, on the granting of the partition and it would be inequitable and unconscionable to the respondents to cancel the partition order.

### **Appellants' Submissions**

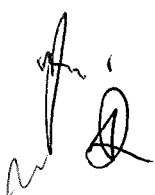
[14] Counsel for the appellant submitted that Isaac J erred in law by concluding that the Court had no jurisdiction to consider the appellants application; that s 47 of the NAA did not apply; and that the partition provisions in the Land Act provided a statutory scheme for creating new titles and for determining a new common ancestor.

[15] In addition, Counsel submitted that Isaac had erred in fact by concluding that Niuean custom does not recognise eviction of a member of the mangafaoa and failing to accept that the cultural norms and obligations of a member to his or her mangafaoa is the underlying factor which determines a members entitlement or continuing entitlement to the use and enjoyment of mangafaoa land but not blood link alone. Counsel argued that to take blood link alone as the determining factor would over time, create individual owners independent of the mangafaoa which is contrary to Niuean custom and contrary to the spirit and purport of the Land Act.

[16] Counsel submitted that there are three issues for this Court to determine:

- (a) Whether Isaac J was correct in his view that the High Court does not have jurisdiction to deal with an application to rescind a partition order and appointment of leveki mangafaoa;
- (b) Whether Isaac J was correct in his view that a partitioning of land results in the creation of a new title independent of the parent title; and
- (c) Whether Isaac J was correct in his view that under Niuean custom, blood connection ties a person's right to mangafaoa land and cannot be broken?

[17] In relation to the first issue, Counsel for the appellant submitted that Isaac J was entitled to use the general provisions in s 47 of the NAA to rescind the partition order, given that there was no specific power to do so in the Land Act. Counsel considered that taking a restrictive view of the Courts general powers per s 47 was unjustified and at odds with the



views of Isaac J that s 47 gives general jurisdiction for matters not provided for. Counsel said that to take such an approach would mean the Court has no jurisdiction to deal with matters not specifically provided for by legislation which cannot be correct.

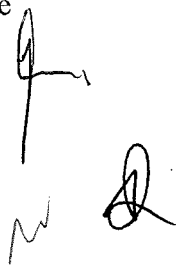
[18] Counsel further submitted that the opening words of s 47 of the NAA “in addition”, make it clear that the general jurisdiction of the Court is inclusive rather than exclusive and widens the scope of the Court’s jurisdiction rather than restricting it.

[19] Counsel argued that all that was needed to invoke the jurisdiction of the Court and enable the Court to make the orders sought, was that the application relate to ownership, possession, occupation or utilisation of Niuean Land. As the application did relate to those matters, it was within the scope of the general jurisdiction of the Court.

[20] In addition counsel submitted that if the Court accepted the findings of the Lower Court regarding jurisdiction, it would be tantamount to finding that the Court could not deal with any matter not specifically provided for. They assert that such a finding could not be correct as there would be many eventualities not considered by the law-makers, which the general jurisdiction provisions specifically contemplate. If the law-makers had intended that a partition order could never be revoked, except in the case of fraud, they would have expressly stated that.

[21] As regards the second issue counsel submitted that Isaac J was wrong in finding that a partition in effect creates a separate title and severs the allotted land from the parent title, to the extent that the parent mangafaoa have no control over the allotted land. Counsel argued that such severance would create an alienation of Niuean customary land akin to individual ownership, which is not in line with Niuean custom.

[22] Counsel submitted that the Land Act provides a legislative scheme for the determination of title and ownership of Niuean Land which is held in communal ownership by the mangafaoa, the members of which are ascertained by determining the common ancestor. Counsel stated that a leveki mangafaoa is appointed and administers the use and occupation of the land. Counsel also pointed out that occupation orders and partition orders are simply mechanisms for divesting occupational or possessory rights to members of the

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mangafaoa but ownership of the land is retained by the mangafaoa at all times. Partition is therefore, according to counsel, only a subdivision of the physical land and not the legal title.

[23] Given this, counsel argued that the findings of Isaac J attempt to import ownership concepts into Niuean law that could not have been intended by law-makers and such application of the law will erode the Niuean concepts of customary land ownership.

[24] As to the third issue, counsel submitted that while Isaac J was correct to find that blood alone defines a person's connection to mangafaoa land, it is not the paramount factor in determining rights to use and occupy the land. Counsel submitted that in accordance with Niuean custom, blood connection must be accompanied by loyalty, continuing good relations with the mangafaoa, and continuing performance of obligations to the mangafaoa. Counsel contended that it naturally flowed that if you sever your affiliation to the mangafaoa your rights to use and occupy the land can be similarly severed.

[25] Counsel also pointed to publications in relation to Niuean custom to show that improper behaviour can lead to reduced inheritance and sometimes complete exclusion. The appellants contended that there was ample evidence that the respondents had violated their cultural obligations to the degree that their eviction from the mangafaoa land could be justified.

[26] Counsel for the respondents submitted that if the Court is not minded to grant the orders sought, alternative orders should be made to provide that in continuing to occupy the land the respondents need to comply with certain conditions. Counsel proposed that the respondents should apologise to the matua tupuna and the leveki mangafaoa and should file with the Court written undertakings to respect them and maintain good relations and harmony and render support to the mangafaoa in accordance with Niuean custom. Counsel also said that the respondents should agree to be removed as leveki mangafaoa and be replaced with the appellant, Juliana Tongahai and Patricia Tongahai as joint leveki mangafaoa.



[27] In conclusion Counsel submitted that this alternative could provide a practical solution to the dispute between the parties.

### **Respondent's submissions**

[28] The respondents rely on the submissions presented at the Lower Court hearing. At that hearing Ms Drummond, for the respondents submitted that the Court, as per the Land Act, has the ability to make orders to partition land and to amend those orders as necessary.

[29] Ms Drummond had also accepted that Niuean custom is both an aid to statutory interpretation and is also to be given due consideration in the exercise of some discretion within the Act itself. However counsel did not accept that custom can be permitted to strain interpretation beyond breaking point or to provide powers and abilities not granted by statute.

[30] Counsel further submitted that the definition of mangafaoa contained within s 2 of the Land Act does not provide for an individual to be removed from the mangafaoa, with the exception of legal adoption.

[31] In addition it was argued that the two important principles that operate in relation to the Court's approach to partition are firstly that while the totality of the land established by an ancestor should be held for the benefit of his or her descendants (the mangafaoa), it is not the case that any particular piece of land will only be held for the benefit of the totality of the beneficiaries.

[32] Before us at appeal, Mr Allan for the respondents argued that as there had been no hearing to determine the facts that the Court would need to determine if various allegations made by the appellant were accepted. Counsel stated that if the Court determines that it does have jurisdiction to cancel a partition order (and he argues the Court does not have jurisdiction) then the Court still needs to hear the matter as to whether eviction and cancellation of the order should take place which is a fact finding matter. In his submission, if the Court finds there is jurisdiction then it must send the matter back to the High Court for a substantive hearing as whether cancellation of the partition order should take place.



[33] Counsel also submitted that partition is provided for so a subset of mangafaoa can enjoy a portion of the land. The use and enjoyment of that land is determined by the leveki. Counsel argued that all situations mentioned by the appellant as to why a Court must have power to cancel orders are dealt with by specific provisions in the Land Act. In that:

- (a) If there is no mangafaoa the Court can determine title. It is not cancelling a partition;
- (b) If there are errors as to who is given a partition, then s 54 allows for correction; and
- (c) If a wrong parcel of land is partitioned the Court can deal with this through a rehearing.

[34] In terms of s 47 Counsel submitted that while it provides the Court with wider powers there is still a need to come within the ambit of the section and the 1968 Act. Counsel argued that in determining whether the Court has jurisdiction to cancel the partition, it needs to look at the statutory scheme, customary matters and the overall justice and equity of a case. In Counsel's view, Isaac J did that.

### **The Law**

[35] Section 47 of the NAA sets out the general jurisdiction of the Land Court as follows:

#### **47 Jurisdiction of the Land Court**

- (1) In addition to any jurisdiction specifically conferred upon the Land Court by any enactment other than this section, the Land Court shall have exclusive jurisdiction:
  - (a) To hear and determine any application to the Land Court relating to the ownership, possession, occupation, or utilisation of Niuean land, or to any right, title, estate or interest in Niuean land or in the proceeds of any alienation of it;
  - (b) To determine the relative interests of the owners or the occupiers in any Niuean land;
  - (c) To hear and determine any application for the appointment of a *Leveki Mangafaoa* in respect of any Niuean land;
  - (d) To hear and determine any claim to recover damages for trespass or any other injury to Niuean land;
  - (e) To grant an injunction against any person in respect of actual or threatened trespass or any other injury to Niuean land;

- (f) To grant an injunction prohibiting any person from dealing with or doing any injury to any property which is the subject-matter of any application to the Land Court;
- (g) To create easements in gross over Niuean land;
- (h) To make any order recording the determination of any matter relating to land or any interest in it, whether provided for in this Act or other enactment;
- (i) To authorise the survey of any land.

(2) The grant of an easement under subsection (1)(g) may, if the Court thinks fit, be made subject to the payment of compensation in respect of it, or to any other conditions that the Court may impose.

[36] Section 52 of the NAA provides that all orders of the land Court determining or affecting title to Niuean land shall bind all persons having an interest in that land:

#### **52 Orders bind all persons interested**

Every order of the Land Court determining or affecting the title to Niuean land or to any estate or interest in it shall bind all persons having any interest in that land, whether or not they are parties to or have notice of the proceedings in which the order is made, and whether or not they are subject to any disability.

[37] Part 3 of the Land Act also sets out the provisions in relation to the partition of Niuean land. Sections 34 to 39 provide:

#### **34 Jurisdiction to partition Niuean land**

- (1) The Court shall have exclusive jurisdiction to partition Niuean land.
- (2) The jurisdiction to partition shall be discretionary and the Court may refuse to exercise it in any case in which it is of the opinion that partition would be inexpedient in the public interest or in the interests of the Mangafaoa or other persons interested in the land.

#### **35 Court may apportion rights and obligations**

- (1) When a partition order is made, the Court may, in that order or in any subsequent order made on the application of any person interested, or of the Registrar, or of its own motion, apportion or adjust as between the several pieces into which the land has been partitioned all rights, obligations, or liabilities arising from any lease, occupation order, or charge to which the land is subject at the date of the partition of it and every such order of apportionment or adjustment shall have effect according to its tenor in the same manner in all respects as if all necessary transfers, releases, covenants, and other dispositions or agreements had been duly made in that behalf by all persons concerned.
- (2) In the exercise of its powers under this section the Court shall not make any apportionment or adjustment without the consent of each and every –



- (a) Lessee of the land; and
  - (b) Person having an interest in the land, by virtue of an order made under section 31, where the order has been made upon the terms mentioned in that section; and
  - (c) Person or body in whose favour a security charge created under section 32, subsists over the land or over any interest in the land.
- (3) Subject to subsection (2) the Court may exercise the powers of apportionment or adjustment, conferred upon it by subsection (1).

### **36 Discretionary powers of Court**

In partitioning any land the Court may exercise the following discretionary powers –

- (a) It may where the Leveki Mangafaoa wishes to allocate a portion of the land to a member of the Mangafaoa or the Mangafaoa has become unduly large or in cases of irreconcilable family disputes, partition the land among groups of members of the Mangafaoa on what appears to the Court to be the general desire of the persons concerned to be just and equitable;
- (b) It shall avoid, as far as practicable, the subdivision of any land into areas which because of their smallness or their configuration or for any other reason, are unsuitable for separate ownership or occupation;
- (c) It may appoint new Leveki Mangafaoa in respect of the pieces of land affected by any partition orders.

### **37 Combination of several areas of land**

When the Mangafaoa of one area of land is also the Mangafaoa of any other areas of land, the Court may, for the purposes of partition between groups of members of the Mangafaoa, treat those several areas as a single area owned by them and make an order or orders of partition accordingly.

### **38 Saving of interests charged on partitioned land**

If, on the partition of any land, the share or interest of any person is subject to any right, charge, or interest vested in any other person, that right, charge, or interest shall, subject to any apportionment or adjustment made under section 35 attach to and affect the land or interest that is allocated by the partition order to the owners of the first-mentioned share or interest.

### **39 Entries in Land Register**

When any land is partitioned by the Court, the Registrar shall give effect to the partition by entries in the land Register, recording particulars of any new section thereby created and to the extent necessary for cancelling or amending any former entry.

## **Issues**

[38] The issue for the Court to determine is whether the court has the jurisdiction to cancel the partition order made on 1 October 2007. In determining this matter it is necessary to consider the following:

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- (a) What is a partition in the Niuean context?;
- (b) Does a partition order create a separate title?; and
- (c) Can the Court cancel a partition order?

### **What is a partition in the Niuean context?**

#### *General law context*

[39] In a general law context, a partition involves the destruction of the unity of possession by the division of the land held in common ownership.<sup>3</sup> Partition refers to the dividing of land held in joint tenancy, or in tenancy in common, between the parties entitled thereto; so that the joint tenancy or the tenancy in common is destroyed, and each party has henceforth an undivided share. This may be done by agreement, or compulsorily by a partition action.<sup>4</sup>

#### *Discussion*

[40] In accordance with Niuean law land must be held in communal ownership – with the mangafaoa. There is no individual ownership. As such the Niuean concept of partition will necessarily vary from that of the general law relating to partitions where destruction of the unity of possession is the key consequence of partition.

[41] Neither the NAA nor Land Act contain specific definitions of partition however ss 34 to 39 of the Land Act do give the Niuean Land Court exclusive jurisdiction in relation to partitions. The provisions are silent as to the effect of a partition but the general tenor suggests that underlying ownership of the land continues to reside with the mangafaoa and the Court should consider the interests of the mangafaoa in exercising its discretion as to whether to grant a partition.<sup>5</sup>

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<sup>3</sup> G W Hinde, N R Campbell and Peter Twist, *Principles of Real Property Law* (2007 Lexis Nexis Wellington) at 816.

<sup>4</sup> Peter Spiller, *Butterworth's Law Dictionary* (7<sup>th</sup> ed online 2006).

<sup>5</sup> Land Act 1969, ss 34(2), 36, 37.

[42] This view is strengthened by the fact that where the Court is required to determine title to Niuean land it is required to do so in accordance with Niuean custom and usage.<sup>6</sup> Ownership is determined by ascertaining and declaring the mangafaoa of that land by reference to the common ancestor.<sup>7</sup> Relative interests of the mangafaoa in the land can be determined by the Court but only for the purposes of allocating money and not it seems for ownership purposes.<sup>8</sup> A leveki mangafaoa is then appointed, who must be supported by the mangafaoa, and that person has the power to control the occupation and use of the land.<sup>9</sup> The exercise of the leveki mangafaoa's powers must be done in accordance with Niuean custom and in consultation with the mangafaoa.

[43] The ownership of land in Niue is communal and held by the mangafaoa. While partition orders can be granted by the Court, and new leveki mangafaoa appointed for each partitioned area, this can only be done between members of the mangafaoa and so the ultimate ownership is still held with the mangafaoa whether that be the same mangafaoa of the common ancestor or a subset of the original mangafaoa through a different common ancestor.

[44] In this regard the partition of Niuean land is closer to the general definition of subdivision or of a partition of Māori land, as common ownership between the areas is still capable of being maintained.

#### *Māori Land Context*

[45] The Māori land situation is of some assistance in determining the law of partitions in Niue. The Māori Land Court has exclusive jurisdiction to make partition orders in respect of Māori land, which is governed by Part 14 of Te Ture Whenua Māori Act 1993.<sup>10</sup> The Court can partition the land into parcels held by a single owner, joint tenants or tenants in common. In doing so however, the owners are not prevented from retaining an interest in the residue of the land.<sup>11</sup> This distinguishes Māori land partitions from the general definition of partitions as the common ownership can still exist.

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<sup>6</sup> Land Act 1969, s 10.

<sup>7</sup> Land Act 1969, s 12.

<sup>8</sup> Land Act 1969, s 13.

<sup>9</sup> Land Act 1969, ss 14, 15.

<sup>10</sup> Te Ture Whenua Māori Act 1993, s 287.

<sup>11</sup> Te Ture Whenua Māori Act 1993, s 290(2).

[46] In the case of *Heta – Taiharuru 4C3B* the Māori Land Court considered at length its jurisdiction of the Māori Land Court to make partition orders.<sup>12</sup> In that decision Judge Ambler examined the nature of Māori Land Court partition orders as compared with partitions and subdivisions at general law.

[47] The Judge considered that partition under the 1993 Act had developed considerably to a more expansive concept than that which applies at general law.

[48] Judge Ambler went on to consider the Māori Land Courts ability to make partition orders under TTWMA and stated that:<sup>13</sup>

[47] The Court's partition jurisdiction developed further under the 1993 Act to the point that the term "partition" may be somewhat of a misnomer. In truth, the Court's powers are concerned with the rationalisation of the community of ownership rather than its destruction. This is apparent from the Court's express powers and the kaupapa of the 1993 Act.

[48] The principal reason why partition under the 1993 Act is not synonymous with the orthodox definition of partition in Halsbury and Principles of Real Property is that s 290(2) expressly allows the community of ownership to continue:

Nothing in this Part of this Act shall prevent any such owner from retaining any interest in the residue of the land.

[49] The continuation of the community of ownership is anathema to partition at general law. Partition, whether under the Partition Acts 1539 and 1540 or s 140 of the Property Law Act 1952 or s 25 of the Property (Relationships) Act 1976 or s 342 of the Property Law Act 2007, is only concerned with the complete separation of ownership interests by either the division or sale of the land.

...

[55] Thus, the purpose of partition under the 1993 Act is not the destruction of the community of ownership but rather the rationalising of land holdings – that is, the reorganising of titles – by the definition of separate parcels. Further, it can only be done for the purpose of facilitating the use and occupation of the land by its owners. It has nothing in common with the general law where the focus is on separating ownership interests. Indeed, given the Court's exclusive jurisdiction under s 287(1), any "right" under the general law to demand the separation of interests in Māori freehold land is long gone.

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<sup>12</sup> *Heta – Taiharuru 4C3B* (2010) 13 Taitokerau MB 203 (13 TTK 203).

<sup>13</sup> *Ibid* at [47].

[56] The Court's jurisdiction to partition is broadly stated. It is not limited to "partition proper" as applies at general law but allows for an unlimited array and combination of title orders that define separate parcels of land. Importantly, there is no requirement that the owners end up with separately held titles. Rather, the sole requirement of partition orders under s 289(1) is that they define separate parcels which, importantly, may in accordance with s 290 be held jointly.

### *Discussion*

[49] While the Māori Land Courts decision in *Heta – Taiharuru 4C3B*<sup>14</sup> is fact specific to the matter before the Court it does give some insight into a view of the law of partition in relation to communal ownership in the Māori context.

[50] By contrast, Niuean law does not specifically provide for an owner to retain any interest in the land partitioned. However, given the communal ownership basis upon which title is determined - common ownership is preserved upon partition, rather than being destroyed. In other words, upon partition common ownership must continue to exist.

[51] Partitions under Niuean law should be seen - not as the destruction of community of ownership but rather as the rationalising of land holdings – that is, the reorganising of titles by the definition of separate parcels and the issuing of new titles.

[52] The Niuean situation as contemplated by the Land Act must be one where partition does not call for the complete separation of ownership interest with the issuing of a new title, but looks to preserve common ownership within the mangafaoa. If the land being partitioned was to issue in a new mangafaoa, or a subset of the original mangafaoa, with a different common ancestor from that of the originating land block, then that would surely require a title determination to accompany the partition application.

[53] In our view Niuean law provides that a partition is a subdivision of the physical land and also the legal title but not a partition of the underlying mangafaoa ownership.

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<sup>14</sup> Ibid.



## **Does a partition create a separate title?**

[54] Partitions at general law and partitions of Māori land both result in the creation of separate certificates of title, regardless of whether common ownership is retained or not. Such titles are generally created on the registration of partition orders and is therefore a two-stage process; the making of the partition order and the effecting of the partition through registration of the order or other partition instrument.

[55] The Niue situation is similar in that when a partition is ordered the land is surveyed to expressly show the area to be partitioned and recorded as a new title.

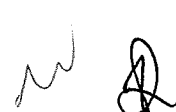
[56] Section 35 of the Land Act contemplates that there will be a separation of land and separation of title with leases, occupation orders or charges being appropriately apportioned to the specific land blocks and specific titles that they relate to.

[57] To have a partition in cases of irreconcilable family disputes and have the disputing families upon one title runs contrary to s 36(a). It is difficult to contemplate the situation where a partition is given in the case of irreconcilable family disputes and then the families are not given separate title.

[58] Section 36(c) allows the Court to appoint new leveki mangafaoa in respect of the pieces of land affected by any partition order. This also indicates that a new title is contemplated under the partition regime.

[59] Section 39 of the Land Act provides that when any land is partitioned, the Registrar shall give effect to the partition by an entry in the Land Register recording particulars of any new section created. Therefore requiring a separate and new certificate of title to issue.

[60] As noted above in the Niuean context a partition is a subdivision of the physical land and also the legal title but not necessarily a division of the underlying mangafaoa ownership.





[61] When the Court orders a partition in Niue the resulting legal effect of that order will necessarily see:

- (a) a division of the physical land into two or more blocks – completed with a survey;
- (b) the appointment of a leveki (it maybe the same person or a different person) for the newly partitioned block;
- (c) the issuing of a new title for the partition block that is independent of the parent title; and
- (d) the recording of the common ancestor on the new title.

#### **Can the Court cancel a partition order?**

[62] In the New Zealand general law context there is no specific provision for cancellation of partitions.<sup>15</sup> This is not surprising given the effects of a cancellation of a partition. A cancellation of a partition will cancel the division of the separation of the physical land but more importantly it will cancel a person's or persons' right to a separate title to the land.

[63] In terms of Māori land however the Māori Land Court, has a specific power to cancel partitions under s 306 of Te Ture Whenua Māori Act 1993. In the Māori land context cancellation of a partition results in the land comprised in the partition being again held under the former instrument of title as if no partition had taken place; and all orders of the Court and alienations affecting interests in the land made or effected since the date of the order cancelled, shall be deemed to relate to the former title and the interests under it.

[64] In relation to Niuean land, there is no specific power to cancel a partition set out in either the NAA or the Land Act other than in cases of fraud. In fact rather than provide for the cancellation of title the legislation provides by s 52 that every order of the Land Court determining or affecting title shall bind all persons having an interest in that land.

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<sup>15</sup> Property Law Act 2007, s 338.



[65] Section 54 of the Land Act provides that the Court can annul orders obtained by fraud. In these circumstances a cancellation of a partition order will necessarily see the cancellation of:

- (a) a division of the physical land from two or more blocks to return to one block;
- (b) an approved survey;
- (c) the appointment of a leveki;
- (d) a new title for the partition blocked that is independent of the parent title;  
and
- (e) the recording of the common ancestor on the new title.

[66] The cancellation of a partition will also likely result in the cancellation of a mangafafoa's entitlement to the separate title they received upon partition. The issuing of land title and entitlements that append to that title is a serious matter as is the cancellation of any mangafafoa's land title.

[67] In this case, the appellants sought to persuade us that jurisdiction existed under s 47 of the NAA. While this section provides a general power for the Court to hear and determine any application relating to the ownership, possession, occupation or utilisation of Niuean land, we do not read the provision as extending to provide jurisdiction for the cancellation of partition orders and therefore the cancellation of title to land. Further s 47 must be read in light of s 52 which clearly provides for orders of the Court determining or affecting title to Niuean land being final, unless there is fraud.

[68] Section 47 provides jurisdiction for the Land Court to hear matters *relating* to ownership, possession, occupation, or utilisation of Niuean land, or to any right, title, estate or interest in Niuean land or in the proceeds of any alienation of it. That is the Court has jurisdiction to hear matters *relating* to title and ownership - once that title and ownership have been determined.

M

N Q

[69] As has been noted counsel for the appellants argued that the opening words of s 47 of the NAA “in addition”, make it clear that the general jurisdiction is inclusive rather than exclusive and widens the scope of the Court’s jurisdiction. The overall tenor of the submissions was that, where the specific provisions relating to partitions are silent as to the power to rescind, revoke or cancel partition orders, the general jurisdiction can be used to supplement those provisions. This essentially allows for an application to rescind or cancel a partition order to be caught by the term “any application” in s 47 of the NAA. The appellants argued therefore that all that was needed to invoke the jurisdiction of the Court and enable the Court to make the orders sought, was that the application relate to ownership, possession, occupation or utilisation of Niue land. As the present application did relate to those matters, it was therefore argued to be within the scope of the general jurisdiction of the Court.

[70] We do not agree. Section 52 of the Land Act and 47 of the NAA, in our view, do not extend to allow the Court to hear matters involving of determination and cancellation of ownership to title. Section 47 focuses on matters relating to title, not determining and cancelling title. If Parliament intended to contemplate such a drastic step as the cancellation of a mangafaoa’s title to land obtained through a partition order - then Parliament should have provided specific jurisdiction for this Court to do so. No specific or general jurisdiction exist in the current legislation.

[71] We therefore conclude that the Court has no jurisdiction to cancel a partition order unless that title is obtained by fraud.

### **Other matters raised on appeal**

[72] For completeness we note the appellants raised other issues including whether the Lower Court was correct in finding:

- (a) that a partition of land results in the creation of a new title independent of the parent title; and
- (b) in accordance with Niuean custom, blood connection ties a person’s right to mangafaoa land and cannot be broken.

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W Q


[73] Given that the Court lacks jurisdiction to cancel a partition order, we consider that there is no need for us to determine whether in accordance with Niue custom blood connection ties a person's right to mangafaoa land and cannot be broken.

### **Decision**

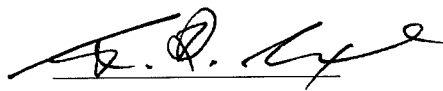
[74] We agree with the Isaac J in his finding that the High Court did not have jurisdiction to cancel the partition order. Having reached that conclusion it is not necessary to refer the matter back to the High Court for determination. The appeal is dismissed.

[75] We are of the view that costs should lie where they fall. However, if either counsel have a different view then they have 14 days from the date they receive this decisions to file submissions with the Court.

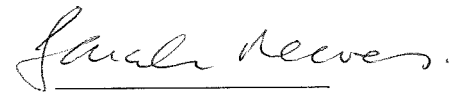
Dated at Rotorua on the 27<sup>th</sup> day of October 2015.



P J Savage CJ



C T Coxhead J



S F Reeves J