IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND, NEW ZEALAND

CA8/03
(Land 146/96)

IN THE MATTER	**of Article 60(3) of the Constitution**
BETWEEN:	**the descendants of STANLEY HEATHER**
	Appellants
A N D:	**TAUTU MATAIAPO TUTARA also known as MENE ROI HEATHER**
	Respondent

Hearing:	**25 September 2003**
Coram:	**Casey JA (Presiding)** **Smellie JA** **Williams JA**
Appearances:	**Mrs T P Browne for Appellants** **M C Mitchell for Respondents**
Judgment:	**2 October 2003**

JUDGMENT OF THE COURT

Solicitors:
Browne Gibson Harvey P.C., P O Box 144, Rarotonga, Cook Islands
M C Mitchell & Co, Solicitors, Rarotonga, Cook Islands

[1] On 28 March 2003 Smith J gave a decision in the High Court Land Division vesting Vairauara Section 107 containing 44.9 ha. in the Respondent as family land. The Appellants sought leave to appeal out of time which was granted, subject to their counsel Mrs Browne undertaking to pay $2500 as security promptly into the Court at Raratonga. This land was originally part of a larger area described as section 106, but on 20 February 1995 Dillon J vested 16.7 ha. thereof in the names of the issue of Kati Heather, and the residue then became the above Section 107. Kati Heather was a son of Stanley Heather and the father of Manao Heather who had made the original application to Dillon J on behalf of Kati's issue, but sought only the 16.7 ha. out of the total area of over 100 acres (most of it rocky), which that Judge found had been in the continuous and uninterrupted occupation of members of the Heather family for at least 60 years. They were at the time working a quarry on that smaller area. Dillon J added:

> This Order is intended to satisfy in full the interests of the Heather family in this land. As a result they will not be entitled to any further allocations within the 106 Block, the balance of which will remain uninvestigated land.

(As noted above, that balance of s106 has now become s107)

[2] Dillon J had rejected two competing applications by Mrs Jonassen and Emily Pauka to succeed to the whole of s106 because they failed to prove use and occupation, but noted that further material evidence might justify a future claim. A Mr Jonassen (presumably a relative of Mrs Jonassen) sought to become a party to the application now under appeal in respect of part of s107, but could not succeed because he failed to produce a proper plan. Mrs Browne "entered the fray late" according to the Judge, and advanced a claim on behalf of the issue of Stanley Heather in opposition to the Respondent's claim, but Smith J said there was nothing in her submission nor in evidence to satisfy the requirement of long occupancy of the land. He also relied on Dillon J's comments quoted above as excluding the Heather family from the land.

[3] He found support for the Respondent's claim in her statement made when she was very elderly, that she came to know the land through her grandmother who regularly collected nuts from it, and after her marriage she and her husband and sister planted and worked on it. He also mentioned evidence by a nephew about clearing a road and planting, and concluded that the Respondent and her family had used the land and enjoyed a continued and long and uninterrupted occupation and were the proper persons to be vested as owners.

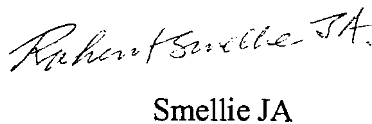
[4] There was a meeting held on 28 July 1976 directed by the Land Court to define the boundary and to look at various applications concerning this land. Dillon J described this meeting as being "of real significance," and Mrs Browne submitted that Smith J should not have relied on evidence given by or on behalf of the Respondent where it was in direct conflict with what was said there by a number of older people, most of whom are now dead, to the effect that the land was occupied and planted by the Stanley Heather family. The Respondent was not then a claimant, and there were two competing claimant families, neither of whom made any reference to occupancy by the Respondent or anyone else. Counsel also pointed to an error in His Honour's account of the Respondent's statement; he has her saying that her brother Karika built a house on the land, but in fact she said he built it on the adjoining land. Mrs Browne also submitted that the exclusion by Dillon J of the Heather family from the balance of s106 (now 107) must have been meant to apply to only the family of Kati Heather, and not to other descendants of his father Stanley.

[5] In reply to these criticisms, Mr Mitchell pointed out that the statement of Teokati Heather at the 1976 meeting did not support continued and uninterrupted occupation by the Stanley Heather line because at one stage when the plot was given to Tinomana they ceased to plant and started moving their things off the land. This man said he thought the land belonged to Tinomana, thus indicating that not all of Stanley's family thought they were entitled to claim s107. Tinomana made no claim, thereby inferring (according to Mr. Mitchell) that he thought the Respondent should have the land.

[6] In his 1995 judgment Dillon J made no secret of the difficulties he and counsel had of establishing the source of ownership and entitlement to the land claimed by the three applicants, but in the end had no doubt that the evidence from the Heather family met the criteria for the 16.7 ha claimed by them. He followed this by the clear and unambiguous statement that they were excluded from any further interest, and that his order was intended to satisfy their interests in full. Consideration of the circumstances surrounding their claim at the time persuades us that Dillon J knew what he was doing. The family expressed no interest in the balance of the land, which evidently had little attraction for them once they had opened the quarry, and His Honour left it open for anyone else to claim if they could bring sufficient evidence. We see no call for an inference limiting the prohibition to Kati's family, as submitted by Mrs Browne, and the words of the judgment must be given their full meaning and effect. Accordingly we affirm Smith J's decision excluding the Heather family, and while there may be justified criticism of some of the evidence supporting the Respondent's claim, we are satisfied there was sufficient for the finding in her favour.

Conclusion

[7] The appeal is dismissed with costs of $2000 to the Respondent, together with disbursements and the reasonable travel and accommodation expenses of counsel to be fixed by the Registrar if the parties cannot agree.



Casey JA Smellie JA Williams JA

Signed at am/pm on 2003