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

APPLICATION NO: 483/2010 & 315/2011

IN THE MATTER of Section 50 of the Cook Islands Amendment Act 1946

AND

IN THE MATTER of the land known as TE RAOIA SECTION 12K2, NGATANGIIA, RAROTONGA

AND

IN THE MATTER of an Application by DIANNA CLARKE BATES
Applicant

Hearing: 17 October 2011
(Heard at Rarotonga)

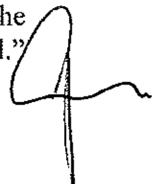
Appearances: Mrs Tina Browne for applicant

RESERVED JUDGMENT

Introduction

[1] This is an application, for an Occupation Order pursuant to s50 of the Cook Islands Amendment Act 1946 (s50). That section reads:

> "**50. Land Court may make orders as to occupation of Native land** __
> (1) In any case where [the Land Court] is satisfied that it is the wish of the majority of the owners of any Native Land that that land or any part thereof should be occupied by any person or persons (being Natives or descendants of Natives), the Court may make an order accordingly granting the right of occupation of the land or part thereof to that person or those persons for such period and upon such terms and conditions as the Court thinks fit.
>
> (2) Any person occupying any land under any such order of the Court shall, subject to the terms of the order, be deemed to be the owner of the land under Native custom.
>
> (3) No order shall be made by the Court under this section without the consent of the person or persons to whom the right of occupation is granted."



Overview of the Legislation

[2] Native land legislation in the Cooks is the product of earlier experience in New Zealand. Much of that experience in New Zealand was highly unfortunate and to that extent the Cook Islands are lucky in that those who were legislating in the early 20th Century could learn from the mistakes made. The result now is that all of the land in the Cooks is intact in the hands of the kin groups that owned it. For all intents and purposes alienation is impossible except by lease for less than 60 years or through the very narrow gateway provided by the Land (Facilitation of Dealings) Act 1970.

[3] One of the great problems that arises however, for owners in common, and it matters not whether they have undefined, equal or more usually differing levels of shareholding, is that every owner owns every piece of land. No owner can point to an area or a corner of the land and say "that is mine." How then can exclusive possession for housing be provided? There are two approaches evident.

[4] The first is partition, which is possible pursuant to Part XIII of the Cook Islands Act 1915. Partition is only practicable for a time. As land interests become more and more fractionated and lots become smaller and smaller, it becomes impractical to partition further. Progressively fewer people hold sufficient shares to be the equivalent of a usable area. With the diaspora of Pacific Islanders, it becomes harder and harder to get support across groups of owners as would move a Judge to exercise his discretion to partition. Partition may not be viewed as acceptable to certain groups who want to identify with the land as a whole, not just with remnants. Partition only works for a time in any event. Once a Partition Order is made the cycle starts again and after two or three generations the same problems with multiple owners will usually arise. An owner is not able, in the Cooks Islands, to deal with the issue of fractionation using a will to limit succession to particular people.[1] For these very reasons partition has fallen from favour in New Zealand māori land legislation and is now very difficult to obtain. In the Cook Islands my impression is that partitions are not nearly as common as they once were.

[1] s445 Cook Islands Act 1915

[5] The second approach is for an owner to obtain a Court Order granting occupation without dealing with the underlying title at all. Usually a right to enjoy part of the land as a site for a house and curtilage is granted.

[6] This has been a feature of New Zealand Native land law since the Native Housing Amendment Act 1930,[2] which was successively amended until it became s440 of the Māori Affairs Act 1953. There is an equivalent in s23 of the Cook Islands Amendment Act 1960. Both these however refer to the proposition that one native owner is vesting an estate or interest in another native to provide him with a site for a dwelling. Presumably it was thought that landlessness rather than the problems inherent in common ownership had to be ameliorated.

[7] A much more useful approach providing for occupation of land, whether for horticultural or housing purposes is exemplified by s50. I am aware that a number of these Orders have been made for orange plantations. The New Zealand equivalent is s328 et sec of Te Ture Whenua Māori Act 1993. There are differences in that in the New Zealand context an occupation Order can only be given to an owner, whereas s50 does not require that. There is however an exception in New Zealand which allows an occupation Order to be granted to someone who is entitled to succeed to an owner. That of course does not necessarily mean that a child is entitled to succeed to a parent, for land interests can pass by will to other members of the appropriate kin group. In New Zealand there have been the same problems that arise in the Cooks as to the term of the Orders and the possibility of succession to Orders. These were dealt with by legislative amendments in 2002.[3]

[8] S50 of the Cook Islands Act 1915, and s328 of Te Ture Whenua Māori Act 1993 have the same underlying intent. No new title issues. There is simply a notation against the existing title. There is no change in ownership as a consequence of the Order. The holder of the occupation right has a right to exclusive possession as against the world and more particularly against his or her co-owners for the term of the Order.

[2] s20

[3] Te Ture Whenua Māori Amendment Act 2002, s53

I am well aware that there is a concern at the number of Orders for rights of occupation granted within the Cook Islands, which are in a variety of terms, some of which will have been cancelled in their terms. For example, a house not being built as required. Most Orders provide for automatic cancellation in these circumstances. People have presumed that an occupation right is pretty much of the same effect as a partition Order. The whole course of the legislation makes it very clear that they are quite different.

Threshold

[9] At the date of hearing, this land had 34 owners and 19 had expressed a wish that an occupation Order be granted to the applicant on terms that I will discuss further in this judgment.

[10] S50 is structured in terms of a jurisdictional threshold and then a judicial discretion.

[11] As to the threshold, the Land Court must be satisfied that it is the wish of the majority of the owners of the Native land, that the land or any part thereof should be occupied by any person or persons being Natives or descendants of Natives.

[12] The application simply sought a grant pursuant to s50 to the applicant, but at hearing it became clear that the wishes expressed related to an Order being granted to this applicant, her children, grandchildren and direct descendants. The meeting at which the wishes were expressed on Monday 11 July 2011 seemed to come down in the end to the granting of an occupation right to Diana, her children, grandchildren and so on ad infinitum.

[13] At the hearing, the application was presented to me as seeking a right for her life and the life or lives of her direct descendants, who may by succession Order of the Court succeed in respect of the right of occupation.

[14] There was a previous application, (483/2010), which ended with my reserved judgment of the 17th day of May 2011. The issue there was that the expression of

wishes did not conform with the application to the Court. I mention this for context only. This is a fresh application to be considered in its own right.

[15] While there was still to an extent some confusion as to the exact expression of wishes of the owners, the evidence of Kaiei Nia Rua carries me to the point where I am prepared to accept that what was intended was that Dianna and her direct descendants have an Occupation Order forever. In my earlier judgment I referred to the situation whereby a great number of the applicant's descendants would have a right to the occupation right with no means whereby disputes between them could be resolved. No doubt this is why in the present application, it is suggested that the Court will decide who will succeed to the right of occupation.

[16] Having reached this point I am satisfied that I have jurisdiction to grant an Occupation Right and the issue is whether I should exercise my discretion to do so.

Discretion

[17] The factors influencing the exercise of the discretion will alter somewhat from case to case but a number will remain pivotal. In this case I deal with the matter in this way.

[18] It is highly desirable that the land be managed and utilised as desired by its owners or in accordance with the wishes of its owners and particularly that housing be provided for people upon their land. The applicant in this case does not fit this criteria exactly.

As a result of partition in the 1970s, she is an owner and has a house on an adjoining block. The subject land, some $600m^2$, adjoins her land and was a swamp which she has filled in, thereby abating a mosquito problem. So the land is not for housing, she is not an owner in the land and the area is quite small.

In my view her case has merit and the fact that the application is of a slightly unusual nature, does not count against her. In my view where owners who have expressed

wishes are unanimous, then all things being equal and subject to the particular facts of a case the discretion ought to be exercised in favour of an applicant such as this.

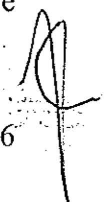
There is another unusual aspect to this case, in that, the applicant as a non-owner is offering to pay $30,000 to the owners of section 12K2 for the occupation right. A cynical view of the matter might suggest that this is evidence that this is a purchase in another form. The counsel for the applicant in her written submissions said that this should not be interpreted as converting the matter from a family matter to a commercial one. I take that view and it is clear to me that the close family relationship between the applicant and the owners of section 12K2 is important in driving this matter forward and it is not merely a matter of money.

Nonetheless, I cannot help but observe that the payment of a sum of money such as that will be of no consolation five or six generations from now when the benefit that might be obtained from that money has long since dissipated.

[19] It is a central tenet of the legislation relating to native land in the Cook Islands, that it is not available for alienation. This is very specific in Part XVI of the Cook Islands Act 1915. Leases may not be for longer than 60 years, there are restrictions on alienation by will, by way of mortgage or charge, or the taking of land for payment of debts. I discussed this matter with counsel at hearing. It is common in Polynesia that land is regarded as a gift from ancestors for the use of the present generation who can be regarded as ephemeral and to be secured for the use of generations to come.

If an occupation Order is sought on the basis that it is open ended and has no foreseeable termination point, then it is an alienation by another name. The owners cannot see a point when the land will come back to them in common and the owners cannot see a point when they can have the opportunity to apply to the Court to occupy this piece of land themselves.

[20] On the other hand it is proper that the Court makes Occupation Orders in terms and for a term that will allow the holder of the right to develop the land, secure



in the knowledge that they have it for the medium to long term. To do otherwise would not encourage proper and substantial development.

[21] Although the scheme of s50 is that the threshold requirement, the wishes of the owners in the majority, identifies the person and then the granting of the Order and its terms are for the Court, the wishes of the owners as to the term and terms of the Order to be made must be given significant weight. Here, the majority of owners have indicated that they are happy with long term occupation.

[22] S50 refers to a person or class of persons who may obtain the grant of a right of occupation. There is no requirement that that person be one of the owners and as I have indicated earlier, the fact that the applicant is not an owner does not at all count against her.

[23] At the hearing I expressed my concern at the breadth of the class of the holders of the right. Clearly this family is united now but experience inevitably teaches one that as the population of the family increases there will be differences that appear. People will inevitably be spread across the globe, will have had different life experiences and have different values.

In her written submissions counsel suggested that the Order could provide for succession to persons who the Court decides should succeed to the right of occupation. I am not clear that the Court has any such jurisdiction. I also wondered what was meant by a direct descendant as is referred to in the evidence. Counsel suggested that would mean other than by adoption. On reflection I think the term is intended to mean direct rather than by collateral descent, as is the case where a sibling dies without issue. In the circumstances of this case I believe that the Order can be drawn so as to attach to the house on the adjoining block so that those who are direct descendants of the applicant and succeed to an interest in the house, can have an interest in the Occupation Order.

[24] Although a majority of the owners have expressed a wish to support the application in its present form, I would not allow them to unreasonably fetter future generations. If the application as sought were to be granted, those owners in the

future would have no reasonable prospect of occupying this part of the land. Those future owners must have some prospect of the land returning to them for them to exercise their decisions as to how it should be used. I will not lock the land up to one person or one group indefinitely.

[25] In the end as I had indicated, the many positive aspects of this application are overwhelmed by the sheer length of time that is sought by the applicant.

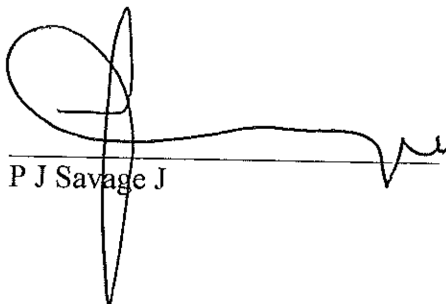
[26] This is not to say that Dianna Bates should not obtain an Occupation Order. Her application has many commendable aspects and the owners clearly have great affection for her and are happy for her to use this land and happy for that to be so for the foreseeable future.

[27] On reflection, and having dwelt on the matter for some time, I believe that a reasonable outcome would be that she should have this land for a term of 60 years from the date of this decision, or on the death of her last surviving grandchild, whichever should happen first. I am prepared to receive submissions from counsel as to the other terms to be inserted in the Order, for as discussed, there are unusual aspects to the occupation in this case. I am prepared to receive that memorandum within the next 3 months.

[28] I am aware that counsel are concerned to conclude this matter and may well wish to test the matter on appeal. If she does so I will expedite that by dismissing the matter so that she has the finality she seeks and the capacity to appeal.

[29] Finally I would like to thank counsel for the full and helpful submissions that she provided to me.

Dated at Rotorua, New Zealand this 18th day of May 2012



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