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

APPLICATION NO: 196/14

IN THE MATTER	of section 3 of the Declaratory Judgments Act 1994 and sections 399(3), 446 and 448 of the Cook Islands Act 1915
AND IN THE MATTER:	of the land known as TEPUKA SECTION 106C, AVARUA
BETWEEN	ELLENA TAVIONI on behalf of the successors of Makea Takau Applicant
AND	THE COOK ISLANDS CHRISTIAN CHURCH INCORPORATED OF AVARUA First Respondent
AND	CAROLINE TUPOU BROWNE Second Respondent

APPLICATION NO: 441/15

IN THE MATTER	of section 416 and 421 of the Cook Islands Act 1915, and section 3 of the Declaratory Judgments Act 1994
AND IN THE MATTER:	of the land known as TEPUKA SECTION 106C, AVARUA
BETWEEN	CAROLINE TUPOU BROWNE Applicant
AND	THE COOK ISLANDS CHRISTIAN CHURCH INCORPORATED OF AVARUA First Respondent
AND	MAKEA ELLENA TAVIONI for the descendants of Makea Takau Second Respondent

Hearings: 25 July 2016
26 July 2016
(Heard at Rarotonga)

Counsel: Mrs T Carr, for the applicant (196/14)
Mr R Holmes, for the applicant (441/15)
Mrs T Browne, for the first respondent (196/14 and 441/15)

Judgment: 24 November 2016

REASONS FOR JUDGMENT OF ISAAC J

---

[1] On 27 July 2016 I issued a preliminary decision in which I considered the following issues:

a) Does the Court have jurisdiction to make declarations under the Declaratory Judgments Act 1994 (DJA) regarding the validity of historic court orders?

b) Can the court validate or invalidate orders if those orders have been incorporated into legislation?

c) Does s 399(3) of the Cook Islands Act 1915 grant the court jurisdiction to act as an appellate court for the purposes of that section?

[2] The answer I gave to all three questions was no. This judgment sets out my reasons for that answer.

Background

[3] The applications relate to a piece of land known as Tepuka Section 106C Avarua. In 1864 Makea Ariki gifted the land by deed to Mr Krause of the London Missionary Society (LMS). In 1903 the LMS applied to the Land Title Court for confirmation of the alienation and to vest the land in the LMS. These applications resulted in the following four orders by Chief Judge Gudgeon that are now at the centre of the present applications:

a) A 4 January 1904 order confirming the alienation of Tepuka Section 106C Avarua by Makea Ariki to the LMS.

b) A 23 May 1904 order vesting title to various lands, including Tepuka Section 106C Avarua, in the LMS.

c) A 1905 order that Makea Ariki held a life interest in the land, following an investigation into its customary ownership.

d) A 31 August 1908 order cancelling the 1905 order.

[4] The next relevant event occurred in 1968 with the passing of the Cook Islands Christian Church Incorporation Act 1968-69 (CICCI Act). The Act transferred all the LMS' titles to Cook Island lands to the Cook Islands Christian Church (CICC). The lands to be transferred were listed in the Second Schedule to the Act. The Schedule included Tepuka Section 106C Avarua and referred to the two 1904 orders mentioned above.

[5] In 2011, Ms Tavioni filed an application pursuant to s 390A of the Cook Islands Act 1915, seeking an order cancelling the 1904 orders. After a series of judgments, one of which was recalled, Weston CJ declined jurisdiction under s 390A, finding that the 1904 orders fell outside the ambit of s 390A because they had been made without jurisdiction. He relied on the Privy Council's judgment in *Tumu*,[1] which supported the proposition that s 390A did not authorise the Chief Judge to repair an order made without jurisdiction. I set out the relevant section of the judgment, referred to in the Chief Judge's decision:[2]

> [45] In the view of the Board, it is clear that the amendments were made without jurisdiction, and were for that reason invalid. For the same reason, they could not benefit from the presumption of validity in relation to defects of "practice or procedure" under section 399, since that does not extend to orders made "without or in excess of jurisdiction" (section 399(2))

[1] *Descendants of Utanga and Arerangi Tumu v Descendants of Ipou Tumu* [2012] CK-UKPC 1.
[2] At [45] and [59].

...

> [59] ... that section [s 390A] proceeds on the basis of a decision made within jurisdiction. In the Board's view, the decision under that section, even though not itself open to appeal, could not limit the scope of the matters to be taken into account under section 416 in deciding whether to validate an order made without jurisdiction.

The present applications

[6] Undeterred by the unsuccessful s 390A application, Ms Tavioni turned to the Declaratory Judgments Act 1994 (the DJA) to pursue the intent of her initial litigation. At the hearing before me, her counsel, Mrs Carr, sought:

a) a declaration under the DJA that the 1905 order stating that Makea Ariki held a life interest in the land was still valid; and

b) a succession order over the land in favour of the descendants of Makea Takau.

[7] The second respondent, Mrs Caroline Browne, opposed Ms Tavioni's application for a succession order, alleging that as a descendant of the ancestral owners, she also has an interest in the land. However, both Mrs Caroline Browne and Ms Tavioni oppose the vesting of the land in the CICC and agree that the land has customary status which was never extinguished (nor could it have been extinguished), by the 1904 orders or the CICCI Act.

[8] In line with these positions, counsel for Mrs Caroline Browne, Mr Holmes, sought:

a) declarations under the DJA that the 1904 orders are invalid for want of jurisdiction; and

b) an order under s 421 that the land is customary land.

[9] The first respondent, the CICC (represented by Mrs Tina Browne), opposed the applications of both Mrs Caroline Browne and Mrs Tavioni. In its 23 June 2016 Memorandum of 23 June 2016, the CICC applied to have both applications dismissed for lack of jurisdiction under Rule 333(3) of the Code of Civil Procedure.

Submissions

[10] The parties have submitted on multiple matters since the initial application. Nevertheless, I was of the view that it was necessary to begin by resolving the initial question of the court's jurisdiction to make the declarations sought. At the hearing on 25 July 2016 the parties agreed to address the issue of the court's jurisdiction first. Accordingly, despite the breadth of arguments presented to me, I focus here on detailing the parties' submissions on this first issue.

Mrs Carr for Ms Tavioni

[11] Mrs Carr submitted that the Court should declare that the 1905 order, which declared that Makea Ariki had a life interest in the land, was still valid. She submitted that the order's cancellation in 1908 was made without jurisdiction because only a court order could effect such a cancellation, yet no record of any hearing or court order exists.

[12] Mrs Carr also sought a declaration that the gift originally transferred by the 1864 deed, and then confirmed by the 1904 orders, was now 'spent'. First, because Makea Ariki (who only held a life interest in the land and therefore could not have transferred anything more than that which she held), passed away in 1911; second, because the land ceased to be used in line with the conditions of its transfer under the deed.

[13] Mrs Carr submitted that the existence of the CICCI Act did not impede the Court from making these declarations. This is because, contrary to the submissions of Mrs Tina Browne, the declarations were not inconsistent or incompatible with a true reading of the 1904 orders and the CICCI Act. She submitted two reasons for this position:

a) The 1904 orders and the CICCI Act never intended to effect a transfer of the land in question. The 1904 orders merely confirmed what was transferred by the original deed (a life interest subject to certain conditions), which was now spent. In turn, the CICCI Act, which relied on the 1904 orders, could not have transferred to the CICC anything more than that which the LMS had acquired under the 1864 deed.

b) The land's status is crucial because it affects the nature of what the 1904 orders and the CICCI Act could have transferred. The 1904 orders could not have alienated freehold title to the LMS, nor could Parliament in 1968 have envisaged that they were vesting freehold title to the land in the CICC because the land was customary land and the ownership of the owners was never extinguished. If the 1904 orders or the CICCI Act had purported to transfer ownership of the lands, this would represent a breach of the constitutional rights of Cook Islanders. Therefore, this is clearly not what was transferred.

Mr Holmes for Caroline Browne

[14] Mr Holmes submitted that the 1904 orders were invalid and sought a declaration under the DJA to that effect. He also submitted that the lands in question were, and still are, customary lands. This customary status could not have been extinguished in the manner purportedly effected by the Act nor by the 1904 orders upon which the Act relied (which, in any case, were invalid).

[15] Mr Holmes was reluctant to consider the court's jurisdiction to make the declarations sought independently from the question of the orders' validity and the land's status. He maintained that the matters were inextricably intertwined. However, when it became apparent that I intended to deal with the question of jurisdiction first, Mr Holmes submitted that:

a) no legal impediment prevented me from declaring that the 1904 orders were invalid for want of jurisdiction;

b) the DJA provides positive authority for such a declaration;

c) the wording of s 399(3) of the CIA implies that the Court has the power to declare orders invalid if proved that the orders were made without jurisdiction;

d) neither the lapse of time in bringing the application nor the existence of the CICCI Act prevent the Court from declaring the 1904 orders invalid. The Act was based on the false presumption that the land was already held by the LMS, when in fact the 1904 orders that apparently vested those lands in the LMS were invalid for want of jurisdiction. If the land was not vested in the LMS when the CICCI Act was enacted, then the Act could not have gone on to vest that land in the CICC; and

e) not only is there jurisdiction to invalidate the orders, it is imperative that this be done because the land is native customary land and the 1904 orders purport to extinguish that status, thereby depriving those entitled to the land of an essential component of their identity.

Counsel for the CICC

[16] Mrs Tina Browne submitted that the applications should be dismissed under Rule 333(3) of the Code because the Court lacks the jurisdiction, under either the Cook Islands Act 1915 (CIA) or the DJA, to make the orders sought. Mrs Browne submitted that only a superior court has jurisdiction to set aside the orders, and that the DJA does not empower this court to make the declarations sought because:

a) Section 3 of the DJA permits the review of a limited range of documents. The only category that a court order could possibly fit within is a 'document of title', which is not defined in the DJA.

b) It is doubtful that a court order falls within s 3 because that would essentially give the High Court jurisdiction to review the validity of

another court's order, whereas the ordinary course would be to appeal the order or seek a rehearing.

c) Section 3 is premised on a person having done or desiring to do some act, the validity, legality or effect of which depends on the construction of certain legal documents. There is no doubt as to the meaning and effect of the orders or the CICCI Act. The DJA procedure is inappropriate for the kind of declaration sought.

[17] Even if jurisdiction could be found under either or both Acts (for example, if a court order could be considered to come within the ambit of s 3), the Court must decline to make the orders sought because:

a) the declarations would fundamentally contradict the CICCI Act, which vested the lands in the CICC and effectively confirmed the 1904 orders by incorporating them into the Act's Second Schedule;

b) the declarations would serve no legal purpose because the DJA does not confer any jurisdiction on the Court to invalidate Acts of Parliament, which would be necessary to achieve the applicants' desired results, given that the CICCI Act has vested full title to the land in the CICC; and

c) the applications have been made after considerable delay, yet there is strong public interest in the courts not overturning orders conferring title to property more than 100 years after the orders have been made and nearly 50 years after Parliament has adopted them in an Act.

[18] Mrs Tina Browne also submitted that New Zealand has a materially similar provision in its DJA, and that when applying that provision the New Zealand courts have consistently declined to entertain applications where the facts are in dispute or there are questions of mixed law and fact, both of which are apparent in this case.

[19] In her oral submissions, Mrs Browne refuted the claim that Te Puka Section 106C Avarua was customary land. She also submitted that the gift which was the subject of the 1904 orders was clearly an unconditional alienation to the LMS, and that the CICCI Act vested full title to the land in the the CICC.

The Law

[20] Section 3 of the DJA states:

3. Declaratory orders on originating summons -

(1) Where any person -

(a) has done or desires to do any act, the validity, legality, or effect of which depends on the construction or validity of any enactment, or any deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or

(b) claims to have acquired any right under any such enactment, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof, -

such person may apply to the High Court by originating summons for a declaratory order determining any regulation, bylaw, deed, will, document of title, agreement, memorandum, articles of instrument, or of any part thereof....

[21] Section 399 of the CIA states:

399. Validity of orders –

(l) No order of [the Land Court] shall be invalid because of any error, irregularity, or defect in the form thereof or in the practice or procedure of the Court, even though by reason of that error, irregularity, or defect the order was made without or in excess of jurisdiction.

(2) Nothing in the foregoing provisions of this section shall apply to any order which in its nature or substance and independently of its form or of the practice or procedure of the Court was made without or in excess of jurisdiction.

> (3) Every order made by [the Land Court] shall be presumed in all Courts and in all proceedings to have been made within the jurisdiction of the Court, unless the contrary is proved or appears on the face of the order.

Discussion

[22] As evident in s 3 of the DJA, a declaratory judgment under that Act can only be made in relation to one of the following instruments:

> ... any enactment, or any deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate...

[23] It is clear that a Court order does not fit any of these categories. I agree with Mrs Browne that the DJA is an inappropriate legislative vehicle for the purpose that the applicants seek. The DJA does not give this Court jurisdiction to declare the 1904 court orders invalid. For the same reason, the Court cannot use the DJA to declare as valid a court order that was later cancelled by the court (i.e. the 1905 order). To make such orders would be to act as an appellate court by stealth.

[24] Furthermore, as I noted in my oral decision, I do not consider that s 399(3) of the CIA gives this court jurisdiction to pronounce upon the validity of another court's orders. In the context of the section as a whole, the subsection merely states that orders of the Land Court are to be presumed valid, unless the contrary is proved. This latter phrase does not introduce a jurisdiction to hear and adjudicate upon challenges to the validity of orders with which applicants disagree. The proper process is to appeal the order when it is made, or, in historical cases, to apply under s 390A. If either or both of these applications are unsuccessful, it can fairly be said that the applicant has exhausted the judicial avenues available.

[25] The courts cannot provide multiple avenues by which to challenge orders through increasingly convoluted and ingenious statutory interpretation. To the contrary, the avenues that exist are purposely restricted by legislators based on a careful balancing of the two competing policy principles of securing certainty and

finality of decisions, on the one hand, and providing opportunity to challenge decisions because of mistake or error on the other. In short, there must be an end to litigation.

[26] That would be enough to dispose of the application, but I wish to record other barriers to the case presented by Ms Tavioni and Mrs Caroline Browne. In this discussion I draw on New Zealand precedent, given that the relevant provisions in the equivalent New Zealand legislation, the Declaratory Judgments Act 1908, are substantially similar to the DJA.

[27] The Court's jurisdiction and discretion to make declaratory judgments under the DJA are wide. Nevertheless, the legislation is not a catch-all and certain requirements must be met before the Court will exercise this jurisdiction.[3] Declaratory judgments under the DJA are a mechanism for resolving and clarifying issues of legislative interpretation. They are to be invoked when doubt exists about an instrument's construction or validity and such doubt is obscuring the ambit or permissibility of an act done in reliance on that instrument.[4] They may also be invoked where a person's rights are affected by the construction or validity of the instrument.[5]

[28] Mr Holmes asks this court to declare the 1904 court orders invalid because they were made without jurisdiction, and Mrs Carr sought to declare the 1905 order valid because the circumstances for its cancellation are arguably dubious. However, these applications are not articulated in the terms of the criteria in s 3 of the DJA. Do the applicants desire to do an act that depends on the validity of the court orders? In the case of the 1904 orders, is Mr Holmes seeking a declaration about the validity of the deed that transferred the land, or about the court orders that confirmed that transfer? Is he submitting that the court order is an act that was invalid because the deed transferring the land was invalid? Is Mrs Carr seeking a declaration that the act of cancelling the order was impermissible because of an incorrect view of the 1905 order's validity? Are both parties simply saying that they are "interested" in the validity of the court orders and seek a declaration on those grounds?

---

[3] *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85.
[4] *Pouwhare v Kruger* HC Wellington CIV-2009-485-967 12 June 2009 at [9].

[29] Most relevantly in this case, the declaratory judgments jurisdiction will not be exercised to resolve an issue that is partly related to fact and partly related to law.[6] In this case, factual and evidential questions are intertwined with the legal issues. This was made abundantly clear in the hearings when counsel struggled to address the issues of jurisdiction without referring to contested matters of fact. These include the circumstances in which the gift of land was made, the reasons for the cancellation of the 1905 order and how this was effected, and the status of the land, which are (inter alia) a matter of contention between the parties. The fact that Mr Holmes was at pains to stress that the question of jurisdiction was inextricably linked to other aspects of the case and could not be considered independently, only further consolidates the reality that the matters at issue are not strictly questions of legal interpretation. The Court cannot make declaratory judgments in such a context.

The 1968 legislation

[30] Even if the Court had jurisdiction to make an order, it retains the discretion to decline to do so "on any grounds which it deems sufficient".[7] The Court may decline to make a declaratory judgment where it would serve little or no practical purpose.[8] In this particular case, the declaratory judgments sought would be of limited utility. That is because the effect of the orders, namely, the transfer of title to Tepuka Section 106C Avarua to the CICC, which is at the centre of the applications, has been enshrined in the CICCI Act.

[31] Even if Mrs Carr is correct that the 1904 orders transferred no more than what was transferred in the 1864 deed, a plain reading of the CICCI Act demonstrates that Parliament intended a full vesting of title in the CICC. The Court is in no position to challenge this legislation. As emphasised in previous cases, the DJA does not give the Court power to prevent the operation of an Act.[9] Not only can the DJA not assist, but more generally, the Court is constitutionally unable to make declarations that challenge the basis of legislation. Courts in the Cook Islands do not have the power to override, strike down or amend legislation. The Parliament of the

---

[5] *Turner v Pickering* [1976] 1 NZLR 129 (SC) at 133-135.
[66] *NZ Insurance Co Ltd v Prudential Assurance Ltd*, above n 3, at 85; *Poinwhare v Kruger*, above n 4, at [9], [27].
[7] Declaratory Judgments Act 1994, s 10.
[8] *Turner v Pickering*, above n 5, at 141-142.
[9] *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) at 166-168.

Cook Islands is a sovereign Parliament.[10] Accordingly, Parliamentary law is supreme.

[32] Furthermore, because the orders complained of have been incorporated (and thereby effectively affirmed) in the CICCI Act, any power the court might have had to amend or cancel the orders is prevented. In *Ngati Apa Ki Te Waipounamu Trust v The Queen*,[11] the applicants asked the Court to set aside a Māori Appellate Court order that had been incorporated into settlement legislation. The Court declined, reasoning that the order's incorporation into the Settlement Act as an "integral part" of that Act precluded the High Court from setting aside the order which would "completely undermine an essential element of the Settlement Act".[12] The Court added that this would be the case even if the order were invalid:[13]

> Ordinarily such an invalid order would be set aside but here the adoption by Parliament of the Order for the purposes of the Settlement Act makes any such setting aside inappropriate... substantive rights in terms of the Order and its legislative adoption cannot be altered except by further legislation.

Decision

[33] For the reasons set out in this judgment, I do not have jurisdiction under either the CIA or the DJA to make the declarations sought. Nor do I have jurisdiction to challenge the CICCI Act by amending or cancelling the orders complained of. The applications are dismissed.

Dated at Wellington, New Zealand this 24th day of November 2016

Isaac J

[10] Constitution of the Cook Islands, article 27(1).
[11] *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659 (CA).
[12] At [154].
[13] At [157].