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

APPLICATION NO. 69/2019

UNDER	section 409(d) of the Cook Islands Act 1915, rules 132, 193 and 254 of the Code of Civil Procedure of the High Court 1981 and section 9 of the Judicature Act 1980-81
IN THE MATTER OF	the land known as NUKUPURE 3C, NGATANGIIA
BETWEEN	**MATA-ATUA MCNAIR** **Applicant**
AND	**NGATANGIIA MATAVERA SPORTS ASSOCIATION INCORPORATED** an incorporated society under the Incorporated Societies Act 1994 and having its registered office in Rarotonga **First Respondent**
AND	**KORERO O TE 'ORAU INCORPORATED** an incorporated society under the Incorporated Societies Act 1994 and having its registered office in Rarotonga **Second Respondent**

Appearances: Mr B Marshall for the applicant
Mr T Nicholas for the first respondent
Mrs T Browne for the second respondent

Decision: 24 September 2019 (NZ)

JUDGMENT OF JUSTICE WW ISAAC

APPLICATION NO. 144/2019

UNDER	section 409(d) of the Cook Islands Act 1915, rules 132, 193 and 254 of the Code of Civil Procedure of the High Court 1981 and section 9 of the Judicature Act 1980-81
IN THE MATTER OF	the land known as NUKUPURE 3C, NGATANGIIA
BETWEEN	**DOROTHY HOFF (UIRANGI MATAIAPO), TEAIA MATAIAPO, RUA KOMONO (FREDERICK GOODWIN), TUMAKA RANGATIRA (MATA NOOROA), VAIKAI MATAIAPO (SONNY DANIEL)** as landowners and traditional leaders (Aronga Mana) **Applicants**
AND	**MATAATUA MCNAIR** **Respondent**

Introduction

[1] This is an application by Mataatua McNair, an owner in Nukupure 3C, Ngatangiia (the land). She seeks an interim injunction to restrain the Matavera/Ngatangiia Sports Association Incorporated and Korero O Te 'Orau Incorporated from undertaking any construction or doing any other injury to the land until such time as they have the approval of the Court or landowners.

[2] The applicant maintains the respondents have no legal interest in the land and all rights are vested in the owners solely. As the owners have not consented to any building work, the status quo needs to be maintained until the matter can be decided between the owners and the **respondents.**

Background

[3] Nukupure 3C is located on the eastern side ofRarotonga at Ngatangiia, near to the Muri lagoon. It is a fairly large block of land extending from the lagoon into the hills. The number of owners in the land totals more than 700 according to the parties, with a large proportion of these located outside of the Cook Islands.

[4] The lower part of the land, close to the lagoon, is densely occupied with a marae, clinic, police station, the spmis grounds and netball comis all located there. The inland areas are used for housing and the like.

[5] On 9 May 2019, I invited the paiiies to enter into undertakings in lieu of judgment. These unde1iakings would preserve the status quo by allowing the respondents to continue to occupy the land but halting any further construction or development.

[6] This proposal was rejected by the traditional leaders of the land (the Aronga Mana) who wished to maintain the administration of the land in the traditional way. Without any agreement between paiiies, I now decide the issue of the interim injunction.

Submissions for the Applicant

[7] The applicant first applied for an ex-paiie injunction on 25 February 2019. The applicant submitted she is both a landowner and the chairperson of a committee which represents a majority of landowners.

[8] It is submitted that the respondents sought landowner approval for the proposed developments in February 2018 but that over the course of three meetings in September 2018, the landowners first requested more information and then declined to support the development.

[9] Counsel for the applicant relied on the two-step test for an interim injunction as set out in *American Cyanamid Co v Ethicon Ltd* that there must be a serious question to be tried and that the balance of convenience falls in favour of granting an injunction.[1] Counsel also referred

'*Am.dcan Cyanam:d Ca v EtMcan Ltd* **[1975] AC 396.**

to the third step added by *Klissers Farmhouse Bakeries,* that the Court consider the overall justice of the case.[2]

[1 O] The applicant submits that the respondents are on notice that the Landowners are opposed to the construction and that they dispute any right the respondents might hold in the land. As the respondents have indicated their intent to continue with the work regardless of opposition, counsel for the applicant submits that damages would not be an adequate remedy in this case.

[11] Counsel further submits that the balance of convenience falls in favour of preserving the status quo as it would only cause delays in construction for the respondent but could result in significant damage to the land the applicant has an interest in.

[12] Where the matter is finely balanced, counsel cited Lord Diplock for the principle that preservation of the status quo is the prudent choice as one party is simply delayed in unde1iaking an action they have not been able to do before.[3]

[13] On review of the Land Comi records, the applicant has found no indication that the first respondent ever obtained what was refen-ed to as a "permanent grant" of the land, nor a lease, occupation right or any other legal title.

[14] The applicant therefore submits that any decision about what happens on the land rests with the owners and they have sent cease and desist letters to the respondents. The ongoing development, despite objection, is a breach of the owners' rights and what right the respondents have to occupy and build on the land is the serious question to be tried in this case.

Submissions for the First Respondent

[15] Counsel for the first respondent also represents the Aronga Mana a group of Mataiapo and Rangatira from the district, some of whom are owners in the land. Counsel submits that the land in question is owned and administered according to Maori custom and the mana of the traditional leaders. The land forms paii of Teaia Mataiapo' s title land. All seven members of

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[2] *Klissers Farmhouse Bakehouse Ltd v Harvest Bakeries Ltd* [1985] AC 331.
[3] Above n 1 at 405 per Lord Diplock.

the Aronga Mana support the sports ground and development of the land, and five of them are owners in the land.

[16] The respondents do not dispute that the land was gifted without formal documentation, but state the oral arrangement was according to Native Custom. Counsel fmiher submits that management of this land by the Mataiapo and Rangatira is a long-held custom and that the Comi has jurisdiction to recognise this custom under s 66A (4) of the Cook Islands Constitution AmendmentAct 1994-1995.

[17] The respondents dispute the case put forward by the applicant that the land in question is not title land and should be treated the same as any other family land. The respondents also refened to evidence submitted by the applicant in the form of meeting minutes which shows that the title holder has always determined what should happen on the land and should continue to do so.

[18] When the question of formalising the anangement with the respondents was put to Teaia Mataiapo, he refused to enter into a lease, preferring to continue maintaining and adminstering the land according to custom and having his customary interest in the land recognised.

[19] As Dorothy Hoff (Uirangi Mataiapo), Uatakiri Pittman (Teaia Mataiapo), Mata Nooroa (Tumaka Rangatira), Sonny Daniel (Vaikai Mataiapo) by respect of their positions as traditional leaders, act on behalf of their kopu, the respondents submit that the applicant's landowners' committee is not representative of all landowners or even a majority of them and the applicant has provided no formal evidence that she acts on behalf of landowners.

[20] The respondents submit that the 3 April 2019 meeting of owners was poorly conducted and there was no clarity of representation when it came to voting; and regardless the final tally showed no paiiy receiving majority suppmi.

Law

[21] The law governing the grant of an interim injunction is well-established and has been helpfully set out by Weston Jin the 2010 case of *Cook Islands Democratic Party Incorporated v Willis*:[4]

> [13] In order successfully to obtain an interim injunction the applicant must show there is a serious question to be argued and that, secondly, the balance of convenience favours the granting of the interim injunction. Issues such as delay, inconvenience to third parties and other factors fall to be considered under the second head. There is a final obligation on the Comito stand back and assess the overall justice of the case.

[22] I adopt the former Chief Justice's approach.

Issues

[23] The issues to be determined are:

(a) Is there a serious question to be argued; and

(b) What does the balance of convenience favour?

(c) The overall justice of the case.

Discussion

Is there a serious question to be argued?

[24] The applicant maintains that the serious question to be determined is what or if the respondents have any claim to occupy the land. They state in the absence of a lease, occupation right or any other approved alienation in their favour, the respondents are occupying the land without right. The applicant submits that those owners who approved the development on the land, had no right to do so on behalf of the other landowners.

[25] The respondents, with the support of the Aronga Mana, state that the land is title land and traditionally controlled and administered by Teaia Mataiapo and others of the Aronga

1 *Cook I.lands DemocmNc Pa.·ly Inco.poroted v Wi/f;,* [20I0J CKHC 63 ,t [13].

Mana. They submit that the Cook Islands Constitution allows such an a1Tangement by the Aronga Mana to continue without Court approval.

[26] There is a clear clash here of traditional Maori custom and modern expectations of rights of ownership. Although the respondents have refened to s 66A(4) of the Cook Islands Constitution Amendment Act 1994-1995, there is a case that it may be outweighed by the preceeding subs (3).

[27] I will not make any assessment of prope1iy rights in this instance but it is sufficient to say that there is a serious question to be argued in this case.

The balance of convenience

[28] Weston J also discussed the effect of delay on an application for interim injunction, noting that it is very often fatal due to the increased pressure it puts on the respondent and the Comi to determine the matter and prevents settling via other means such a merits-based determination.[5]

[29] The applicant was not delayed in bringing this application, but it is clear from the evidence that there has been ongoing work on the land since the 1980s. The applicant must have been aware of the building work to establish the spmis grounds and the updates made to the facilities over the intervening years and yet there is no evidence of earlier opposition.

[30] The applicant argues that the balance of convenience is in favour of granting an interim injunction. They say that the respondents have received notice of their objection to the development and nonetheless decided to proceed. They also point out that they have paid an unde1iaking as to damages.

[31] The undertaking ensures that any potential loss suffered by the respondents may be recovered, but it does not guarantee that funding required to complete the project will be available to the respondents in the future. The respondents are concerned that they will lose out on funding they would not otherwise be able to obtain, in a market where fundraising is generally challenging.

Above n 4 at [27].

[32] Although the question of property rights may be up for debate, the actual impact of the development on landowners is minimal. The interim injunction is to maintain the status quo, wherein the land is still being used as a spo1is ground and is already host to the facilities. Resealing the netball court and expanding the covered area will not limit landowner rights any more than they are cmrently and also the area has not been available for occupation or use for some time. However, the facilities have been available to landowners and the people of Ngatangiia for general recreation and community good for some time and their continued use and maintenance is clearly beneficial.

[33] Tenants in common have rights to all of the land not otherwise alienated, however, as concerns the applicant's immediate use of the land, neither her occupation nor her access to the land is prohibited or limited by the proposed development. The respondents occupy the beach front section of the land only leaving the inland portion of the land available to the landowners. While land may be limited, there is no exclusion oflandowners from Nukupure 3C.

[34] By right of title, the Mataiapo and Rangatira represent the landowners of the area and they are united in their support for the development here. This is not a case of single title holder as against the landowners but a united Aronga Mana in supp01i of development and an unclear number of landowners opposed.

[35] On one side of the balance, the rights of the applicant and the respondents to the area cmrently occupied by the respondents are currently indeterminate. Until such time as they are dete1mined, preservation of the status quo would maintain all rights as they cunently stand. However, on the other side of the balance, the respondents may lose out on large funding to unde1iake works that are generally beneficial to the community and have the support of the community leaders. I take into account too, that the landowners would still be able to enjoy the land as they cull'ently do should the development go ahead.

[36] I find that for the above reasons, the balance of convenience does not favour granting the interim injunction.

The overall justice of the case

[37] The Comi is able to take a further step and consider the overall justice of the case before exercising its discretion.

[38] As stated, there is a serious question regarding the potential alienation of the land into the hands of the respondents, but I do not believe that substantive issue is greatly affected by the proposed development. Or at least, the development will not affect any rights oflandowners fmiher than they cmTently are.

[39] There is a possibility the applicant will litigate the substantive issue. Should the cun-ent respondents be successful in that case and I do not issue the injunction, the community will continue to receive the benefit of the upgraded facilities, unaffected. Alternatively, it might be that respondents' occupation is upheld but they lose out on funding with consequent effects on the entire community.

[40] If it is deteimined that the respondents do not have a right to be on the land, the responsibility of vacant possession will rest with them so too any loss associated with developing the land. From the applicant's perspective, there must be little difference to the outcome of any substantive case if the development goes ahead, but there is a great difference from the respondents' perspective and that of the community who benefits from the development.

[41] On this basis, the justice of the case does not suppmi granting an interim injunction.

Decision

[42] I decline to issue the interim injunction.

[43] I believe costs should lie where they fall. If the paiiies disagree they have 14 days from the issue of this decision to file submissions.

Da ed at Wellington on this 24th day of September 2019

WW Isaac
JUSTICE