

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

IN THE MATTER of Sections 421 and 423 of the Cook  
Islands Act 1915

AND

IN THE MATTER of the uninvestigated land referred to on  
survey plan as **POKOINU SECTIONS  
227 & 228** in the Tapere of Pokoinu,  
District of Nikao, Rarotonga

**APPLICATIONS 338/11 & 472/11**

AND

IN THE MATTER of applications by the blood descendants of  
**MAKEA ARERA TEANUANUA  
TEREKURA VAKATINITINI AND  
NGAMARAMA A APAI TURURANGI**  
(4<sup>th</sup> Applicants)

**APPLICATIONS 122/10 & 339/11**

AND

IN THE MATTER of applications by the descendants of  
**TUPA, TUEREI, KOKAUA,  
TAMARANGATIRA, TUTINI, RIMA,  
MATA, TOREKA AND VAKATINI**  
(3<sup>rd</sup> Applicants)

**APPLICATION 482/11**

AND

IN THE MATTER of an application for Investigation of Title  
to customary land by the successor of  
**MAKEA TAKAU**  
(5<sup>th</sup> Applicants)

**APPLICATION 76/12**

AND

IN THE MATTER of an application by **TARAARE  
MATAIAPO AND OTHERS**  
(6<sup>th</sup> Applicants)

**APPLICATION 421/12**

AND

IN THE MATTER of an application by **MAKEA DAVIDA  
AND MAKEA TE VAERUA**  
(7<sup>th</sup> Applicants)

*Continued overleaf...*

APPLICATION 434/12

AND  
IN THE MATTER of an application by **PHILLIP  
NICHOLAS**  
(8<sup>th</sup> Applicant)

Hearing date/s: 13 to 15 May (inclusive) and 20 to 22 May (inclusive) 2013

Counsel: Mr Mitchell and Mr Manarangi for the 4<sup>th</sup> Applicants  
Mrs Browne for the 3<sup>rd</sup> Applicants  
Mrs Carr for the 5<sup>th</sup> Applicants  
Mr Framhein for the 6<sup>th</sup> Applicants  
Mr Hunt for the 7<sup>th</sup> Applicants  
Mr Petero for the 8<sup>th</sup> Applicant

Oral Judgment: 22 May 2013

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**ORAL JUDGMENT OF THE HONOURABLE JUSTICE PATRICK SAVAGE**

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[FTR 15:00:23]

[1] I have before me a series of applications pursuant to s 421 and s 423 of the Cook Islands Act 1915. S 421 which reads,

**Investigation of title to customary land**

The Land Court shall have exclusive jurisdiction to investigate the title to customary land and to determine the relative interests of the owners therein.

[2] s 422 reads,

**Native Customs to be recognised**

Every title to and interest in customary land shall be determined according to the ancient custom and usage of the Natives of the Cook Islands.

[3] That latter section in that form has been a feature of investigations into native title in the Cook Islands from the very beginning.



[4] If I make a determination under s 421 I can then make an Order under s 423 which then produces a freehold Order which gives the owners a fee simple estate.

[5] While this matter has been hotly contested in front of me, I have had the assistance of four very senior members of the Cook Islands Bar, a very experienced Land Agent and two lay people. I want to say immediately that those lay people have contributed to this process in ways that have left me full of admiration for them. They have contributed very much in relation to the facts and the law, and have presented their cases in a sensible and balanced way.

[6] There are largely six groups who are contesting before me. There is a good deal of crossover, with support in some aspects given between some contestants, but not on other aspects.

[7] Usually in the course of a case such as this, all too sadly we see the lines hardening as between contestants. It is a credit to those who have appeared before me that this has not happened, things are still amicable at the end and perhaps even more so. The applications as filed have the same pattern or structure, they ask me to investigate uninvestigated land.

[8] During the course of all this hearing I have received extensive evidence of the history of Rarotonga, both before and after the arrival of the gospel. Extensive papa'anga upon which I might have had much to say, but as it pans out I will not have to. I have received extensive research on litigation relating to this land and to other land where it has become relevant for my decision. I have also had the advantage of numerous references to the evidence given by parties in the earlier cases in the Minute Books of this Court. Now all of those materials form 'the Court file' and the file as a whole is, in my view, something of a treasure, a resource for future generations and should be treated as such.

[9] Turning back to s 422 where I am required to have regard to and to determine according to Native Custom and Usage, the most important proposition is that customary title ran from the sea to the ridge to where another water shed was encountered, the colloquial term used is from 'reef to ridge'. Land below the mean high watermark is a somewhat different category, but, be that as it may, there is a



strong presumption that title runs from reef to ridge and also a strong presumption that judgments of this Court will, as they are required to, follow that customary usage. This particular land, as it runs from the sea to the ridgeline, crosses relatively flat land and into the foothills and valleys but very quickly becomes exceptionally steep land. It is the steeper inland portion that I am concerned with in this judgment. It is uncontested that it was not used for residential purposes although there is evidence of a marae there and in that sense it was unoccupied. But there is evidence that it was used for hunting, gathering and, to an extent, for planting. There is a conflict in the evidence there that I now do not have to resolve.

[10] There is a title for the flatter portion of the land. It is an Order dated 10.11.1905. It is for 65 hectares, 56 ars. It is the flatter and, I have no doubt, better and more useable portion of the land. Yesterday afternoon during the course of her helpful submissions, Mrs Carr unravelled the logic or the underpinnings of the case as it had been presented and she revealed the prospect that the uninvestigated land had in fact been investigated. I ventilated this with the parties then and I received further submissions this morning for, if that was the case, there is no basis for the case to proceed and I agreed to issue a short judgment because if that was the case then the applications are mis-founded. I cannot redo what has already been done or, to put it another way, in terms of s 421 of the Cook Islands Act 1915, I have no jurisdiction.

[11] The so-called “uninvestigated lands” have come to be known as sections 227 and 228. They were in one block until the very recent past when the first application in this series related to part of the block as it then stood and it was necessary to divide the block to accommodate that. For the purposes of this judgment they are one block and the filing of application in the very recent past does not alter the occupation, usage, custom, or put it anyway you like.

[12] I now turn to the course of the litigation that produced the November 1905 Order. At some time in 1905, and I say some time because we cannot see the date, but it is in Mrs Browne’s Bundle of Documents and is at page 22, and it must have been earlier that year, because it received a hearing in the middle of that year, we can



see that Kokaua Arera sought an investigation of Pokoinu. Not part of it, but for the land known as Pokoinu.

[13] The matter came on for hearing on the 12<sup>th</sup> June of that year in the Cook Islands Title Court before Chief Justice Gudgeon and the reference is MB 2/49. When you look at the heading there, there is a spelling mistake but that is, I suppose, of no matter. Kokaua Arera opens his claim in this way: "I claim this land for Makea. Ngati Arera have lived on the lands". We then get a contest, not between Makea and those who live on the lands but between Makea and Mataiapo, and that is what the contest was about at that stage.

[14] Now I should say at this time that that Judge was concerned with and had demonstrated a concern at the assertions of power that had no customary underpinning or validity. He was a careful and experienced judge who was alert to the dynamics of Cook Islands society. He was well aware, as I am, of the 1891 judgment, just as I am well aware of the subsequent manifestations of the thoughts there. The judgment is quite clear in its terms.

[15] When the hearing continued on the next day, the 14<sup>th</sup>, extensive evidence was given and it was adjourned to the next morning, and the reference is MB 2/79 where judgment was given. That judgment starts, "In Re the taperes of Pokoinu"... and two others. The judgment dealt with the contest that I have described and ends at, (for the purposes of this case), at Folio 81, with the words, "We award Pokoinu to Makea and Ngati Arera who have lived on the land and paid atinga to Makea". Again, the reference is to the whole, not to part, and the presumption 'reef to ridge' would apply. That is a very strong indication that the land that is concerned in this case has in fact already been investigated. What happened subsequent to that was that the Order that I have referred to of the 10<sup>th</sup> November of that year was sealed, but it only referred to 65 or so hectares, the flat land, the more useful land.

[16] Mrs Carr helpfully referred me to the rules that Chief Judge Gudgeon would have been operating under at that stage. It is clear that the Judge, subsequent to the judgment, could only issue an Order when there was a proper survey, and the reference is there to Rules 9 and 55 which I will not bother to deal with at this stage




and do not need to be read out. The plan that was used is difficult, well, is impossible to obtain, particularly when it appears it may well have been replaced in litigation in 1948, which is referred to at MB 19/18.

[17] If I find, as I do, that the judgment of the 15<sup>th</sup> June 1905 dealt with the tapere as a whole, then why did the Order as drawn only relate to the flat portion of the land? I put it to counsel, who have vast experience in Cook Islands land law, that it was probably that this was because of a problem with the survey or the funding for a survey, perhaps the possibility that the higher land was to be taken for a catchment area. They agreed with that proposition that that was the probability and it is in fact difficult to think of any other reasonable explanation. The land we now refer to as 227 and 228 was then of such little use that the establishment of customary rights on that land was enough and the effort and cost of survey was not justified. Therefore the Court issued an Order for part only of the land that was indeed the subject of the judgment. That judgment stands and it determines the customary title of the lands in question in this case.

[18] There are a number of ancillary matters that I should address. Mrs Carr put it to me that I should award what is now 227 and 228 to her clients. She says that they have the best evidence of occupation. That may be so. She asked me to act as if I was Chief Judge Gudgeon and invoke the jurisdiction that he had at that time. In my judgment I cannot do that, my jurisdiction has a later basis for it, namely the 1915 Act. I cannot amend or tamper with that judgment of the Chief Judge in 1905.

[19] Mr Framhein has advanced the proposition that the judgment did not in fact deal with the tapere as a whole, but on the portion referred to in the Order in November 1905. He was alone in this. He drew my attention to the Cook Islands Gazette which gave notice to the parties and points out that there were in fact three relevant applications. There was the application that I have referred to and two others for lands that became 107A and 107B. And the question implicit in his submissions was, well if that were the case, how could it be that the judgment of 15<sup>th</sup> June 1905 related to the lot. Well there are a number of probabilities. It could be that they were competing applications filed after the first and they do appear to be subsequent in the way that they are listed in the Gazette. Or, they could represent a





special arrangement or compromise where particular groups had particular interests and, where particular people actually lived, or for lands that were an exception for some reason, an exception to the general proposition that the lands were Ngati Arera lands under Makea.

[20] The matter was called some six days later, I think it is referred to as a Wednesday on the 25<sup>th</sup> June, for the provision of lists of names. Without there being contest at that stage, 25 names were entered for Pokoinu 107 and without contest or even evidence it seems, names were entered for 107A and B. The parties had had time to reflect on the judgment and acted upon it and by consent these names were put on. That course of procedure does not, in my view, call into question the very clear terms of the judgment as given.

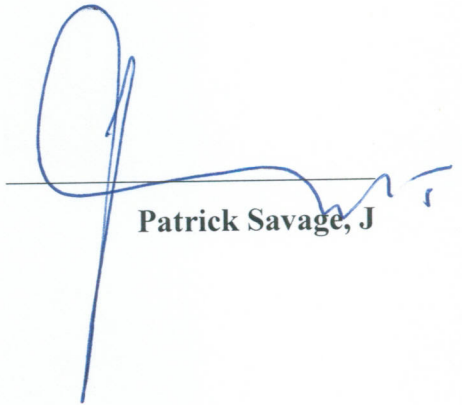
[21] Mr Framhein also asked that I look at the particular terms of the Order drawn in November 1905. The Order talks of declaring that the 25 are the owners of the parcel of land and the point seems to be that the Order rather pointedly did not refer to the balance which is now 227 and 228. That line of reasoning, with the greatest respect, is not supported in the judgment. It is not supported by the course of the litigation. It is not reflected in the way the case proceeded. And in my judgment the Order being drawn for only part of the land simply reflects problems with survey or funding of survey.

[22] Mr Petero who was essentially acting for one of the other two blocks, 107A, says well his clients should now be included in 227 and 228, to the ridgeline as well. He agreed that 107B was a special case and should not go there but his case was somewhat different. And I note there is a dispute as to how these owners got into this block. The short point is that I cannot unpick what has happened more than a hundred years ago. While I am not required to decide it, and I do not decide it, it appears that his clients' rights are specific to a specific area, but that does not fall to be decided by me.

[23] The end result is that there are no uninvestigated lands and the applications are dismissed.



[24] Now theoretically there is now an issue as to costs between the parties, I should tell you that my initial feeling is that I should not be awarding costs. You have all had a long hard fight and there is no winner.



Patrick Savage, J