

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

No 08/01

IN THE MATTER

of the Cook Islands Act 1915  
s.s.390A, 391 & 409(e)

AND

IN THE MATTER

of the lands known as Mangaiti  
Kairoa 30 + 54 No. 1,  
Auautangata 56, Vaitakaia 59,  
Nauparatoa 60, Te Matepa 61,  
Vairoa 64, Vairoa 64B  
(Ruatonga), Taurupau 69,  
Rarokava 70, Te Piri 73  
(Takuvaie), Koterau 88, Taratiu  
93 (Ruatonga), Anga Kopua 125  
(Takuvaie), Rimatara 127N  
(Araitetonga), Nokii 182  
(Ngatipa), Aretura & Takakoka  
188E N, Valokura 191B,  
Rangimanu 191G (Upper  
Tupapa) -- "the Tumu Lands"

BETWEEN

the descendents of Utanga and  
Arerangi Tumu

Applicants

AND

the descendants of Iopu Tumu

Respondents

Hearing: 31 March 2008

Counsel: Mr M Mitchell for the applicants  
Ms T Browne for the respondents

Judgment: 24 June 2008

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JUDGMENT OF DAVID WILLIAMS CJ

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## BACKGROUND – NATURE OF THE CLAIM

- [1] Sometime in 1996, Mrs Tara Scott, nee Utanga (one of the applicants and the wife of Mr John Scott) started clearing and levelling the family home section opposite the Punanga Nui Marketplace at Ruatonga, in the Avarua district, where it was intended the Scott family would market their eggs. The Utanga family had occupied this section of 1 roou 24 perches since the 1930s. It was here they built a family home, planted to the roadside and had a cookhouse at the rear. The six Utanga children (including Mrs Scott) were born and raised here.
- [2] Mrs Mere Raika, one of the respondents (a descendant of Iopu Tumu), from another branch of the family, reacted unfavourably to Mrs Scott's proprietary actions and instructed the Department of Survey to prepare a sub-division partition scheme of three lots in favour of the Arerangi Family (577 sqm), the Utanga Family (576 sqm) and the Iopu/Iobu Tumu family (500 sqm)<sup>1</sup> placing the Iopu/Iobu Tumu family at the valuable road side. This sub-division scheme was to provide the Utangas with just one seventh of an acre (576 sqm). The applicants contended that this was an impossibly small and repugnant recognition of nearly eighty years of occupation of the entire area.
- [3] The applicants alleged that Mrs Raika had a long history of partitioning family lands and selling leases. They argued that it was entirely consistent with her history that she was claiming the commercially valuable roadside section for her family line. A long list of such transactions was submitted in evidence by the applicants. They claimed these transactions demonstrated that Mrs Raika has made a business out of the Tumu Lands (defined below) and had personally benefited to a profound degree and at the expense of the other two branches of the family whom have therefore been denied their rightful share of the family lands.
- [4] For his part, Mr John Scott (who prepared many of the submissions on behalf of the applicants) had often heard of the many alleged land deprivations that had been inflicted upon his wife's line (and because of these had been forced to lease land elsewhere outside the family) but this was the first occasion he had been directly involved. The perceived inequity in this instance sparked a strong sense of indignation and fuelled Mr Scott's determination to better understand the land laws

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<sup>1</sup> An application for the proposed subdivision was made in November 1996 and approved by the Chief Surveyor on 28 January 1997; refer Appendix XIV of applicants' original submissions dated August 2001.

that could allow such alleged indignities to continue. This Application 8/01 relating to the Tumu Lands is the result.

- [5] On 16 October 2001, the applicants brought proceedings in the Land Division "for orders under s 390A of the Cook Islands Act 1915 that a certain Order of the Court made on 30 May 1912 ("the Order") was *ultra vires*, erroneous and founded on mistakes of law and fact and for a further and alternative order that the said order was made on the basis of fraudulent representations being made to that Court". The application sought "a further order by way of an injunction restraining the respondents from dealing or attempting to deal with any part of the Tumu Lands whether by way of partition or otherwise until further order of this Court".
- [6] The application stated that the grounds were as set out in the Memorandum of Counsel filed with the application and upon the further grounds to be adduced at the hearing. This reference created a little confusion as the respondents were waiting for an actual Memorandum to be filed while Mr Mitchell had intended the reference in the application to "Memorandum" to be a reference to the lengthy submissions and exhibits prepared by the applicants themselves dated 7 August 2001.<sup>2</sup>

#### **Basic genealogy of the parties**

- [7] The applicants are the descendants of the Arerangi and Utanga lines. Both the applicants and respondents have a common biological ancestor, Tautu. Tautu, the parties' grandfather four times removed, and his wife Rei had six children. One of their sons, Anautoa had a daughter Arapau. Arapau married Takaroa Pakau (the parties' great-great-grandfather) and had a son Taruia, the parties' great grandfather. Taruia in turn married Maria Teoepai, of the Ngati Uritaua line.<sup>3</sup> Taruia (from the Ngati Anautoa line) and Maria had three children, Iopu (eldest son), Arerangi (daughter) and Utanga. Utanga is Mr and Mrs Scott's grandfather.
- [8] Iopu (later known as Iopu Tumu or Iobu Tumu), Arerangi and Utanga were natural brothers and sisters. They were all of the Anautoa and Uritaua family lines (through their father and mother respectively). The applicants contended that Iopu, as the

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<sup>2</sup> Transcript of Hearing before Smith J (22 March 2002) where Mr Mitchell states "The position at the moment Sir is that an application was filed ... last October. The application was filed together with a lengthy brief or Memorandum prepared by my clients with a number of attachments but which contains in its entirety the case for the applicants...".

<sup>3</sup> Respondents' submissions dated 1 July 2005, para 5(c). It was argued for the applicants that Maria came from the Tumu line through her own ancestry, thus conferring on all of her children, independent of any adoption, entitlement to Tumu lands. The applicants did not submit a genealogy specific to Maria Teoepai.

eldest son and *Rangatira* of the family, was also addressed and known as "Iopu Tumu".<sup>4</sup> The respondents disagreed with that characterisation. They submitted that Iopu gained the "Tumu" (or *Rangatira*) title from Iopu Kamoe,<sup>5</sup> his adopted father, who originally held the Tumu title.<sup>6</sup> The respondents argued that since Iopu Tumu's connection to the Tumu lands was through his adopted father Iopu Kamoe, neither Utanga or Arerangi (who were not adopted) had any formal connection to the Tumu lands.<sup>7</sup> Moreover, the respondents argued that it was suggested that Maria, the wife of Tarua (from Anautoa) was related to the Tumu family but the genealogies in Court were conflicting.<sup>8</sup> In their submission, Maria was not related to the Tumu family but was solely from the Uitaia family.

#### The definition of Tumu Lands

- [9] The Lands listed in the intifuling to the application as being "the Tumu Lands" were as follows:

Mangaiti Kairoa 30 + 54 No. 1<sup>9</sup>  
 Auautangata 56  
 Vaitakala 59  
 Neuparatoa 60  
 Te Matape 61  
 Vairoa 64  
 Vairoa 64B (Ruatonga)  
 Taurupau 69  
 Rarokava 70,  
 Te Piri 73 (Takuvaive)  
 Koterau 88  
 Taratu 93 (Ruatonga)  
 Anga Kopua 125 (Takuvaive)  
 Rimatara 127N (Araitetonga)  
 Nokii 182 (Ngatipa)  
 Aretura & Takakoka 188E N  
 Valokura 191B  
 Rangimanu 191G (Upper Tupapa)

<sup>4</sup> Appendix 1 of the Applicants' submissions dated August 2001 traces the lineage. It is attached as Appendix 1 to this Judgment.

<sup>5</sup> Iopu Kamoe was also known as Iobu Matua or Tumu Senior.

<sup>6</sup> Respondents' submissions dated 1 July 2005, para 5(a)-(b).

<sup>7</sup> Respondents' submissions dated 31 May 2002 and MB 7/268 (18 September 1916) which refers to Iopu Tumu as Iopu Kamoe's adopted son. Iopu Kamoe died on 15 August 1908 intestate.

<sup>8</sup> Respondents' submissions dated 31 May 2002.

<sup>9</sup> This section was the subject of Mrs Raita's subdivision application in November 1996.

- [10] The essence of the legal dispute relates to alleged actions by Iopu Tumu, the applicants' great-uncle, to systematically exclude his siblings Utanga and Arerangi from Tumu land ownership. Although the Tumu lands as defined above at paragraph [9] are extensive, this application was subsequently confined to those lands which were the subject of the 1905 and 1912 Orders. Indeed, the applicants' submissions from September 2004 onwards proceeded on the basis that only three Takuvaine sections were being contested: Te Piri Section 73 at Avarua, Rarokava Section 70 at Avarua and Taurupau Section 69 at Avarua.
- [11] When the land title hearings began at the beginning of the 1900s the Iopu line lived and planted at Takuvaine while the Utanga and Arerangi lines lived and planted in Ruatonga. The bulk of the Tumu Lands hearings were completed between 1905 and 1908.

#### The 1905 Orders

- [12] On 9 March 1905, the Cook Islands Gazette gave notice that the Land Titles Court would sit at Avarua on 13 March 1905 to hear those matters listed in the Schedule. "Tumu" was listed as making three applications, each application concerning numerous sections of land. The present decision is concerned with Tumu's application No. 122 as that application dealt with the three sections (amongst others) which the applicants have since contended should also be theirs.
- [13] On 10 November 1905 after the investigation of title to the lands on 19 April 1905, the Court vested the three blocks of land as follows:

(1) Te Piri section 73 vested in equal share in:

- [1] Tumu
- [2] Iopu<sup>10</sup>
- [3] Utanga Tumu
- [4] Mere Arerangi
- [5] Arapau Arerangi
- [6] Maria Arerangi
- [7] Makiroa Arerangi

(2) Rarokava section 70 vested in equal shares in:

- [1] Tumu
- [2] Utanga Tumu
- [3] Mere Arerangi
- [4] Arapau Arerangi

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<sup>10</sup> The name "Iopu" did not appear in the scheduled attached to the signed Order of the Court and does not appear for the other two land sections. The Register of Title for Section 73 makes reference to the anomaly.

- [5] Maria Arerangi
- [6] Makiroa Arerangi

(3) Taurupau section 48 vested in equal shares in:

- [1] Tumu
- [2] Utanga Tumu
- [3] Mere Arerangi
- [4] Arapau Arerangi
- [5] Maria Arerangi
- [6] Makiroa Arerangi
- [7] Kairangi for life interest

[14] At each hearing for the above three sections, Lt Col Gudgeon CJ and Pa Ariki J were present. Each Order was signed by the Chief Judge, the Registrar Blaine and sealed.

[15] The applicants agreed with the respondents that prior to 1905, only Tumu was listed as the owner of the lands.<sup>11</sup> However, their characterisation of that state of affairs was somewhat different from that of the respondents. The applicants contended that this simply showed that:

"Iopu Tumu had indeed grabbed many of the lands for himself and it can be seen that with the course Iopu Tumu was embarked upon, if allowed to continue unchallenged or uncorrected, his siblings would end up with very little."

[16] The applicants proceeded on the basis that these applications were made by Iopu Tumu. The respondents contended that reference to "Tumu" as the applicant was reference to Iobu Kamoe, who at that stage held that Tumu title, and not to his adopted son Iopu Tumu

#### The 1912 Order (which is allegedly invalid)

[17] On 29 February 1912, the Cook Islands Gazette provided notice that Iopu Tumu had made an application for an amendment of the list of titles contained in the Register of Title for Te Piri Section 73, Rarokava Section 70 and Taurupau Section 69. On 13 May 1912, the Court held:

No. 122      Te Piri Sec. 73  
                  Rarokava Sec. [70] (sic)  
                  Taurupau Sec. 69

[Application] made in 1908 by Iopu Tumu to amend list of owners by striking out certain names. He put the names in himself but by a family arrangement it is desired to take them out.

<sup>11</sup> Applicants' submissions dated August 2002, paragraph 5.3.

[Mere Arerangi, Arapu Arerangi and Makiroa Arerangi, Nieces of Iopu Tumu] are present and desire their names taken out as they have their shares of the family lands elsewhere. Maria Arerangi their sister is dead without issue and they are her successors. The only other owner is Utanga Tumu brother of Iopu. He has signed a consent to his name being [excised]. The 3 lands [altogether] contain about 12 acres and it is said that Tumu is the only one who has occupation.  
Order by consent that the 5 names be deleted from the orders of the 3 lands."

[18] The Order directed the removal of those names numbered 3 to 7 inclusive from Te Piri section 73, and those names numbered 2 to 6 and 2 to 7 inclusive from the remaining two blocks. The names were struck out from their corresponding Title on 13 May 1912.

[19] The reference by the Judge to an "application made by Iopu Tumu in 1908" is to a letter written by Iopu Tumu to Lt Col Gudgeon CJ dated 7 September 1908 which reads:

"Greetings. - - I make this request to the Court to amend certain lists of names in the Tumu lands. When I first put the names in I was ignorant as to the effect this would have in future years but now I see that [there] (sic) will be a lot of trouble. My family are in all the lands and it is not that I want to deprive them of any land. The lands that I wish to amend the list of names in are Te-Piri, Rarokava and Taurupau, these three pieces are planted by myself only and are the special pieces of the Rangatira. . ."

[20] The applicants argued in these proceedings that Iopu Tumu wrongfully and deceitfully engineered the exclusion of the names of his siblings. It is said that he was able to do this because being the older brother his siblings deferred to him in the belief that he would fairly represent their interests. The applicants noted that the Chief Justice of the day Lt Col Gudgeon CJ was outspoken in his recognition of the widespread problem of misplaced trust in land dealings in the Cook Islands and that, on his own initiative, he sought to correct the manifestation of this in the Tumu Lands by ordering the names which belonged in them to be added to the Registrar in 1905.<sup>12</sup> But, the applicants argued, the Registrar Blaine failed to comply with Lt Col Gudgeon's specific directions in 1912 when Iopu Tumu's application was heard and determined. This is said to have led to the Utanga and Arerangi branches of the family being seriously disadvantaged. The applicants argued that Iopu Tumu had a

<sup>12</sup> MB 1/142 (1 August 1905) where the Court states "Sitting held on 1<sup>st</sup> August 1905 to fix permanently lists of names in above two sections". The reference to the "above two sections" was a reference to Section 84 at Puatiki and Waitu (which is not the subject of these proceedings) and Section 70 at Rarokava (although the name of the section was not given, the names listed correspond to those on the Rarokava section title following the 1905 hearings). The Court notes that it is unclear whether the names were in fact permanently fixed as the full records were not provided.



plot to strike them out of sharing ownership with him of twelve acres of prime Takuvaive land, a plot which culminated in the passing of the 1912 Order.

#### THE PROCEDURAL HISTORY OF THE APPLICATION

[21] The applicants sent a letter to the Secretary of Justice on 7 August 2001, enclosing lengthy submissions and exhibits in support and seeking guidance as to how to proceed with the application. A proper application was filed on 16 October 2001 and challenged the validity of the 1912 Order on the grounds that it was ultra vires, erroneous, founded on mistakes of law and fact, and in the alternative, made on the basis of fraudulent representations. The application sought to amend the 1912 Order. The allegations of fraud were subsequently withdrawn.

[22] On 23 November 2001, pursuant to s 390A(3) of the Cook Islands Act 1915 Greig CJ referred the matter to the Land Court for enquiry and report and put in place an interim injunction prohibiting any person from:

"dealing with any part or parts of the Tumu Lands as described in the title to the proceedings, whether by way of partition, alienation, leasing or making any application to the Court in respect of any such dealing or for a succession order or in any other way so as to affect the ownership title or occupation of the Tumu Lands."

[23] Mr Mitchell, Counsel for the applicants, advised the Court at the hearing on 31 March 2006 that the injunction covered all the lands listed in the original intituling except Vairoa 64B (where it has since been discharged since a lease registration went through prior to the issue of the injunction). Mr Mitchell advised that no steps had been taken to discharge the injunction since the parties had at various times anticipated that a judgment would soon be issued.

[24] On 4 March 2002, descendants of "Tumu Tearoa" lodged an objection to this "rehearing application". Mr Mitchell wrote to the Registrar on 20 March 2002 and emphasised that their application was not one of "rehearing" but rather one of amendment.

[25] Smith J, to whom the matter was referred, provided directions on 22 March 2002 following a hearing on that same day. At that hearing, the applicants clarified that their application related only to the three "main sections" at Takuvaive but that their argument was that the events which occurred in relation to those section subsequently affected what happened to the remaining Tumu lands. At the conclusion of the hearing, Smith J sought submissions from the respondents by the

end of April 2002 and submissions from the applicants in response within one month thereafter. The respondents filed their submissions on 31 May 2002. The applicants filed their reply submissions on 26 August 2002. Smith J issued his Report on 19 August 2003. I now turn to that Report.

#### THE REPORT OF SMITH J

- [26] Further to clarification from Counsel that the application related only to three of the eighteen lands listed in the intituling, Smith J limited his report to those three lands only.
- [27] Following receipt of the written submissions from both parties, and after due notice, an enquiry was carried out in March 2003. No witnesses were called. Smith J's August 2003 report recommended that the application be dismissed.
- [28] The report of Smith J, a very experienced Land Division Judge, provides a convenient introduction to the claims of the applicants and the issues requiring determination. I therefore reproduce the essence of the report of Smith J.

##### "The Claim"

The applicants claim, that the Court erred in making the order on the 13<sup>th</sup> May 1912 and the Chief Justice should exercise the jurisdiction afforded him in terms of section 390A [1] of the Cook Islands Act 1915 and cancel the order so as to restore the names of all found to be entitled upon investigation of the title, to the land.

The grounds relied upon by the applications are first;  
That the purported agreement upon which the order was founded was a fiction, and secondly;  
that the orders were made in excess of jurisdiction.

##### The Agreement

On 7<sup>th</sup> September 1908, Iopu Tumu wrote to Col. Gudgeon, Chief Judge, requesting that certain names be struck out of the lands listed above. He said "when I first put the names in I was ignorant as to the effect this would have in future years but now I see that there will be a lot of trouble. My family are all in the lands and it is not that I want to deprive them of any land. The lands I wish to amend the list of names in are Te-Piri, Rarokava and Taurupau, these three pieces are planted by myself only and are the special pieces of the Rangatira."

The applications claim that the reference to the lands not being Rangatira lands was not in the Maori version of the letter, and was introduced into the Court for the purposes of misleading the Court. This statement loses some of its impact, however, when one realises that the owners being taken out of the list of owners were present in Court at the time and consented to their names being taken out.

The Cook Islands Gazette for 29<sup>th</sup> February 1912 listed amongst "Applications for Amendment" applications by Tumu in respect to Te Firi 73, Rarakeva 70, and Taurupau 89 Rimatara 127N.

At MB5 folio 309, after hearing Iopu Tumu as applicant, Mere Arerangi, Arapu Arerangi, and Makiroa Arerangi, all of whom were present and consenting, receiving written consent from Utanga Tumu, and on being advised that Maria Arerangi had died without issue and that the persons consenting to the order were her successors, the Court made the order "by consent".

The applications claim that the agreement relied upon by Iopu Tumu in prosecuting this application was not an agreement to delete the names, but an agreement to exchange interests. This contention is difficult to accept when one looks at the record of the proceedings at M.B. 5 folio 309 were [sic where] it is recorded "He put the names in himself but by a family agreement it is desired to take time out." The emphasis has been added. There is no suggestion in the record of the proceedings that there was to be an exchange of lands.

Apart from Utanga Tumu whose written consent was purportedly produced, all of the owners whose names were to be taken out of the list were present in Court and consented.

The Jurisdiction afforded the Chief Judge under the provisions of section 390A of the Cook Islands Act 1915 can only be exercised in those instances where there has been a mistake or error on the part of the Court or where the Court has acted erroneously.

In this present matter, the applications claim that their ancestors were disenfranchised by the Court in interpreting the "the family agreement as an application to amend the title rather than an application for exchange." The record of the hearing does not support this claim. The order was made by consent with the parties present or consenting in writing.

The Court and to the extent that he has Jurisdiction in this matter, the Chief Justice must rely upon the best evidence available, rather than interpretations placed upon evidence by subsequent generations. Where a modern generation of owners or claimants, seek to alter or cancel orders made by the Court on the evidence and consent of their ancestors, the Court, or in this instance, the Chief Justice, must weigh, not only the arguments and views of the contemporary owners, but such views as are documented in the Court's records of those of earlier generations who supported the order made. The Court is concerned to protect the values of a past generation from the demands of some future generation with a more materialistic mind.

In the absence of adequate evidence that those appearing in the Court at the time the order was made did not understand the full impact of the order, or that the Court in accepting the evidence before it acted erroneously or mistakenly, then this ground put forward by the applicants is untenable.

The second ground relied upon by the applicants is the want or excess of jurisdiction.

The Cook and other Islands Lands Titles Court was established by Order in Council dated the 7<sup>th</sup> July 1902.

The applicants have carried out very extensive research in support of the claims made, and in the supporting papers, record various sections from the founding Order in Council.

In essence, the Court as originally established was to consist of not less than two judges, one of whom would be the Chief Judge, who must be European.

The initial judges appointed were L/Coln. W.E. Gudgeon as Chief Judge, and Pa Ariki, their appointments taking effect from the 14<sup>th</sup> July 1902. Pa Ariki was to die in January/February 1906, and was not replaced.

Gudgeon left the Islands in August 1909, and was succeeded by Capt E. Smith who it is said did not undertake any Land Court work during his term. He was ultimately succeeded in 1912 by Judge MacCormick on loan from the Native Land Court in New Zealand. MacCormick was not appointed Chief Judge. It was Judge MacCormick who heard the application by Iopu Tumu and made the order now being challenged.

Because the Order in Council creating the Court, required the Court to be constituted of a least two Judges, one of whom was to be the Chief Judge, and because Pa Ariki was not replaced following his death in 1906, and MacCormick was not appointed Chief Judge, it is claimed that the Court was not constituted in accordance with the Order of the Council. Therefore all orders made between the death of Pa Ariki in 1906 and the re-appointment of Gudgeon as Chief Judge for a period of three months, in 1913, were made without jurisdiction. Further, the applicants claim that this present order also infringed the Rules of the Court as declared by Chief Judge Gudgeon in pursuance of section 30 of the founding Order in Council.

The applicants claim that no formal application was lodged to amend the names on the title.

That no order was drawn up and signed and sealed.

That in terms of Rule 78 relating to amendments the notice in the Gazette was not adequate notice to those affected by the amendment.

That there was no compliance with the notice required under Rule 87 when there is to be a change in the name of owners on a title.

That at the hearing Iopu Tumu was acting as agent for Utanga who was not present, but Iopu did not produce written notice of his authority to act.

The applications justify their claims that the Court had acted in error or in excess of jurisdiction while there was only one judge in office and no Chief Judge appointed, by reference to the minutes of the Rarotongan Island Council meeting on the 3<sup>rd</sup> September 1913 [annexure vii in the applicants' papers] where Resident Commissioner Northcroft advised the members of the Committee of his efforts to have the matter remedied.

It is intended now to deal with these specific claims.

The only order that the Applicants are challenging and made during the period cited, is that striking out the names of some of the owners in the lands stated above. In that regard, that Judge

MacCormick was aware of his limitations and ability to sign orders, is illustrated in the minutes of the Rarotongan Island Council meeting referred to above where it is recorded that Northcroft advised the members that following a request that Judge MacCormick sign the orders he made, MacCormick wrote back saying "he could not sign any of the orders-they must be signed by a Chief Judge". That is not now the case, for under the provisions of section 415 of the Cook Islands Act 1915, the orders may be signed by any Judge. Whether an order was subsequently drawn up, signed sealed then subsequently lost in the fire in the early 1990s or not, is not clear. Suffice it to say, that the applicants say that they have not been able to locate an order. Whatever the true position, the minutes at M.B.5 folio 309 record the making of an order, and in terms of section 415/15 an order can now be drawn signed and sealed.

With regard to the claimed inadequacy of notice for the purposes of Rules 78 and 87, it is noted that all parties affected by the application were either present in Court or had filed a written consent to the application. Clearly notice was adequate.

Finally the challenge against Iopu's authority to act for others does not stand up. The minutes referred to above show that three of the owners were present and that Utanga Tumu had filed a written consent. There is nothing to show who produced the consent, but it is equally possible, in fact probable, that it was one of the other consenting owners who produced the consent. It is of little moment however, since the other owners were present and raised no objection.

The Cook Islands Act 1915 came into effect on the 1<sup>st</sup> April 1916. Included amongst the provisions of that Act were the following sections.

Section 399, relating to the validity of orders despite errors or irregularities in the form thereof, or the practice or procedure of the Court.

Section 415 empowering any judge to sign any unsigned orders of the Court.

Section 416 empowering the Court to validate any order of the Court where questions of validity arise.

With the greatest of respect to the applicants while acknowledging the tremendous amount of research they have undertaken, because of the lack of conclusive evidence that the Court was misled by the purported "agreement," and because the validating provisions of sections 415 and 416 of the Cook Islands Act 1915, subvert the challenges against the jurisdiction of the Court, this Court must recommend that the application under section 390A of the Cook Islands Act 1915 be dismissed.

As stated above, there is currently an injunction in place in respect of all the "Tumu Lands". As the applicants have also challenged the validity of the order because of the purported fraudulent acts of Court staff at the time, the injunction should remain in place until that application has been determined."

## SUBSEQUENT PROCEEDINGS AND SUBMISSIONS

[29] On 6 July 2004, Chief Justice Greig issued a minute following consideration of the report by Smith J. The Chief Justice said at paragraphs 2-7 of his Minute:

- "2. I have considered the report and recommendation and have sought and received further submissions from counsel but I feel unable to complete my consideration without further submissions and possible a further hearing.
3. The application is to set aside an order made on 13 May 1912 by Judge MacCormick. The order amended the Vesting Order made by Chief Judge Gudgeon on 10 November 1905. Because the 1912 order relates to the 3 titles in the entitlement above I understand, with Judge Smith, that only those 3 titles are in issue in this application.
4. There appear to be a number of points raised or in issue. Some of these have not, I believe, been fully canvassed in submissions on the file or in the Judge's report. The points I have identified are as follows:
  - (a) **There was no jurisdiction to make the 1912 order because the form of application or transaction, namely an amendment, was not contemplated or recognized in the jurisdiction given to the Court.**
  - (b) **The Court was not properly constituted because there was no Chief Judge.**
  - (c) **The Court was not constituted because Judge MacCormick was never appointed a Judge of the Court. (See Applications' Appendix VII Minute Book at p 302 reply by High Commissioner 28 August 1912).**
  - (d) The 1912 order was invalid on various procedural grounds including absence of use of proper form, lack of sufficient notice, not initialled or signed by Judge or Chief Judge.
  - (e) The "family arrangement" or agreement mentioned in 1908-1912 by the applicant was an exchange of land and the landowners who purported to consent to the order as made did not understand that and did not give free and informed consent.
  - (f) The order was obtained by fraud on the Court in which officers of the Court were party to or acquiesced in, by suppressing or failing to inform the Court of the true nature of the transaction. I understand that it is agreed that this is a matter which is separate from the 390A application and is to be dealt with in different proceedings. I need not consider this point further. I observe as a caveat to that, that if the Court was to proceed under s.416 Cook Islands Act it would be difficult to be affirmative in equity, and good conscience with fraud allegations unresolved.
5. Items (a), (b) and (c) do not appear to me to have been dealt with in the Judge's report. At least not in a way in which I can weigh to the submissions for and against them.

6. I ask that Counsel consider this minute, confer with each other and then jointly or separately make submissions as to the course they suggest the matter should take.
7. Although this matter relates to actions almost a century ago which were not challenged until about 90 years later there needs to be some finality to that state of the proceedings. This is particularly so as there is a continuing injunction which prevents dealing with these titles."

(Emphasis added).

[30] In compliance with the Minute, the applicants filed submissions on 16 September 2004. The respondents filed submissions dated 1 July 2005 and the applicants filed reply submissions (by Mr John M Scott) in October 2005.

[31] On 9 November 2005, counsel for the applicants filed a Memorandum, which referred to the history of the matter and concluded by stating in paragraph 8 that:

"The former Chief Justice retired before this case was disposed of. It is a complex matter. The Applicants believe it would be appropriate for counsel to seek directions from your Honour as to how the matter should be disposed."

[32] On 11 November 2005, a Minute was issued by the Court which noted that the issue of a hearing for the presentation of oral evidence had been raised by Mrs Browne and that she requested such a hearing on behalf of the respondents. (There were no witnesses called when the matter was before Justice Smith.) She suggested that if there was to be such a hearing it should be held before Justice Smith. The Minute went on to state that once further submissions were received, the Court would decide if an oral hearing was appropriate and if so, when it should take place.

[33] Subsequent to that Minute I issued a further Minute dated 13 June 2006 in which I noted that I had endeavoured to confer with counsel when sitting in Rarotonga in May 2006 but neither Mrs Browne nor Mr Mitchell were available. That Minute then asked counsel to file Memoranda indicating whether the applicants were pursuing the case and if so, when it would be convenient to hold a further hearing. Counsel were unable to agree on the contents of a joint Memorandum in response. Counsel for the applicants stated that it did not believe that a further hearing was appropriate and that the next step was for me to consider the submissions filed in response to the enquiries from Greig CJ.

[34] On 12 April 2007, I issued another Minute, which recorded that after hearing counsel, I considered the proper course was for me to consider the submissions which had

been presented to Chief Justice Greig following his Minute of 6 July 2004 and then issue a judgment.

[35] The Minute stated inter alia:

- "2. It was agreed that, although at one point both parties had conveyed to Justice Smith they would be calling witnesses, neither party had done so and neither party wished the matter to return to Justice Smith for the hearing of evidence.
3. By consent therefore I will now rule on the 390A application made to Justice Greig but the following points are noted:
  - (i) As I proceed I shall check to ensure that Mrs Browne's submissions to Chief Justice Greig in answer to his queries actually address all of those queries.
  - (ii) Leave is reserved to Respondent to apply to remove the existing injunction from all or part of the lands affected by that injunction."

[36] Subsequently Smith J retired, thus rendering any reference back to him impossible in any event.

[37] When I began to consider the submissions I was troubled by their complexity. In the end, I decided that I wished to have written submissions from the parties highlighting the key points of their cases and that that would be followed by an oral hearing when I would hear counsel in elaboration of their written submissions. The hearing took place in Rarotonga on 31 March 2008.

[38] Before returning to the Minute of Greig J and the additional issues that it raised, certain important matters should be noted. First of all, as already mentioned in paragraph [10] above, since the only Order challenged is the 1912 order, it necessarily follows that the application should be limited to the lands described in that Order. This was the view of Smith J in his report to which I have already referred. Moreover, it appears to have been conceded by both sides because the subsequent titling of the case has thereafter been changed to refer only to the three blocks, that is Te Piri Section 73, Rarokava Section 70, and Taurupau Section 69.

[39] However, it must nevertheless be noted that Mr Mitchell, Counsel for the applicants, stated before me at the hearing in Rarotonga in March, 2008 that, although the application must be necessary to be confined to lands affected by the order, if the application succeeded relief would be sought in relation to other lands. In his written



submissions of 27 March 2008 the Applicant said they were seeking the following remedies:

"Voiding the strike outs in the 12 May 1913 (S.390A(1)).

Instructing the Registrar to identify all lands in which Iopu Tumu is recorded in the title and, where they are not present, to add the names of Utanga Tumu and Aererangi Tumu (or issue) and to apportion the three shares equally (MB 2/142, MB 7/268-275 & S.390a(7)).

Instructing the Land Court to favourably consider an application from the Utanga Tumu line to secure for that line an unfettered title to the 1 rood 24 perches of Mangaiti Kairoa 30 + 54 No.1. The effect of the strike outs and the disproportionate division of the family lands has now had the effect of exposing the Utanga family to an emboldened and acquisitive Iopu Tumu line which threatens the Utanga line's 70-80 years undisputed occupation of this section and the Applicants seek an appropriate remedy of that effect from the Court (S.390A(1)).

That the injunction in place be continued for a further twelve months and that the Applicants be instructed within that time to bring before the Land Court a redistribution scheme for all the Tumu lands with the object of restoring equity between the three branches of the family in the holdings of the family lands (S.390A(7)).

That any benefit that has accrued to the Iopu Tumu branch of the family as a result of the lifting of the Injunction be subject to redistribution or reassignment in accordance with the redistribution scheme in 4 above."

- [40] Secondly, as Mt Mitchell confirmed on 31 March 2008, the applicants have withdrawn their allegation of fraud. They have acknowledged the impossibility of proving fraud after 100 years and their case therefore proceeds purely on the basis of the available evidence in the records of the Land Court as to what happened in respect of the original 1905 Order and the changes made by the 1912 Order. This withdrawal is significant because it eliminates the concerns expressed by Chief Justice Greig as to the invocation of s 416 of the Cook Islands Act (see paragraph f of his July 2004 Minute set out at paragraph [29] above).

#### **SUBMISSIONS OF THE PARTIES**

- [41] In this section of the judgment, I will endeavour to capture the key points made in all of the written submissions of the parties and also in the oral argument before me at the March 2008 hearing.

##### **Submissions for the applicants**

- [42] In all of their submissions the applicants discussed the question of why all three siblings namely Iopu Tumu, Utanga Tumu and Aererangi Tumu were originally vested with the three blocks of land (in 1905) and were later removed by the Order (of 1912).

in presenting these submissions they sought to challenge the explanations given by the respondents. The applicants classified the respondents' explanations as follows:

- (a) The Iopu Kamoe adoption theory;
- (b) The family arrangement theory, which in essence contended that the 1912 Order was a consensual rearrangement; and
- (c) The swap theory.

[43] In relation to all these theories it was stressed that Cook Islanders do not lightly or freely waive their rights. Therefore, the rhetorical question raised was how did the Order come about?

*The adoption theory*

[44] The applicants summarised the respondents' claim as being that by virtue of Iopu Tumu's unregistered adoption by Iopu Kamoe, Iopu junior assumed rights in Iopu Kamoe's lands, which same rights were denied his siblings Utanga Tumu and Arerangi. The applicants observed that by way of this claim, the respondents sought to explain why Iopu Tumu's name appeared in some lands at the exclusion of his siblings and why his siblings should be struck out of the three Takuvaine lands.

[45] The applicants claimed that the respondents' explanation for the Order was unsound for a variety of reasons.

[46] First, the respondents' argument was essentially that by virtue of a flawed adoption, Iopu Tumu acquired control. This was incorrect as rights of succession are acquired upon the death of the principal. Iopu Tumu could not have gained rights of succession for the purposes of the bulk of the Tumu lands hearings as Iopu Kamoe died on 15 August 1908,<sup>13</sup> after the 1905 and 1908 hearings were completed. Therefore, for the respondents' arguments to have any substance, it should have been Iopu Kamoe who made the applications concerning the 1905 and 1908 hearings and not his adopted son. In any event, had Iopu Kamoe applied alone his interests would have eventually merged with all the siblings by virtue of Ayson J's

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<sup>13</sup> MB 7/268 (18 September 1916).

order of 18 September 1916.<sup>14</sup> This aspect of the applicants' argument assumes that it was Iopu Tumu who made the applications in 1905 and not Iopu Kamoe.

- [47] Secondly, Lt Col Gudgeon CJ declared in 1905 that Utanga and the issue of the sister, Arerangi were to be permanently fixed in the list of owners of the Tumu Lands thus theoretically protecting the applicants' lines from further attempts at disenfranchisement.<sup>15</sup> This position was reaffirmed by Ayson J in 1916 when he ordered that Iopu Kamoe's successors in the Tumu Lands were the descendants of Maria and Tarua, namely Iopu Tumu, Utanga Tumu and the issue of the deceased sister, Arerangi.<sup>16</sup> The applicants argued that this order showed that Utanga, Arerangi and Iobu Tumu's connection to the Tumu lineage and the Tumu lands was not through Iopu Kamoe but rather, through Maria, their mother. Moreover, the expression by the Court in 1905 that the land was to be vested in "Tumu son of Maria" also implied that Tumu was inheriting the land by virtue of Maria.
- [48] Thirdly, Iopu Tumu did not have an exclusive relationship with Iobu Kamoe since Iobu Kamoe, Iopu Tumu, Arerangi and Utanga all descended from the same Anautoa line. Here, the applicants referred the Court to the genealogy at MB 7/261A (6 September 1916) which showed the family tree flowing from Anautoa two wives.<sup>17</sup> The descendants of he and his first wife, Vairangi, were Iobu Tumu, Utanga and Arerangi (great-grandchildren). The descendants of he and his second wife (unnamed) included Iobu Kamoe (his grandson).
- [49] Finally, based on the Orders of Gudgeon CJ and Ayson J, the applicants believed that Iopu Tumu's adoptive status, or otherwise, was a "non-issue". The applicants argued that the respondents' claims of adoption were not supported at law. Counsel for the applicants argued that although s 50 of the Native Claims Adjustment and Law Amendment Act 1901 (NZ) had only come to their notice prior to making their February submissions, it was dispositive of the invalidity of the Adoption Order. That section, as applied in modified form by the Order-in-Council of 28 October 1904 provided that:

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<sup>14</sup> By way of that Order, Ayson J appointed as successors in the Tumu lands the descendants of Maria and Tarua but excluded numerous descendants of the Anautoa people (25 in total) as being successors of Iopu Kamoe. This was based on the fact that the Tumu heritage stemmed from Maria Teoepai (wife of Tarua) and therefore the Anautoa people had no entitlement, being related to Tarua only.

<sup>15</sup> MB 2/142 (1 August 1905).

<sup>16</sup> MB 7/272 (18 September 1916).

<sup>17</sup> This genealogy was submitted by Iopu Tumu on 6 September 1916. Conflicting genealogies were provided by other interested parties to those proceedings.

"No claim by adoption to the estate of any native inhabitant of the islands subject to The Cook and Other Islands Government Act 1901, dying after 31.3.1905, shall be recognised or given effect to unless such adoption shall have been registered in the Cook and Other Islands Land Titles Court in accordance with regulations to be made by the Governor in Council."

[50] The applicants pointed out this law was in force at the time of the 1912 Order and they submitted that this was the end of the adoption argument, since there was no evidence of the adoption ever being registered. In support of the latter argument the applicants referred the Court to the Registrar of Adoptions, which commenced early in 1905 and provided no evidence that Iopu Tumu's adoption was formalised. The applicants contended that it was irrelevant whether s 50 was applicable when Iopu Tumu applied for the original investigation of titles as Iopu Kamoe was still alive. The applicants pointed out that had Iopu Tumu been excluded from the title following Lt Col Gudgeon C.J.'s order and then applied for succession post Iopu Kamoe's death, s 50 would have barred him from qualifying. In that circumstance, Iopu Tumu's rights of succession would have depended on Ayson J's order of September 1916.

[51] Moreover, relevant to the s 50 argument, the applicants submitted that Iopu Tumu became aware of his deficiency because in the hearings contesting the Tumu title in 1916 he made the following admissions:

- (a) MB 7/260-261 – "adoption not registered";
- (b) MB 7/267 – "Kamoe and I acted together when Law Court started. I thought adoption law only applied to children. I never thought of adoption of adult people"; and
- (c) MB 7/269 the Court said – "The adoption has never been disputed and was not disputed before this Court. The only defect is want of registration (see order in Council made in October 1904.) This is only a technical defect but the Court cannot overlook it, although the merits of the case are with Iopu".

[52] The applicants summarised the adoption argument as follows:<sup>16</sup>

"There are therefore no justifiable grounds for accepting the assertion that Iopu Kamoe's land interests were separate and distinct from those of Iopu Tumu and his siblings. They were indistinguishable and confirm the Applicant's contention that where Iopu Tumu's name appeared in the Register so too should his siblings. The very notion, in circumstances such as these, that one brother could have exclusive title to the exclusion of his siblings

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<sup>16</sup> Applicants' final submissions dated 27 March 2008 at paragraph 3.16.

would contradict Maori custom, the fundamental purpose of investigating title and any sense of equity and good conscience."

*The legal validity of the order – the law and the requirements for the constitution of the Court*

[53] The applicants submitted that the Lands Titles Court was legally required to be made up of at least two judges, a deficiency which the respondents had never properly addressed. The requirement of two judges was originally complied with by the original Order in Council of 14 July 1902 whereby Lt Col Gudgeon CJ was appointed as the Chief Judge and Pa Ariki as the second Judge. The effective date of their appointments was 1 August 1902. Pa Ariki died around January/February 1906 and was not replaced. Therefore, all activities of the Land Titles Court from Ariki J's death until 1913 (when the oversight was discovered) were *ultra vires*.

[54] To support their claim that the 1912 Order was made without jurisdiction, the applicants referred the Court to the minutes of the Rarotongan Island Council meeting held on 3 September 1913. At page 302 of those Minutes, there is a copy of the letter written by the Resident Commissioner Northcroft to Pa Ariki dated 28 August 1913. He wrote:<sup>19</sup>

"You are in error about Judge MacCormick being appointed a judge of the Land Court here, he was merely taken from the New Zealand Land Court and lent to do the work here. He could have remained here I have been told but he did not wish to do so. Not being Chief Judge and having left Rarotonga he cannot sign any orders therefore everything is hung up until a Chief Judge is appointed.

Any appeals or rehearings must be heard by two judges. Judge MacCormick could not by law sit in any of the cases he heard. The Order-in-Council says the Court shall consist of two judges one to be Chief Judge, that was not done, therefore the work done by him while the Court consisted of one judge was bad and I have written to the New Zealand Government to pass an act if possible to make what he did legal or all the work will have to be done again and your time and money lost."

[55] The validating provisions in the Cook Islands Act 1915 may have been the result of the Resident Commissioner's pleas. However, the applicants rejected their application to their case arguing that these provisions did not satisfy the statutory test of equity and good conscience.

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<sup>19</sup> Appendix VII and VIII to the applicants' submissions dated August 2001.

*The failure to satisfy the requirements of an application for amendment*

- [56] On 29 February 1912, following the arrival of Judge MacCormick, notice appeared in the Cook Islands Gazette that Iopu was applying for an amendment in the title of four lands, three of which concern the present proceedings. The grounds provided were *family arrangement* and *consent*. In addition, the respondents, in their final skeleton submissions at paragraph 8 contended that in 1905 the names of the other 6 persons were erroneously included and had to be removed, which was the basis for the 1912 application and the grounds for satisfying s 25.
- [57] The applicants contended that Iopu Tumu, during the 1905 proceedings, should have been representing not only himself but his siblings as well. Rather, as could be gleaned from the Court records, at the 1905 proceedings, Iopu Tumu attempted to have the lands vested in himself, to the exclusion of Utanga and the issue of his sister Arerangi. The applicants argued that Lt Col Gudgeon CJ tried to permanently thwart this attempt by making an order that the names allocated to the Tumu lands be "permanently fixed".<sup>20</sup> Lt Col Gudgeon CJ also took two further steps. First, he specifically rejected Iopu's request to have his name only placed in the Order of investigation for Te Piri Sec 73.<sup>21</sup> Secondly, Gudgeon CJ declared that the lands were in fact family lands, contrary to Iopu Tumu's claim that the lands were "the special pieces of the Rangitira".<sup>22</sup> Unfortunately, in direct contravention of Gudgeon's Order that the names be permanently fixed, the Registrar Blaine, in 1912, initialled the removal of the applicants' names.
- [58] The applicants objected to various aspects of the 1912 application. First, the applicants submitted that Iopu Tumu was deceitful in the manner in which he originally applied to have the names contained in the 1905 Orders struck out in that in the 7 September 1908 letter Tumu claimed that he had "put the names of his siblings in the land he now wanted them out" The applicants argued that this description was incorrect as it was the Court that had entered the names in 1905, not Tumu.
- [59] Secondly, the applicants argued that the reference to Tumu's 1908 letter in the Minute Book was misleading in that it was described as an "application" (which the applicants contended that it was not).

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<sup>20</sup> MB 1/142 (1 August 1905).

<sup>21</sup> MB 1/380 (18 April 1905).

<sup>22</sup> MB 2/8 (19 April 1905).

[60] Thirdly, the applicants argued that there was no legal basis for the application and that there was no evidence that the matter even came before Lt Col Gudgeon CJ. If Iopu had wished to proceed formally then he would have been required to satisfy certain formality requirements of the Amendment procedure and only then could it have proceeded to a full hearing. These formality requirements, notably s 25 of the Order in Council of 7 July 1902 were that an application for an Amendment to title was required to show that there were grounds "to remedy or correct defects in any proceeding or document, or to give effect to or record the intended decision...". The applicants submitted that Iopu's letter of 1908 did not seek to correct or remedy any defects and did not qualify under s 25. This point was also made during oral argument. The applicants also appeared to allege that the 1908 letter may not have been written by Iopu Tumu because of the fact that the handwriting resembled that of Savage.

[61] Finally, the applicants argued that *family arrangement* and *consent* (i.e. the consent to having their names expunged from the title) were not acceptable grounds for a s 25 amendment. Section 25 of the Order in Council of 7 July 1912 provided that a Court could amend or correct defects or errors in any proceeding or document, or could give effect to or record the intended decision in any proceeding at any time, whether applied for or not. Since Iopu's application could in no way claim to be a remedy or a correction or record of the intended decision, it did not satisfy s 25.

[62] Therefore, the application was not contemplated or recognised in the jurisdiction afforded to the Court. In that regard, in oral submissions, Mr Mitchell contended that the s 25 issue came under s 399(2) of the Cook Islands Act 1915 (constitutional makeup of the Court).

#### *The alleged family arrangement*

[63] The applicants argued that the so-called "family arrangement" referred to in the 1912 order was based on the expression used by Iopu in his 1908 letter which was "bogus"<sup>23</sup>

[64] The applicants also contended that there was a *family arrangement* but not of the type contemplated by Iopu. The *family arrangement* was actually a form of land exchange. Utanga and Arerangi agreed to forfeit their interests in the Takuvaime and Tupapa lands in exchange for Iopu agreeing to forfeit his interests in all the Ruatonga

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<sup>23</sup> Applicants' submissions dated August 2001 at 8.

lands. The applicants produced the diary minutes of a meeting held by the Utanga family in 1975 to support this allegation.<sup>24</sup>

[65] Mere Arerangi, Arapau Arerangi and Makiroa Arerangi were present at the 1912 hearing. At the hearing, the Judge MacCormick spoke of the "family arrangement" and the fact that Mere, Arapau and Makiroa wished to have their names removed since they had land elsewhere. The Judge also referred to Utanga Tumu's signed consent form, permitting his name to be excised. The applicants contended that based on the arrangement they believed existed between Iopu Tumu, Utanga and Arerangi, talk of "family arrangements" and "consent" would not have alerted them to anything. The applicants contended that those present were completely unaware that their names were to be removed and no land exchange was to subsequently take place.

[66] Regarding the so-called consent, the applicants contended that Judge MacCormick did not enquire fully into the nature or history of the lands in question and failed to appreciate that the consents were neither free nor informed. Although the officers of the Court, Registrar Blaine and Savage, knew the background (and the existence of the Gudgeon Orders), they made no effort to inform the Judge.

*Other formality issues*

[67] The applicants submitted that there were numerous formality problems with the 1912 Order:

- (a) Section 1 of the Order in Council required that Orders be authenticated by a judge's signature or be under the Court Seal; Rule 52 of the Rules and Regulations of the Cook and other Islands Land Titles Court<sup>25</sup> ("the Regulations") required Orders if unsigned to be initialled by the Judge and Rule 77 required amendments to be signed or initialled by the Judge – the removal of the names was only initialled by the Registrar Blaine and therefore did not comply with any of these provisions;
- (b) Rule 52 required that all orders of the Court to be drawn up, as far as possible, by the Registrar – the 1912 Order was never drawn up by the Registrar;

<sup>24</sup> Applicants' submissions dated August 2001, appendix V(b).

<sup>25</sup> Cook Islands Gazette No. 133 (14 November 1902) (pp 169-180).



(c) Rule 78 required that "no amendment, whereby the interest of any person may be prejudicially affected shall be made without due notice, nor until opportunity to show cause against such amendment has been given" – the applicants submitted this was not complied with;

(d) Rule 102 required that:

"Every person signing any application, notice or other document, or instituting any proceeding as an agent, must file with the Registrar an authority in writing signed by the person on whose behalf he claims to act. Such authority may either be general or in respect of some particular matter. A general authority will hold good until revoked by notice in writing to the Registrar."

The applicants submitted that as Iopu was making representations in the name of the other owners, he was required to be properly authorised to do so but was not.

[68] At the hearing, Mr Mitchell referred to s 416 of the Cook Islands Act 1915 and pointed out the order has never been validated. Therefore, if the Court were to find for the respondents it would have to now make an order of validation. In that regard, Mr Mitchell submitted that it would be inappropriate to do so because of the equity and good conscience clause, i.e. because of the murky circumstances of the order in the first place it would be against equity and good conscience to validate the order now. Mr Mitchell contended that the passage of time was not a hurdle as all of the evidence was in the Minutes.

#### **Submissions for the respondents**

##### *The source theory (or adoption theory)*

[69] A primary argument for the respondents was the actual source of the title "Tumu". The respondents referred to numerous documents showing that Tumu was the title held by Iobu Kamoe or Iobu Metua. Iobu Kamoe adopted Iopu Tumu from the Anautoa line (Tarua, the children's father was from the Anuatoa line). Therefore, Iopu Tumu's connection to the Tumu lands was through his adopted father and there was no such connection between Utanga and Arerangi and the Tumu lands. In that regard, the respondents observed that Iopu Tumu put his brother and sisters in some of the Tumu lands despite the fact that they had no right to be there.

- [70] The respondents did not agree with those accounts in the Minute Books which suggested that Maria (Iopu, Utanga and Arerangi's mother) was from the Tumu line. Rather, the respondents preferred to adopt the position that the record was conflicting and referred to the evidence that Maria came from the Uritaua line.
- [71] Referring to the 1905 court records, the respondents emphasised that the Court held that the lands in question were Tumu lands. Had they been Anautoa or Uritaua lands then it would have followed that Utanga and Arerangi would have been rightful owners. As could be seen from the evidence at the time of Iopu Tumu's application, the Court was satisfied that Iopu held the Rangatira title. In contrast, the Court also held that the Tamarua line, who claimed to be the only surviving members of the natural Tumu line had left the tribunal and had not lodged a claim for the lands in 1905. Moreover, the respondents argued that Iopu Tumu would not have been entitled to the Tumu land title had he not been adopted by Iopu Kamoe.
- [72] In oral argument, Mrs Browne for the respondents stressed that "the source" was fundamental. Although the applicants may have felt dispossessed by Iopu Tumu's alleged actions, they still had to show their connection to the Tumu land source.

*Formality issues*

- [73] The respondents rejected the submission that somehow the 1908 letter was not sufficient to amount to a formal application. They pointed out that during that period, it was common to write to the Court outlining a request and providing grounds for such a request and that there was no prescribed form. As to the argument that the amendment was not initialled by a judge, the respondents submitted that this was purely administrative and could be easily rectified. In any event, the respondents observed that:
- (a) Rule 5 of the Rules and Regulations merely required an application to be in writing – which Iopu Tumu's application was; and
  - (b) The expression in s 25 of the Order in Council of 7 July 1912 that a Court could amend or correct defects or errors in any proceeding or document, or could give effect to or record the intended decision in any proceeding at any time "whether applied for or not" implied that s 25 contemplated that amendments could be made without an application.

- [74] The respondents submitted that there was no evidence in the Court records to suggest that the writer of the 1908 letter was someone other than Iopu Tumu. In any event, even if he did not write the letter, the application could not be invalidated solely for that reason.
- [75] The respondents contended that, contrary to the applicants' view, the Court records indicated that notice was given. At the 1912 hearing the children of Arerangi were present and the Court was provided with a document signed by all of the owners.
- [76] Regarding Iopu Tumu's alleged failure to obtain written authority to act as agent, the respondents argued that such an authority was never sought nor was it necessary. There was no evidence that Iopu Tumu was acting on his siblings' authority, therefore no written authority was required.
- [77] Turning to the argument that the Court was not properly constituted, the respondents conceded that the documentation appeared to indicate that Judge MacCormick was not appointed as the Chief Judge of the Court. Moreover, it appeared that no steps were taken to have the Judge MacCormick orders validated. The respondents relied on s 399 of the Cook Islands Act 1915 which validates orders despite errors or irregularities in the form thereof or the practice or procedure of the Court. It also cited s 415 which permitted any judge to draw up, sign and seal any order made by the Cook Islands Land Titles Court with the order taking effect from the making thereof. Finally, the respondents relied on s 416 which confers on the Court the power to validate any order of the Court where questions of validity arise. Assuming that the composition of the Court had not been remedied, the respondents submitted that this case was clearly one where ss 399, 415 and 416 applied.
- [78] As for the applicants' argument that equity and good conscience prevented the Court from applying the validating provisions, Mrs Browne submitted that since, in their view, the 1912 Order was correct, then issues of equity and good conscience actually weighed in favour of its validation.

*The s 25 issue*

- [79] The respondents argued that s 25 did apply to Iopu Tumu's 1908/1912 application since he was applying to correct the 1905 Order which had erroneously included 6 persons. In that vein, the respondents included in their submissions their explanation of the 1905 hearing minutes and noted the inconsistency between the Court's finding on the one hand and the actual documented orders on the other. It could be seen

from the Minutes that, for example for Section 73 at Te Piri, although the Court awarded the said land only to Iopu Tumu (or Tumu, son of Maria), the Order included 7 other names. The respondents argued that Iopu Tumu, once he realised what was happening, asked that his name only be put in.<sup>26</sup>

- [80] In oral argument, Mrs Browne for the respondents submitted that the 6 names were actually written in after the Order was made, i.e. in error and the Order therefore had to be corrected.

*Family arrangement, consent and allegations that Iopu Tumu was deceitful*

- [81] The respondents argued that the Court should take into account the fact that the 1912 Order was made by consent and that an order made with the parties' consent should not be disturbed. It referred the Court to the minutes which record that the children of Arerangi were present in the Court and consented to their names being removed. Utanga was not present but signed a consent agreeing to his name being removed. The respondents provided to the Court a copy of the consent form signed by Utanga, Mere Arerangi, Arapau and Makiroa.

- [82] The respondents relied on the decision of the Land Appellate Court of the Cook Islands in *Re Ngapoko Enua Deceased* (Appeal No. 213 1940) which held that the Order in the lower court was properly to be considered a "Consent Order" where consent had been freely given and had to be binding on the parties. That case was referred to in *Tukura Uti Tou v Tuakana Toeta* (30 November 1995) (CA) where the Court of Appeal observed that although the principle enunciated in *Ngapoko Enua* may not be strictly applicable to succession proceedings, the fact that there was consent was a relevant factor. The Court of Appeal also observed that the party was entitled to rely on evidence as to adoption and family relationships given at the 1968 hearing, especially since the 1968 Court was closer in time to the events in question and would have had a more intimate knowledge of the facts. In the same vein the Court observed that the views and determinations of Judges hearing cases at the turn of the century are bound to be more accurate than judges dealing with the same facts many years later.

- [83] The respondents rejected the contention that there was any family exchange arrangement and disagreed that the minutes of the 1975 Utanga family meeting supported that aspect of the applicants' argument. They argued that the signed

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<sup>26</sup> MB 1/380 (18 April 1905).

consent made no reference to any “exchange” arrangement nor did the Minutes of the 1912 proceedings.

[84] The respondents noted that the signed consent form clearly spelt out what the owners agreed. They agreed that their names would be removed from the three lands because they did not assist Iopu Tumu when he initially claimed the lands and fought off other claimants. This agreement was in writing – the exchange agreement was not. The respondents argued that the present-day applicants were attempting to claim to know exactly what their ancestors thought they were agreeing to in 1908 when they were not there and despite a written record of the agreement. The respondents also rejected the contention that any family exchange would have involved lands in Ruatonga as the respondent families had occupied lands in that area for a long time.

[85] The respondents rejected the notion that Iopu Tumu had somehow acted dishonourably and dispossessed his siblings and their descendants. Although the applicants had insisted that Lt Col Gudgeon CJ had attempted to thwart Iopu Tumu's attempts to exclude his siblings and that the 1912 Order would never have occurred if Lt Col Gudgeon CJ had been present, the respondents painted a different picture. They referred the Court to a letter written to Iopu Tumu by Lt Col Gudgeon CJ dated 28 April 1916 which included the following passage:<sup>27</sup>

“I have no hesitation in saying you are the only Tumu that I know of and it was to you I awarded the Tumu lands after hearing the claim of the Tamarua people to that title”

*The passage of time*

[86] The respondents emphasised that the challenged orders had stood for over 93 years. It cited the decision in *Tau Samuel v Tauariki Taimau* (Court of Appeal, 13 December 2004) where the Court of Appeal approved of Smith J's lower court decision where His Honour had placed great weight on the lack of challenge over such a long time as a major reason for not interfering with the earlier orders. On appeal, the Court of Appeal upheld Smith J's approach and noted that not only had the cases not been challenged for at least 40 years, no fresh evidence had been produced and no sufficient basis had been provided to warrant overturning findings made by a Judge who saw and heard the witnesses.

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<sup>27</sup> MB7/258-259.

[87] Perhaps in support of the ratio of the *Tau Samuel* case, the respondents asked the Court to be mindful of the fact that a large fire in 1990 had destroyed many court records.

#### *The injunction*

[88] In light of the fact that the applicants' case had reduced from 18 lands to 3, the respondents asked the Court to make an Order lifting the injunction on those 15 lands which were unaffected by the present proceedings.

### **ISSUES FOR DETERMINATION - DISCUSSION**

#### **Issues for determination**

[89] Having carefully considered all of the written material, the applicants' case reduces to the following three legal issues:

(a) Was the 1912 Order invalid for any of the following reasons:

(i) Mistake, error or omission of fact or law in terms of s 390A(1) of the Cook Islands Act 1915 (e.g. lack of consent, incorrect family arrangement);

(ii) Lack of jurisdiction; or

(iii) Failure to fulfil certain formality requirements.

(b) If yes to (i) above, what remedy must follow under s 390A(1);

(c) If yes to (ii) or (iii) above, can the order nevertheless be validated by virtue of s 416 of the Cook Islands Act 1915.

[90] Having framed the issues in this way, many of the arguments that have been raised by both parties for the most part fall away. In particular, the adoption and source theories which were extensively presented by both parties are not directly relevant in terms of the validity of the 1912 Order. They are only relevant if they inform the enquiry into whether or not the Court in 1912 was mistaken, erred or omitted to do something. Indeed, this Court's jurisdiction is confined to examining contested orders within the boundaries of the Cook Islands Act 1915 and the relevant provisions contained therein and in particular s 390A(1). That section provides as follows:

**"[350A. Amendment of orders after title ascertained—(1)** Where through any mistake, error, or omission whether of fact or of law however arising, and whether of the party applying to amend or not, **[[the Land Court]]** or **[[the Land Appellate Court]]** by its order has in effect done or left undone something which it did not actually intend to do or leave undone, or something which it would not but for that mistake, error, or omission have done or left undone, or where **[[the Land Court]]** or **[[ the Land Appellate Court]]** has decided any point of law erroneously, the Chief Judge may, upon the application in writing of any person alleging that he is affected by the mistake, error, omission, or erroneous decision in point of law, make such order in the matter for the purpose of remedying the same or the effect of the same respectively as the nature of the case may require; and for any such purpose may, if he deems it necessary or expedient, amend, vary, or cancel any order made by **[[the Land Court]]** or **[[the Land Appellate Court]]**, or revoke any decision or intend decision of either of those Courts."

[81] Therefore, the main enquiry is whether in 1912 Judge MacCormick:

- (a) "through any mistake, error, or omission whether of fact or law" did not intend the outcome of his order; or
- (b) "decided any point of law erroneously".

[92] The alternative enquiry is whether the 1912 Order was invalid for want of jurisdiction or for other formality failures.

[93] The applicants have not contested the 1912 Order on the grounds that Judge MacCormick decided a point of law erroneously. Rather, the focus of their argument has always been that Judge MacCormick was misled by the "family arrangement" and the parties' consent and therefore erred in making the orders he did.

#### Preliminary observations/findings

[94] Although at their heart the issues in this case are legally simple, the facts underlying them are not. There has been disagreement between the parties over genealogies, in particular who are the Tumu descendants, and the identity of the original applicant in 1905 (Iopu Tumu or his adopted father Iopu Kamoe). The applicants have relied on numerous court orders spanning decades and relating to different pieces of land to support their case that Iopu Tumu "pulled the wool over his siblings eyes" and had them removed from lands to which they were legally entitled.

[95] The Court has considered the Minutes and the Gazette records in detail. Upon closer inspection of the Minutes of the 1905 hearings, this Court is not surprised at the substantial confusion that has arisen, in part due to the use of one name to denote more than one individual. However, this Court concludes the following from the various Minutes presented to it.

[96] First, Iopu Kamoe was present at the 1905 hearings concerning Tumu land. Iopu Kamoe gave evidence as "Iopu" that when Maria Teoepai died, he adopted Iopu Tumu, her son, as his child. He also gave evidence that Maria was a Tumu.<sup>28</sup>

[97] Secondly, a reference to "Iopu" in the 1905 minutes<sup>29</sup> could be to either Iopu senior or Iopu junior. A reference to "Tumu" is not always to Tumu senior – for example a certain Tumu is quoted as saying "I do not know the instructions of Tumu to Te Ariki Arai Te Tini. But he was to hold the title for Papa. You are a son of Taruia. I don't know who Maria was. I was away when Te Ariki died". This "Tumu" seems to be of the Paenui line but is neither Tumu senior nor Iopu Tumu as he did not know Maria.<sup>30</sup>

[98] Thirdly, the Court held on 19 April 1905 with respect to Te Piri, Section 73 at Avarua that:<sup>31</sup>

"Taraare who is himself a Tumu but not of the Ruatonga people says both Tamarua and the present Tumu son of Maria are Tumus. And the Court believes that such is the case. And awards this land Te Piri to Tumu son of Maria.

Order on Page 380 of Book 1."

[99] Therefore, at least with respect to Te Piri Section 73 (and, by analogy to the other two Takuvaie sections) what becomes clear is that during the 1905 proceedings the Court awarded the land to Iopu Tumu, son of Maria. The Order on page 380 of Minute Book 1 (18 April 1905) which is cross referred to above states that "Te Piri is the land of Tumu and awards it to him". In light of this cross reference,<sup>32</sup> "Tumu" here must have been a reference to Tumu junior.<sup>33</sup> This in turn implies that Tumu junior was the applicant, not Iopu Kamoe.

[100] The Court must also point out that although the applicants have on numerous occasions made allegations that Iopu Tumu was "greedy" or "deceitful", these

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<sup>28</sup> Refer MB 2/5 (18 April 1905).

<sup>29</sup> See MB 2/4 (18 April 1905).

<sup>30</sup> Based on the genealogies before the Court, Paenui was a sibling of Tautu, the applicants' grandparent four times removed. Paenui and Tautu's father was Makea Tepatuakino, the common ancestor of all parties. Tepatuakino had at least four children which led to the Arika line (through his son Keu), the Anautoa line (through his son Tautu) and the Paenui line.

<sup>31</sup> MB2/10 (18 April 1905).

<sup>32</sup> Between MB 2/10 (19 April 1905) and MB 1/380 (18 April 1905).

<sup>33</sup> This would also mean that the anomaly contained in the Register of Title for Te Piri Section 73 and the reference to "Iopu" could very well be the reference to Iopu Kamoe.



allegations are irrelevant in terms of this enquiry since, absent allegations of fraud (which, rightly, have been abandoned), they carry no legal weight.

*The adoption and source theories*

[101] As already noted above, this argument is not directly relevant to the enquiry under s 390A(1) as the applicants did not rely on the adoption to show that Judge MacCormick was wrong in removing the names from the titles in 1912. However, the adoption and source theories were canvassed at length and this Court will therefore make the following comments.

[102] The applicants' arguments concerning the "adoption theory" cannot be sustained for the following reasons. First, it does not matter that Iopu Kamoe may not have made the 1905 applications. Iopu Kamoe was present at the 1905 Tumu lands hearings and agreed that certain land should vest in his adopted son.

[103] Secondly, the 1916 order of Ayson J concerning succession orders (and the finding that the Tumu connection was through Maria) has no relevance as the Order was confined to Iopu Tumu's succession to Iopu Kamoe in the following blocks only: Te Matepa 61, Vaitakaia 59, Angakopua 125, Rangiatua 1030 and Mangaiti Kairoa 54. For that reason, the Judges' findings concerning succession were not of general application.

[104] Thirdly, the reference to "Iopu son of Maria" in the 19 April 1905 Order did not imply that Iopu had succeeded in the Tumu lands by virtue of Maria. Rather, this Court interprets that turn of phrase as being for the purposes of identification only and to distinguish Iopu Tumu from his adopted father, Iopu Kamoe.

[105] Finally, the fact that Iopu Kamoe, Iopu Tumu, Arerangi and Utanga may all share the same ancestor, Anautoa, does not prove that they have a connection to the Tumu lands. It is the connection between Arerangi and Utanga to the Tumu lands which is crucial. In this regard, the 1916 Ayson J Order which the applicants relied on to support their case is against it since Ayson J concluded that the Anautoa descendants could not be included in the Tumu lands for the purposes of those lands at Te Matepa 61, Vaitakaia 59, Angakopua 125, Rangiatua 1030 and Mangaiti Kairoa 54. In any event, as the Court has held above at paragraph [103] the Ayson J Order is not relevant, and at most, is equivocal.

[106] In any event, regardless of the adoption theory and any connection Utanga or Arerangi may have had to the Tumu line, the 1912 Order which was contested was made by consent. For whatever reason, Utanga and Arerangi consented to the removal of their names. That removal does not seem so odd in light of the agreement of the parties that prior to 1905, only the Tumu name appeared on the titles. That fact would appear to support the respondents' argument that the addition of the names in 1905 was in fact an error which the 1908/1912 application sought to correct. This point is dealt with further at paragraph [116] below under the section "other informalities".

[107] Concerning the source aspect of the respondents' argument, the Court would like to record that it has given no weight to the letter that Lt Col Gudgeon CJ allegedly wrote to Iopu Tumu in April 1916 and which the respondents relied on. That letter included the following passage:<sup>34</sup>

"I have no hesitation in saying you are the only Tumu that I know of and it was to you I awarded the Tumu lands after hearing the claim of the Tamarua people to that title."

[108] A reference to the minutes where the Court refers to this letter immediately warns against placing any reliance on it: Iopu Tumu produced the letter as evidence and the Court merely noted it. The original document was not produced in the record of these proceedings.

#### **The 1912 Order was based on error, mistake or omission**

[109] As the respondents rightly contended, apart from the Minutes of a meeting held on 5 October 1975 there is no evidence of an alternative family arrangement as the applicants have claimed. These minutes are too far removed in time from the actual events of 1912 to provide reliable evidence of the nature of the 1912 family arrangement. The Court therefore gives them no weight. Since there is no evidence, the Court cannot be said to have erred in removing the names on the grounds of some alternative family arrangement.

[110] Secondly, there is no evidence that those present during the 1912 hearings (of the Arerangi line) did not understand the full impact of the Order and therefore had not provided full and informed consent. It is insufficient to rely on generalities (i.e. landowners during that era did not fully understand the Court processes; younger

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<sup>34</sup> MB7/258-259 (28 August 1916)

siblings deferred to their order siblings). Rather, actual evidence must be provided that can show a lack of understanding, or rather, the presence of a misunderstanding of the effect any order would have on ownership. In this regard, the applicants claimed that the consent of the parties was neither free nor informed but provided no evidence to support that claim. As Smith J rightly found, there was no such evidence before the Court. Accordingly, the Court did not err in accepting the evidence before it.

[111] Thirdly, as to the allegation that Judge MacCormick did not enquire fully into the nature and history of the lands in question, and assuming that this would be a valid ground on which to base a s390A(1) enquiry, it is impossible for this Court, based on the evidence before it, to hold that Judge MacCormick failed in his duties to make a proper enquiry. All parties were fully represented, the Arerangi line in person, the Utanga line with a signed consent form. There is no evidence to suggest that Judge MacCormick did not conduct a proper enquiry. The applicants have assumed that had Blaine and Savage informed him of the background, including the Gudgeon orders of 1906, Judge MacCormick may not have made the orders. This Court does not agree with that assumption. Regardless of Gudgeon's prior orders, MacCormick was faced with a removal by consent. This necessarily means that notwithstanding any prior decisions of the court, the parties consented to having their names removed from the titles.

[112] Fourthly, the Court agrees with the respondents' reliance on the decisions in *Re Ngapoko Enua Deceased* (Appeal No. 213 19040) and the Court of Appeal decision in *Tukura Uti Tou v Tuakana Toeta* (30 November 1995). A Court must be cautious, a hundred years after the fact and with sparse records, about substituting its views for those of a court closer in time and space to the dispute in question. Judge MacCormick had Iopu Tumu and four members of the Arerangi line in his courtroom when making the 1912 Order. Furthermore, he had a written consent form from Utanga. The parties were given the opportunity to be heard and the judge made his decision. There is no evidence which would displace the assumption that his findings were accurate. The Court fully endorses the following comments made by Smith J in his 19 August 2003 report at page 4:

"The Court and to the extent that he has jurisdiction in this matter, the Chief Justice must rely upon the best evidence available, rather than interpretations placed upon evidence by subsequent generations. Where a modern generation of owners or claimants, seek to alter or cancel orders made by the Court on the evidence and consent of their ancestors, the Court, or in this instance, the Chief Justice, must weigh, not only the arguments and views of

grounds of "family arrangement" and "consent" were not appropriate grounds for an amendment application.

[118] The Court considers the respondents' argument that the expression "whether or applied for or not" implies that no formal application is necessary is persuasive. The provision is designed to remedy any errors or mistakes which may have been made and is therefore intended to facilitate the process rather than hinder it. Consistent with that, the provision contemplates that certain errors could be fixed on the Court's own volition without any formal application.

[119] In the Court's view, s 25 did not require a formal application of the type contended for by the applicants. Iopu Tumu made an application in writing and this was sufficient to comply with s 25. Moreover, the provision does not specify what grounds must be provided. There is no reason why "consent" and "family arrangements" could not be considered grounds which properly made out a case for remedy or correction. The Court notes that the parties are agreed that prior to 1905 Tumu was the only owner listed on the three titles. In 1905 the names were added in. The respondents relied on certain comments made by Iopu Tumu at the 1905 hearings asking that he alone be put in the orders. These comments are not conclusive but indicate that there was some confusion surrounding the 1905 hearings and that the names were erroneously added into the titles. If that is so (and the Court does not make any conclusive findings on this point) then the application in 1908 was one to amend an order on the grounds of error.

*Failure to comply with other rules and regulations*

[120] The Rules and Regulations of the Cook and Other Islands Land Titles Court came into force when notice was provided in the Cook Islands Gazette on 14 November 1902. Those Rules were made by Lt Col Gugdeon CJ pursuant to his authority to do so under the Order-in-Council of 7 July 1902 which established the Cook and Other Islands Land Titles Court. The Order-in-Council provided that:

"The Chief Judge of the Cook and Other Islands Land titles Court may, from time to time, make and prescribe rules of practice and procedure and forms of proceedings in the various matters which jurisdiction is or may be conferred on the said Court, and also regulations for the government of all persons acting under the said Order-in-Council, and for regulating the sittings of the said Court and for fixing the fees to be paid under the said Order-in-Council, and the time and mode of payment and for enforcing payment thereof."

[121] The applicants relied on numerous provisions in the Regulations, notably the following:

**\*ORDERS.**

52. All orders of Court shall be in triplicate, and it shall be the duty of the Registrar, without any unnecessary delay, to draw up and complete, as far as possible, all orders made by the Court. Such orders, if unsigned, shall be initialed by the Judge, or one of the Judges making the same.

**AMENDMENTS**

77. Every amendment shall be signed or initialed by the Judge or presiding Judge at the time of making the same, and shall specify the date on which the same was made.

78. No amendment whereby the interest of any person may be prejudicially affected shall be made without due notice, nor until opportunity to show cause against such amendment has been given.

[122] The applicants contended that the following aspects of the 1912 Order breached the formality requirements prescribed by the Regulations:

- (a) Lack of signature and Court's seal;
- (b) Lack of Judge's initials on the Order;
- (c) Order not drawn up by Registrar Blaine;
- (d) No notice provided to the parties; and
- (e) No written authority obtained from Arerangi and Utanga for Iopu Tumu to act on their behalf.

[123] It seems to be accepted by the respondents that grounds (a)-(c) are made out. The Order does suffer from these technical defects. Indeed, the respondents simply said that the Order could be validated under the Cook Islands Act 1915. This point is dealt with below.

[124] As for (d)-(e), the Court does not find that these grounds are made out. As to (d), it is clear that notice was provided as the Arerangi family were present and Utanga had prepared a signed consent. Whether or not there was formal notice is irrelevant as the parties were clearly given an opportunity to present their case which is what Rule 78 of the Regulations is intended to guard against.

[125] As to (e), the Court agrees with the Respondents that Iopu Tumu was not acting on his siblings' behalf in the capacity as their agent. Therefore, no written authority was required.

#### **Validating provision and the operation of "equity and good conscience"**

[126] The validating provisions in the Cook Islands Act 1916 are as follows:

##### **Section 398 Validity of orders**

- (1) 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 Court 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.

##### **Section 415 Drawing up of orders heretofore made**

Any order made by the Cook Islands Land Titles Court which has not been drawn up, signed, and sealed before the commencement of this Act may be drawn up, signed and sealed by an Judge of [the Land Court], and shall take effect as from the making thereof.

##### **Section 416 Validation of former orders**

- (1) When any question arises as to the validity of any order made by the Cook Islands Land Titles Court before the commencement of this Act, and [the Land Court] is satisfied that having regard to equity and good conscience such order ought to be validated, [the Land Court] may by order validate the same accordingly.
- (2) No such order shall of any force or effect until drawn up, signed and sealed.
- (3) No such order shall be signed or sealed until and unless it has been assented to by the Attorney-General in writing.
- (4) Every such order shall take effect as from the date of the order validated thereby.

[127] Pursuant to s 47(4) of the Constitution of the Cook Islands, a Judge of the High may exercise any of the jurisdiction and powers of a Judge of any Division of the High Court, including the Land Division. Therefore, as the Chief Justice I may draw up any orders under s 415 of the Cook Islands Act 1915 or validate any orders under s 416 of the Act.

[128] As the respondents suggested, s 415 of the Cook Islands Act 1915 specifically covers the deficiencies discussed at paragraph [122] above. Once the 1912 Order is signed, sealed and appropriately drawn up it will take effect from the date on which it was issued.

- [129] The validity issue that remains is that of the constitution of the Court back in 1912. Section 399 covers two categories of invalidities: (1) invalidities as to form and (2) invalidities as to the practice and procedure of the Court. The invalidities as to the form of the 1912 Order come within the more specific s 415 and have been dealt with above. The issue of the constitution of the Court, to the extent that it does not amount to a "substantive" excess of jurisdiction, will fall within the category of "practice and procedure of the Court".
- [130] The applicants have presented two arguments as to why the Court was without jurisdiction:
- (a) Judge MacCormick was never a Judge; or alternatively
  - (b) The Court was supposed to be made up of a Chief Judge and a Judge. When the 1912 Order was made, only Judge MacCormick was a Judge.
- [131] Section 399(1) entitles a Court to assume that there was jurisdiction unless the contrary is proved. Turning to the first ground, that Judge MacCormick was not a judge, the applicants have not proved this ground. Although the Resident Commissioner Northcroft refers to Judge MacCormick as being on loan from the New Zealand Native Land Court, it is ambiguous in his letter whether Judge MacCormick was never a Judge of the Cook Islands or was never a Chief Judge of the Cook Islands (which is accepted by both parties). The Resident Commissioner in his letter to Judge Pa Ariki of 28 August 1913 starts off by saying that Judge Pa Ariki was "in error about Judge MacCormick being appointed a judge of the Land Court here" as he was "merely taken from the New Zealand Land Court and lent to the work here". However, this sentence is qualified by the following sentences when the Commissioner goes on to say that "Not being Chief Judge ... everything is hung up until a Chief Judge is appointed". This sentence actually implies that Judge MacCormick was a Judge, but not a Chief Judge. On this basis, his letter is ambiguous as to whether Judge MacCormick was appointed as a Judge and in the absence of concrete proof that he was not, this Court is entitled to assume that he was under s 399(3).
- [132] Turning to the second ground, the Court accepts that it has been proved and that the 1912 Order was made without jurisdiction. However, the Court is of the opinion that this irregularity is one of the practice and procedure of the Court, and does not go to the substance of the Order itself. Therefore, the Court finds that a jurisdictional

irregularity of this nature can be validated pursuant to s 416 of the Act. The Court observes that if this validation were not possible, the Cook Islands would be in a very difficult position as many of the land orders which are currently perceived as binding would suddenly be left wide open to applications for rehearing, a hundred years after the fact.

[133] The question that remains is the operation of the principles of "equity and good conscience" within s 416(1). The applicants contended that in this case, principles of equity and good conscience dictate that the 1912 Order not be validated. The Court must disagree for two reasons.

[134] First, the applicants, although citing the proviso contained in s 416(1), have failed to actually identify those facts which support the application of this "equitable proviso". Presumably the applicants would have raised the fact that Iopu Tumu was deceitful, greedy and that he had struck up a special relationship with Savage, who himself was of questionable character. There is no real proof of any of these things and the Court doubts whether they would qualify as triggering the proviso. Situations that may trigger a proviso would be, for example, an equitable estoppel. This may include a scenario where all parties had proceeded as if the Order had not been made and those persons who had been included in the 1905 Orders had gone about cultivating their land and had lived there for the last 100 years. That is not the case for the present applicants in relation to the three sections at Takuvaine.

[135] Secondly, this is a situation where the Order in question was signed by consent. The consensual nature of the Order strongly suggests that it would be contrary to the principles of equity and good conscience not to validate it.

[136] Therefore, all of the defects with the 1912 Order are caught by the validating provisions and the applicants' claims fail on all grounds.

#### **DECISION AND FORMAL ORDERS AND DECLARATIONS**

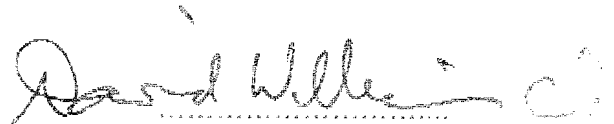
[137] The Court finds and declares as follows:

- (a) Judge MacCormick did not commit any mistake, error, or omission whether of fact or law when he signed the 1912 Order thus removing the names of the applicants' ancestors; and
- (b) The 1912 Order of Judge MacCormick is hereby validated under s 416 of the Cook Islands. This validation will not take effect until the validation of the 13



May 1912 Order is first, assented to in writing by the Attorney-General and second, drawn up signed and sealed by a Judge of the High Court. Once that has taken place, the Order will take effect from the date it was made, i.e. from 13 May 1912.

- (c) In compliance with s 416(3) of the Cook Islands Act 1915, the respondents are ordered to prepare a submission to the Attorney General which will include a copy of this judgment, requesting that the Attorney-General assent to the validation. Once the assent is obtained, the respondents are to submit the Order to the High Court for drawing up, signature and sealing.
- (d) The existing injunction issued by Greig CJ on 23 November 2001 shall remain in place until either (i) the Attorney-General's assent is received and the Order referred to in (c) above has been sealed, signed and drawn up by this Court; or (ii) a further Order of this Court is made discharging the injunction.
- (e) The applicants have no legal interest in the following sections:
  - (i) Te Piri Section 73, Takuvaine;
  - (ii) Taurupau Section 69, Takuvaine; and
  - (iii) Rarokava Section 70, Takuvaine.
- (f) The respondents are entitled to their reasonable costs of and incidental to the proceedings up to the date of this judgment. The parties shall endeavour to agree on costs. Failing agreement, the respondents shall lodge submissions as to costs within 42 days from the date of delivery of this judgment. The applicants shall then have 21 days to reply in writing. Thereafter, the Court will issue a decision "on the papers" unless it considers that a further hearing on costs is necessary.

  
David Williams CJ

Signed at Auckland, New Zealand

Tuesday, 24 June 2008