

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

APPLICATION NO. 02/02

IN THE MATTER of S.390A of the Cook
Islands Act 1915

AND

IN THE MATTER of the land known as
Avaavaroa Section 10A
Takitumu

BETWEEN Members of the **IRO**
and **NUMANGA**
families
Applicant

AND **ROBERT BRUCE**
GRAHAM of Rarotonga
Respondent

Mr Mitchell for applicant
Mrs Browne for Respondent
Date of hearing: 11 March 2003.

REPORT TO CHIEF JUSTICE

This is the report of the Court following the enquiry conducted in pursuance of the direction of the Chief Justice on the 15th July 1902.

History

On the 22nd March 1972 the Court made an order in terms of S. 50 of the Cook Islands Amendment Act 1946 granting Albert Henry m.a. and Elizabeth Henry f.a. equally a right of occupation over part of Avaavaroa Sec. 10 Takitumu. The said S. 50 states:

2.

"Land Court may make orders as to occupation of Native land - (1)

In any case where [the Land Court] is satisfied that it is the wish of the majority of the owners of any Native land that that land or any part thereof should be occupied by *any person or persons (being Natives or descendants of Natives)*, the Court may make an order accordingly granting the right of occupation of the land or part thereof to that person or those persons *for such period and upon such terms and conditions as the Court thinks fit.* (The emphasis has been added).

(2) Any person occupying any land under any such order of the Court shall, subject to the terms of the order, be deemed to be the owner of the land under Native custom.

(3) No order shall be made by the Court under this section without the consent of the person or persons to whom the right of occupation is granted."

Clearly the Act empowers the Court to make these orders in favour of any person or persons provided that they are Natives or descendant of Natives.

Native is defined in section 2 of the Cook Islands Act 1915 as:

"a person belonging to any of the Polynesian races (including the Maori race), and includes a half-caste and a person intermediate in blood between a half-caste and a person of pure descent from any such race."

3.

Further, the Court is empowered by S 50 to fix the term of the right and impose such terms and conditions as the Court thinks fit.

There is no dispute that Albert Royale Henry and Elizabeth Henry were Natives.

Conditions were imposed on the Right of Occupation by inter alia:-

Clause 1: The land shall be used as a site for a dwelling house for the benefit of the said Albert Royale Henry and Elizabeth Henry and their direct descendants.

Clause 2: limited the right of occupation to a term of 60 years.

Albert Royale Henry died on the 1st January 1981 and his wife Elizabeth Henry died on the 19th April 1983. Copies of the respective entries of the deaths in the Register have been produced.

On the 13th July 2001 Robert Bruce Graham a grandchild of Albert and Elizabeth Henry filed in the Court an application for succession to their respective interests in the Right of Occupation.

The application was made with the consent of the majority of the descendants of Albert and Elizabeth Henry.

Objections were filed by Te Tika Mataiapo Dorice Reid, Frank Paku Williams and Kautai Mataiapo Teariki Numanga. The application went to a hearing but was adjourned to enable Mr Mitchell, counsel for the objectors to file an application under Section 390A/15.

4.

In granting an adjournment the Court directed that if the application was not filed by the date of commencement of the next Court session the application for succession would proceed.

Mr Mitchell stated he had not been given a copy of the directions and omitted to file his application.

The Court enlarged time for filing, and this was objected to by Mrs Browne counsel for the applicant for succession.

The Court recorded that if the matter had proceeded, Mr Mitchell would have been entitled to appeal the decision of the Court, or file an application under S. 450/15 for revocation of the succession order.

It was therefore in the interest of all that opportunity should be given for the filing of the S. 390A/15 application .

The application was filed and on the 5th July 2002 the matter referred to this Court for report.

Enquiry

On the 22nd August 2001 Mrs Browne appeared to prosecute the application by Robert Bruce Graham to succeed to the Right of Occupation granted to Albert Royale Henry and Elizabeth Henry.

Mr Mitchell appeared to oppose and sought to have the matter stood down because of her prior commitment for a telephone hearing with the Chief Justice.

Upon resuming Mr Mitchell suggested an agreement.

5.

He continued by saying he had three witnesses with him to confirm his belief that the Right of Occupation granted to Albert and Elizabeth Henry was for a life interest.

Ngatokokorima Rasmussen gave evidence that she had attended the meeting held in March 1971 to consider the granting of the Right of Occupation to Albert and Elizabeth Henry. She had not attended any previous meeting because she was in New Zealand. She had no recollection of anything having been said at the meeting concerning the term of the Occupation Right but stated that Elizabeth Henry was her sister in law and Albert Henry did say to her, Mrs Rasmussen, that when he passed away you can have your land back.

Tekura Ruaporo who took the minutes of the meeting on the 16th march 1971 when the consent of the grant of the Right of Occupation was given gave evidence to the effect that the minutes were silent on the term of the Occupation under the order, that she could not recall if it was addressed during the meeting but that her late father had told her it was for a life interest. She saw nothing of a previous meeting.

Pare Larkins then gave evidence that she was at the meeting on 16th March 1971 but did not know of any earlier meeting. She stated that she thought the Right of Occupation was for life.

However, under examination, Pare admitted that she was not a landowner and did not speak at the meeting. She further stated that her father had told her that it was a life interest. That concluded Mr Mitchell's evidence.

The Court then adjourned the hearing until the next Court to allow Mr Mitchell to file his S 390A/15 application with the admonition that "if it is not filed at

6.

that time we will conclude this application." (the application for succession by Albert Bruce Graham).

The matter then came before the Court on the 22nd March 2002 at which time the 390A application was not filed.

Again, against the wishes of counsel for Mr Graham, the application was adjourned for filing of Mr Mitchell's application.

That was done on the 28th March 2002, referred to the Chief Justice on the 5th July 2002.

On the 26th August 2002, the Sec 390A/15 application was called for enquiry.

Both counsel appeared surprised, and stated that they relied upon the past evidence and submissions filed.

Justice Hingston on the 26th August 2002 directed that the matter be stood down for Smith J to report to the Chief Justice.

Nothing further occurred until the 11th March 2003 when the application was again called. Both counsel were of the opinion that the file had been remitted to Smith J for a report and were expecting to hear the decision of the Chief Justice. They inspected the files to ensure that all their respective materials were included, , then the matter was stood down for a report.

At various times between the original hearing and the 22nd August 2001 and the latest airing of the matter various papers and memoranda were lodged with the Court.

7.

27th March 2002

Memorandum by Mrs Browne re Court proceedings

28th March 2002

Amended Memorandum by Mrs Browne. Neither of these address the question of the Right of Occupation and address the procedure adopted by the Court and emphasis in the History of the application there.

Memorandum by Mr Mitchell headed "Occupation Right" Extract from Cook Islands Amendment Act 1960 relating to Vesting Orders submitted by Mr Mitchell.

Extract from House Representative In discussing the Cook Islands Amendment Bill 1946 also submitted by Mr Mitchell..

Report

Mr Mitchell in his submission filed has traversed the nature of an Occupation Right Order. He refers to Hansard which does not specifically refer to S 50/46, and Professor Crocombe's book "Land Tenure in the Cook Islands." He draws the conclusion that Occupation Rights were introduced to foster the planting of Citrus Plots. This is not supported by the discussion of the Bill as recorded in Hansard. At pages 593,497,598 and 599 of Hansard produced, there is considerable comment made in Part IV of the Bill and its probable impact in agriculture and more particularly citrus growing in Rarotonga. But S. 50 falls within part III of the Act, and is not part of the agriculture scheme.

A more compelling argument that Occupation Rights have been accepted predominantly for housing purposes can be seen from S. 2 of the Cook Islands Amendment Act 1960 under the heading Housing Improvement.

8.

Admittedly it is the 1960 amendment that introduced jurisdiction to vest land as a site for a dwelling. This alternative means of acquiring a house site does not appear to have been accepted to the same extent as the Occupation Right provisions.

The 1960 amendment makes provisions for cancellation of Vesting orders and also to the rights of succession to any interest therein. The successors being those entitled prior to the making of the order.

Succession in the case of an Occupation Right depends upon the term of the order. If an order is made in respect to named persons "and their direct descendants" then the descendants decide amongst themselves who are to succeed and occupy, and such occupation shall continue until the descendants die out.

If however as in this present instance the Occupation Right is for a term certain, 60 years, then the issue of the original occupier determine who are to occupy for the balance of the 60 year term.

S. 50 empowers the Court to grant occupation orders on such term and what such conditions the Court determines.

Counsel's attempts to prove that the present right to Mr and Mrs Henry was for life has failed as his witness who attended the meeting could not confirm that.

The order made by the Court on the 22nd day of March 1972 was made in accordance with the jurisdiction afforded the Court under S. 50/46.

The Court granted Albert Royale Henry and his wife Elizabeth Henry **and their direct descendants** a right of occupation in this land for 60 years.

9.

In terms of S. 50(2)/46 the persons in whose favour an Occupation Right is made are "deemed to be the owner of the land under Native custom."

Section 446/15 provides that the persons entitled to succeed on the death of a Native, to his interest in Native freehold land, shall be determined in accordance with Native custom.

Native custom dictates that the descendants from the blood line shall succeed subject to the circumstances applying where there has been an adoption. There has been no adoption in this instance and therefore the issue of Mr and Mrs Albert Henry are the person to determine succession to this right for the balance of the term granted in the Occupation Right.

In so far as the order granting the Occupation Right was clearly made within the provisions of S. 50/15, it is recommended that this application be dismissed.


JUDGE