IN THE HIGH COURT OF
THE COOK ISLANDS
(LAND DIVISION)

App No. 4/2007

IN THE MATTER	of sections 129 and 129A of the Property Law Act 1952
AND **IN THE MATTER**	of the land known as POKOINU SECTION 107J-M, Avarua and the land known as POKOINU SECTION 107H, Avarua
BETWEEN	**TAI KOKAUA also known as TAI DAVIES** of Rarotonga
	Applicant
AND	**HENRY BROWN** of Rarotonga for and on behalf of the landowners of Pokoinu Section 107H, Avarua
	First Respondents
AND	**MINISTRY OF WORKS (SURVEY DEPARTMENT)** a Ministry established pursuant to the Public Service (Identification of Departments) Order 2000
	Second Respondent

Hearing: 19 October 2010 (Rarotonga)
11 October 2011 (Rarotonga)
20 October 2011 (Rarotonga)
18 December 2014 (teleconference)

Appearances: Mr Little for the applicant
Mrs Browne for the first respondents
Mr Elikana and Ms Evans, Solicitors-General, for the second respondents

Judgment: 15 February 2017

INTERIM DECISION OF JUSTICE P J SAVAGE

Introduction

[1] The applicant, Tai Kokaua (Tai), seeks an order under s 129 or s 129A of the Property Law Act 1952 (the Act), granting occupation of Pokoinu 107H by way of lease to her and her husband. She also seeks orders that the first respondent, the landowners of Pokoinu 107H (the Landowners), and/or the second respondent (the Survey Department) pay compensation, as fixed by the Court, to the Landowners, for the grant of the lease.

Background

[2] Both the Aitu/Brown families and the Kokaua family had previously been owners in the land known as Pokoinu Section 107. On 17 May 1991, in response to an application by the landowners, the Court partitioned Pokoinu Section 107 (the Partition Order), as follows:

a. Pokoinu 107H (107H) in the name of Mata Mereana and Mavis Aitu Pori in equal shares; and
b. Pokoinu 107J-M (107J-M) in the names of the remaining owners, including Tai.

[3] On 12 June 1991 Mrs Browne, acting for the Aitu/Brown families, advised the Survey Department of the Partition Order, by letter. She attached four plans, noted the instructions for the partition and suggested that the Survey Department obtain the Court transcript of the Partition Order. The Partition Order was recorded against the Register of Titles of the parent block. The titles of 107J-M and 107H record that these sections were created by that Partition Order.

[4] Some years later, about 2003, Tai decided that she wished to build a house for herself on the family land. She sent her niece, Ann Raymond, as her agent, to ascertain what land was available. Ms Raymond acquired a survey map for the Pokoinu section from the Survey Department, which she and the private surveyor, Kenneth Tiro, used to identify 107J-M as a possible section that Tai and her sister could acquire occupation rights over. Using the documentation from the Survey Department, Mr Tiro produced a plan for the proposed occupation rights, which Ms Raymond took to a family meeting on 8 December 2013. At this meeting, the family consented to Tai and her sister (Noora) applying for occupation rights over 107J-M.

[5] On 24 February 2004 this Court granted two rights of occupation over 107J-M to Tai and Noora, in accordance with Mr Tiro's plans. Tai's occupation right (the Occupation Right) covered 2015m^2 at the front of the section. Noora's occupation right covered 2045m^2 at the back. Sometime in early 2004, the date is contested, Tai and her husband cleared the land over which the Occupation Right had been granted to her. They began building a home in mid-2006.

[6] In late 2006 the Landowners realised that something was amiss regarding the plans for 107J-M and 107H. In 2007 they discovered that the plans relied upon for the Kokaua sisters' occupation rights had erroneously included part of 107H within the 107J-M survey. Not only that, but the Court had subsequently granted occupation rights to two of the Landowners, Henry Brown, and his sister, Maryanne Brown, which overlapped with the Kokauas' occupation rights. It then transpired that Tai had mistakenly built her home entirely on 107H.

Procedural History

[7] On 27 September 2007, Henry Brown, on behalf of the Landowners of 107H, applied, pursuant to s 390A of the Cook Islands Act 1915, to rehear Tai's Occupation Right. As Noora had not built on the back section, she agreed to surrender her occupation right. However, Tai, having already expended funds to build a house on the land, cross-applied on 7 December 2007 for an order granting her a lease over the area of land upon which she had mistakenly built, pursuant to ss 129 or 129A of the Act.

[8] Hearings were conducted by Hingston J on 18 March 2008, and by myself on 19 October 2010, and 20 October 2011. At the latter hearing I determined that the two applications should be heard separately. Tai filed a fresh s 129/129A application on 21 October 2011.

[9] The s 390A application has since been dealt with. On 19 July 2012 Weston CJ cancelled the order granting the Occupation Right for want of jurisdiction because no owner of 107H had attended the meeting convened to consent to the Occupation Right (because the meeting attendees were mistakenly dealing with land they did not own, i.e. 107H instead of 107J-M), as would be required by s 50 of the Cook Island Amendment Act 1946.

[10] Thus, this decision deals with the outstanding s 129A application. Following its filing as a separate application, the Court received submissions from Mr Little (Counsel for Tai), on 24 October 2012; Mrs Browne (Counsel for the Landowners),

on 5 February 2013; and Crown Counsel (for the Survey Department), on 29 April 2013. Mr Little filed the applicant's submissions in response on 8 July 2013.

[11] I convened an urgent teleconference for 18 December 2014 to discuss an apparent arrangement between the parties to grant Tai a 60-year lease, raised in the applicant's 8 July 2013 submissions. On 17 December 2014 Mrs Browne filed a memorandum stating that the Landowners would not proceed with this arrangement. After the teleconference, I granted Mr Little leave to file further submissions in reply to Mrs Browne's memorandum, which he filed on 19 December 2014. Mrs Browne filed a submission in reply to this memorandum on 23 December 2014.

[12] The submissions leave me with four overarching issues to address:

a. Should I make an order under s 129 or s 129A of the Act granting Tai relief?
b. If so, what kind of relief?
c. If I grant Tai relief, what is the appropriate quantum of compensation for the Landowners?
d. Who is liable to pay this compensation?

Should Tai Kokaua be granted relief?

The law

[13] During the course of the hearing, it became apparent that the application should be progressed pursuant to s 129A. As the applicant correctly pointed out, s 129 relates to cases of encroachment, whereas s 129A contemplates the situation where a person with an interest in an original piece of land builds on wholly the wrong land. The latter situation more closely reflects the situation in this case. Accordingly, I deal only with s 129A.

[14] The relevant provisions in s 129A of the Act are as follows:

> *(1) Where (whether before or after the commencement of this section) any person who has or had an estate or interest in any piece of land (in this section referred to as the original piece of land) has, while he had that estate or interest, erected a building on any other piece of land (that piece together with any land reasonably required as curtilage and for access to the building in this section referred to as the piece of land wrongly built upon), if the building has been so erected because of a mistake as to any boundary or as to the identity of the original piece of land, that person, or any other person for the time being in possession of the building or having an estate or interest in either the original piece of land or the piece of land wrongly built upon,*

or any other person mentioned in subsection (6) of this section, may apply to the Supreme Court [High Court], whether in any action or proceeding then pending or in progress and relating to the piece of land wrongly built upon or by an originating application, to make an order in accordance with this section.

(2) If in the opinion of the Court it is just and equitable in the circumstances of the case that relief should be granted to the applicant or any other person, the court may in its discretion make an order –

(a) Vesting the piece of land wrongly built upon in the person or persons specified in the order;

(b) Allowing any person or persons specified in the order to remove the building and any chattels and fixtures or any of them from the piece of land wrongly built upon;

(c) Where it allows possession of the building to any person or persons having an estate or interest in the piece of land wrongly built upon, requiring all or any of the persons having an estate or interest in that piece of land to pay compensation in respect of the building or any other improvements to the piece of land wrongly built upon to such a person or persons as the Court may specify;

(d) Giving the person who erected the building or any person or persons claiming through him the right to possession of the piece of land wrongly built upon for such a period and on such terms and conditions as the Court may specify.

(3) Where appropriate, the Court may make any such order without ordering the applicant or any other person to give up possession of the piece of land wrongly built upon, or to pay damages, and without granting an injunction.

(4) Where the Court makes any order under this section the Court may, in the order, declare any estate or interest in the piece of land wrongly built upon to be free from any mortgage, lease, easement, or other encumbrance affecting that piece of land, or vary, to such extent as it considers necessary in the circumstance, any mortgage, lease, easement, contract, or other instrument affecting or relating to that piece of land.

(5) Any order under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit, whether as to payment by any person or any sum or sums of money, or the execution by any person of any mortgage, lease, easement, contract, or other instrument, or otherwise.

(6) Every person for the time being in possession of the building or having any estate or interest in the piece of land wrongly built upon or in the original piece of land, or

claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract, or other instrument affecting or relating to any such land, and the local authority concerned, shall be entitled to apply for an order in accordance with this section, or to be heard in relation to any application for or proposal to make any order under this section. For the purposes of this subsection the Court may, if in its opinion notice of the application or proposal should be given to any such person as aforesaid, direct that such notice as it thinks fit shall be given to that person by the applicant or any other person.

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Applicant's submissions

[15] Mr Little submits that s 129A applies because Tai had an interest in 107J-M and while holding this interest, she and her husband built a house wholly on another piece of land, being 107H, due to a mistake about the identity of 107J-M. Mr Little submits, per s 129A(2), that granting Tai relief is just and equitable for the following reasons:

a. She obtained the Occupation Right over the land through no negligence or intentional wrongdoing on her part or that of her agent Ann Raymond. At all material times she relied on the land and survey information provided by the Survey Department, which she was entitled to do, but which turned out to be incorrect.

b. She and her husband spent $270,000 of their savings improving the land and building their home on it. The building is made from concrete blocks, sitting on a concrete foundation. Thus, it cannot be moved and would need to be demolished.

c. If the Landowners had followed-up the sealing of the Partition Order that created 107H, the Survey Department could have amended its survey information and records relating to Pokoinu Section 107, so that the Occupation Right was not made over the wrong land.

d. Mark Brown, Henry Brown's son, knew of the Kokaua sisters' applications for occupation rights. Furthermore, on at least two occasions his friend John Tearoa Tini warned him that Tai and her husband were building a home on 107H. Mark Brown did not investigate the matter further or speak to Tai.

First Respondent's submissions

[16] Mrs Browne submits that s 129A does not apply, for two reasons. First, Tai's undivided interest in 107J-M did not amount to ownership of that land and did not enable her to build on 107J-M. Secondly, Tai erroneously obtained the Occupation Right over 107H and built on that land believing that she had good title. She was not mistaken as to the boundary or identity of the original piece of land.

[17] If the Court finds that s 129A does apply then it must be satisfied that granting the relief sought is just and equitable in the circumstances. When assessing this question, the Court should carefully balance the interests of the encroaching owners and the owners of the property encroached upon. In this exercise, Mrs Browne submits that it is relevant to weigh the fact that Tai knew or ought to have known that the house was built on the wrong land because:

a. Tai's family knew of the details of the Partition Order. In fact, as part of that partition the Aitu family, at the request of the Kokaua family, had accepted the section now known as 107H.

b. Ms Raymond knew, or should have known about the Partition Order, and the possibility that the Occupation Right would be on the wrong land because:

    i. At the 18 March 2008 hearing, Tai gave evidence that her sister, Kiki Carlson, who assisted Ms Raymond, was more likely than not present at the family meetings when the Partition Order was discussed and therefore was able to explain the proceedings to Ms Raymond.

    ii. At the 19 October 2010 hearing, Louise Akeronga Utanga gave evidence that at a family meeting called to discuss the applications of Tai and Noora Kokaua, in 2003 or 2004, her uncle stated in Māori that the land the Kokaua sisters sought belonged to the Aitu family. Louise Utanga said that Ann Raymond was present and that what was said was explained to her in English.

c. The Partition Order was entered on the Registers of Title of Pokoinu Section 107, 107J-M and 107H.

[18] The Landowners did not contribute to the mistake by failing to alert Tai that she was gaining an occupation right over, and later building on, the wrong land. The

Landowners did not know that the survey plans were amiss until it was too late to stop construction of the house. At the 18 March 2008 hearing, Tai's husband, Robert Davies, gave evidence that 107H was cleared by him and Tai in 2004. In July 2006, construction began and was completed in November 2006. If the Court accepts Mr Davies' evidence, then the house was complete by the end of 2006; that is, before the Landowners realised that the plans were wrong and that the Davies had built on the wrong land.

If relief is ordered, what kind of relief?

Parties' submissions

[19] At the 18 March 2008 hearing the parties appeared to proceed on the basis that the Court should make an order under s 129A that Tai receive a 60-year lease, subject to the Landowners receiving compensation. Based on this understanding, Mr Little detailed, in his 2013 submissions in reply, that the appropriate relief would be to grant Tai and her husband a 60-year lease over the land she mistakenly built on, commencing from either the date the Occupation Right was made or the date it was cancelled, and upon the standard terms and conditions for family leases for residential and/or commercial purposes. Furthermore, at the hearings, it was uncontested that the location of Tai's house was such that granting her an occupation order over a quarter section alone would be impractical. Thus, if any relief in the form of a right of occupation were awarded, it should be over a half acre section, rather than a quarter.

[20] However, confusion was created by further submissions made in anticipation of, and following, the urgent teleconference I convened on 18 December 2014 to clarify the nature of the parties' negotiated agreement. Responding to my calling the teleconference, Mrs Browne filed a memorandum on 17 December stating that the Landowners did not wish to proceed with the arrangement to provide Tai with a 60-year lease, arguing that the negotiations were based on a fundamental error of law committed by both counsel. Namely, the presumption that an Occupation Right would grant Tai an interest in perpetuity, effectively dispossessing the Landowners of an interest in the section. As this was not actually the case, Mrs Browne stated that the Landowners now wished that the Occupation Right not be cancelled.

[21] At the teleconference I emphasised that the Occupation Right had already been cancelled in 2012 for want of jurisdiction, so this point could not be revisited. Accordingly, Mrs Browne submitted that her clients would be prepared to allow Tai

an occupation right over 107H under the same terms and conditions as the cancelled Occupation Right (i.e. a non-transferable life interest to Tai only, for the purpose of a dwelling house, with no rent payable). At the end of the teleconference, all parties agreed that, whatever the finer details, Tai would at least receive an occupation right.

[22] On 19 December Mr Little filed further submissions in reply to Mrs Browne's 17 December memorandum, submitting that the Landowners were essentially seeking to renege on an agreement based on their own counsel's mistake of law, after the evidence had been heard and final submissions made, and after the Landowners had already sought and obtained cancellation of the Occupation Right. The purpose of the s 129A application hearings had been to assess liability for, and quantum of, compensation for the agreement reached between the parties, i.e. a 60-year lease. At no point during the entire proceedings was an occupation right discussed or valued. Furthermore, the applicant had accepted the Occupation Right cancellation because the Landowners had guaranteed that a 60-year lease would be offered. Thus, the Landowners were estopped from reneging on this agreement.

[23] In her submissions in reply on 23 December 2014 Mrs Browne argued that while s 129A provides the Court with a wide discretion, intervention should be minimised to that necessary to secure proper relief for the encroaching owner. However, under Mr Little's preferred approach, i.e. the parties' negotiated "agreement", Tai would receive an interest greater than what she had when the mistake was made (an increased term of occupancy, inclusion of her husband on the title, an annual rental reserved for landowners, enlargement of permitted use of the section to residential and commercial purposes, and application of lease terms and conditions usually reserved for landowners).

[24] Mrs Browne also submitted that the Landowners were not estopped from withdrawing from the agreement because estoppel applies to representations that have induced the representee to alter his or her position to his or her detriment, in reliance on the truth of the representation. In this case, both counsel had proceeded with the agreement due to a mutual misunderstanding that an occupation right would guarantee Tai an interest in perpetuity. Mrs Browne also submits that although the first respondents had supported cancelling the Occupation Right, this was because that particular order had been granted without jurisdiction. Their opposition to that Occupation Right does not preclude their support for a new occupation right.

Discussion

Should Tai receive relief?

[25] I do not agree with the first respondent that s 129A is not available to the applicant. The language of s 129A indicates that applications under the section are open to all persons with an interest in a piece of land, not just those who own a particular piece of land. Tai had an interest in 107J-M, in the form of the Occupation Right, and she and her family are also landowners in that section. Tai clearly built on a wholly other piece of land, being 107H.

[26] The issue is whether Tai built on 107H because of a mistaken belief that 107J-M's identity matched what was marked on the plan. That the plans were inaccurate is uncontested, but the first respondents alleged that Tai should have known that the plans were wrong and that the land she was building on was not part of 107J-M. They argue that Tai knew the land had been partitioned and that her agent, Ms Raymond, knew that the land that she proposed for Tai's occupation right belonged to the Aitu family because this was mentioned at the family meeting.

[27] I find that Tai did build on 107H in the mistaken belief that it was part of 107J-M. I do not accept that she knew that the land was the incorrect land, that she was wilfully blind to this, or that she was negligent in any way. I find this because the plans provided by the Survey Department and used by her private surveyor, Mr Tiro, set out that the land on which Tai was building was 107J-M, over which she had been granted an occupation right by the Court. The fact that she knew that the section had previously been partitioned has no bearing on her knowledge that the plan marking out 107J-M, which was partitioned to her family, was wrong.

[28] I also do not accept that Ms Raymond knew or wilfully closed her eyes to the fact that the supposed parts of 107J-M were actually part of 107H. Ms Raymond had gone to the Survey Department to get the plans, she had worked with Mr Tiro to produce the proposed occupation right, and she had taken the appropriate steps to secure owner consent through the family meeting convened. No evidence was put before me that indicated that she acted in a deceptive or opportunistic manner. It beggars belief that Ms Raymond was in fact aware, in the meeting referred to above at [17]b.ii, that the land was the wrong land.

[29] Furthermore, the first respondents effectively removed from contention the fact of Tai's mistake, by reason of their concession that she should receive relief under s

129A, which implies, as a precursor, that the applicant was operating under a mistake. At the 2014 teleconference both Mr Little and Mrs Browne agreed with my assurance that Tai "would at least have an occupation right. There is no question that she be deprived of possession. We are all agreed on that and that she should know that."

[30] Given the first respondents' acceptance that Tai should be entitled to some form of relief, I consider it just and equitable that the Court accommodates this via an order under s 129A(2). The question then becomes what form of relief is appropriate.

What relief is appropriate?

[31] The Court's discretion to make an order under s 129A(2) is particularly wide. In exercising this discretion, I consider that the justice and equity of the matter must affect the content of the order, specifically, the nature of the relief available. I accept that the parties initially negotiated possible solutions to the impasse, which at one point included a possible 60-year lease over 107H in favour of Tai and her husband. This is clear from the 18 March 2008 hearing transcript. Nevertheless, the parties were not bound by this arrangement nor were their statements made during these negotiations representations which they are estopped from retracting.

[32] Apart from the fact that there is no evidence that either Mrs Browne or the Landowners made statements in the nature of a representation, it would have been unreasonable for the applicant to shape her legal argument in reliance on what Mrs Browne or the Landowners did or did not agree to. It is not for the parties to decide what order will be made. Section 129A gives the Court the discretion to decide, based on the evidence and submissions presented. In this case, parties' negotiations and any possible agreement are relevant to the Court's exercise of its discretion, but it is still for the Court to consider where justice and equity lies in the circumstances.

[33] Considering the matter as a whole, I agree that it is just and equitable that Tai be granted relief in the nature of a right to possession of the land she occupies. She was not responsible for the mistake in the plans that led her to build her house on the land, which cannot be moved and for which she expended considerable personal sums.

[34] However, the Landowners will undoubtedly suffer loss from the granting of relief, as they are also victims of the mistake, which, as I will explain, they bear no responsibility for either. I note that s 129A departs from the basic principle of indefeasibility of title and "ought therefore to be applied with circumspection: not so

as to defeat the purpose for which [it has] been enacted, but rather to ensure that no more is done than is necessary to achieve that purpose."[1] I am of the view that to order the granting of a 60-year lease in 107H to Tai, in the manner proposed by Mr Little, under terms broader than those of the Occupation Right, and which extend the interest to Tai's husband as well, exceeds what is necessary to provide relief in this case. I comment that Tai has no interest in 107H, and that family leases usually reflect an interest in the land, which is why they are typically very generous. I agree with Mrs Browne's submissions that it would not be just and equitable for Tai to receive an interest greater than that which she had in the land that has turned out to be 107H. This would amount to her unjust enrichment at the Landowners' expense.

[35] Accordingly, I agree that Tai should receive an occupation right, under the same terms and conditions as the previous Occupation Right over the quarter acre of 107H upon which her home is built, as well as the additional quarter acre of land which both the applicant and first respondents agree cannot be separated from the rest of the section because of difficulties with the terrain.

[36] This outcome requires me to make an occupation order. While the Court's discretion to make orders under s 129A is broad, it must be read against the Court's jurisdiction to make occupation orders set out in s 50 of the Cook Island Amendment Act 1946, which reads:

> 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.

[37] Despite the breadth of s 129A, I cannot simply order the occupation right sought without ensuring compliance with s 50. Specifically, I must be satisfied that the majority of the 107H owners wish to grant the occupation right over the half acre. In the ordinary run of cases, parties will demonstrate majority owner support by holding a meeting of landowners, who consider the proposed occupation rights as set out on a proposed plan that is then presented to the Court alongside evidence of the necessary wishes, such as the signature of the majority. This has not happened in this case in

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[1] *Blackburn v Gemmell* (1981) 1 NZCPR 389 at 393.

relation to the occupation right requested, but I note that the legislation does not prescribe this process. As noted in the *Mataipo* case, while s 50 requires the Court to be satisfied as to the wishes of the majority of the landowners, "[t]here is no requirement as to how their views will be ascertained".[2] The Court of Appeal upheld this position in *George v Teau*, stating that "the contention that a meeting of owners is an indispensable element of a valid majority vote is flatly contradicted by the longstanding decision of this Court in the *Mataiapo* case."[3]

[38] In the present case, the facts that have led to the proposal for an occupation right are not ordinary and have not involved a majority vote at a meeting of landowners. However, I note that the party proposing the occupation right are the representatives of the landowners of 107H. Indeed, it was the Landowners who specifically proposed the occupation right, rather than the 60-year lease (the original solution proffered for the majority of this application's lifespan). Thus, in the exceptional circumstances of this case, I am satisfied that a majority of the landowners wish to grant an occupation right to Tai on the terms mentioned above.

Compensation – liability to pay and quantum

[39] The applicant and the first respondents agreed that any relief Tai received would be subject to the Landowners receiving compensation, and this was not challenged by the second respondents. However, all parties contested the quantum of compensation and who should be liable to pay it.

Applicant's submissions

[40] In relation to liability for compensation, Mr Little submits that Tai was, at all material times, the innocent party and should not be liable to contribute any compensation to the Landowners for the lease of the land. Rather, the Landowners and the Survey Department are liable. In relation to the Landowners, Mr Little submits:

a. They were granted the Partition Order but did not ensure that it was finalised and sealed. Had it been, the Survey Department would have been advised of the land's changed status and could have amended its records accordingly.

b. Mark Brown was warned by a friend, John Tearoa Tini, that Tai and Noora Kokaua were applying for Occupation Rights over the land. Mr Tini also

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[2] *Mataiapo v Abera* [1985] CKCA 2; CA 1.1985.
[3] *George v Teau* [2013] CKCA 1; CA 2/2012 at [63].

rang Mark Brown twice to advise that the land had been cleared and preparations had begun for the building of a home. Mark Brown took no steps to investigate the matter or speak to Tai.

[41] Regarding the Survey Department's liability, Mr Little submits that:

a. Proximity between Tai and the Survey Department gives rise to a duty of care. Mr Little referred to the Ministry of Works' website which states, "The Survey Land Information Division is responsible for the supply and maintenance of land survey information," and "Responsible land management involves maintaining the accuracy and integrity of the land survey information within acceptable standards." Thus, Tai, her agent Ann Raymond, and the surveyor Mr Tiro were entitled to rely on the Survey Department to provide accurate survey information to enable Tai to identify land over which she would be entitled to seek an occupation right.

b. The Survey Department acted negligently, breaching the duty of care it owed to Tai. The Survey Department provided Mr Tiro with incorrect land and survey information. The information provided to Tai, Ms Raymond and Mr Tiro mistakenly identified the land subject to the Occupation Right as 107J-M, when it was actually 107H.

c. The Occupation Right was granted over the wrong land due to the incorrect information provided by the Survey Department, which Tai was entitled to rely on. The Survey Department should have foreseen that provision of incorrect information would cause loss to Tai and the Landowners.

[42] Accordingly, two thirds of the compensation fixed by the Court should be paid by the Survey Department, which was primarily responsible for the house being built on the wrong land. The Landowners should pay the other third for failing to follow-up the sealing of the Partition Order, and act on their knowledge that Tai and her husband were building on the land. The Landowners' contribution to the compensation should be deducted from the total value of compensation due to them, as set by the Court.

[43] In relation to quantum, Mr Little submits that:

a. the Landowners should only be compensated for the value of the land, not any work and improvements that Tai and her husband completed.

b. At the hearing on 18 March 2008 John McElhinney, a valuer and real estate agent in Rarotonga, gave evidence that the value of a 60-year lease

over 107H was $20,000 in 2004 and $25,000 in 2008. These valuations were based on 107H's original condition and its location.

c. The value of the 60-year lease must be taken at the date that the lease is ordered. If the Court orders the lease to commence from the date the Occupation Right was granted (2004), compensation should be fixed at $20,000. If a lease is to commence from the date the Occupation Right was cancelled (2008), compensation should be fixed at $25,000. Any increase in the amount of compensation that the Court makes should not exceed $20,000, which is based on a further five-year period from 2008 to 2013.

d. If the relief to be granted is changed to an Occupation Right, this affects the applicability of the valuation evidence as that evidence related to a 60-year lease.

First Respondents' submissions

[44] Mrs Browne submitted that the Survey Department contributed to the mistake and should be liable to pay compensation because:

a. Contrary to the argument that the Landowners should have followed up after the making of the Partition Order, the law in the Cook Islands is that every High Court judgment is deemed complete when a minute is made in the record book of the Court and signed by a Judge or Justice, as the case may be.[4] Therefore, the Partition Order is deemed made at the time it was pronounced by the Court and recorded in the Court records. The Survey Department did not need to wait for sealing.

b. At the 19 October 2011 hearing the Chief Surveyor Tereapii Charlie confirmed that once the Court orders a partition, instructions are forwarded to the Chief Surveyor who then surveys the land in accordance with the plans. These plans then form part of the schedule attached to the draft Partition Order.

c. In any event, the Landowners of 107H, via Mrs Browne, advised the Survey Department of the Partition Order by letter on 12 June 1991. The Survey Department appears to have surveyed the land but omitted to include, per Mrs Browne's instruction, a portion of 107H, which it

[4] Judicature Act 1980-81, s 43.

mistakenly labelled as 107J-M (the Occupation Rights of Tai and Noora Kokaua were later granted over this portion).

[45] Mrs Browne also submitted that Tai should be partially liable to pay compensation for the same reasons as those she presented in relation to Tai being granted relief.[5]

[46] Mrs Browne was content to leave it to the Court to determine how liability should be apportioned between Tai and the Survey Department.

[47] In relation to the quantum, she notes that at the 18 March 2008 hearing, Tai and her husband agreed to pay reasonable compensation to the Landowners. Examples were given of section sales surrounding 107H, recorded as $35,000 for a quarter acre and $60,000 for a half acre. As the positioning of Tai's house makes granting an occupation order over just a quarter acre impractical, the Court should grant an occupation order for half an acre and the Landowners should be compensated in the sum of $60,000 to $70,000.

[48] Mrs Browne responded to Mr Little's submission regarding the diminished relevance of Mr McElhinney's valuation evidence if an occupation right were granted rather than a 60-year lease. She submits that compensation could never have been tied to those valuations because other considerations are relevant. In particular, any compensation award should take into account that the agreement is not a freely negotiated sale but a case of unwilling owners.[6]

Submissions of the Survey Department

[49] The Survey Department submitted that if the Court finds that s 129A of the Act applies then the Survey Department denies liability because:

a. the conduct of Tai and the Landowners contributed to the building being placed on the wrong land; and
b. no evidence has been given on which the Court can find, on the balance of probabilities, that the Survey Department is liable pursuant to ss 129 or 129A.

[50] In relation to Tai's conduct, the Survey Department argues that she contributed to the house being built on the wrong land as she knew or should have known that the land had been partitioned. The Partition Order was recorded in the public records of the Land Division of the High Court and in the Survey Department's records. In

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5 See [17] above.

6 *Collins v Kennedy* [1972] NZLR 939 at 942.

evidence Tai told the Court that she knew Pokoinu Section 107 had been partitioned. The Survey Department also notes that Louise Utanga gave evidence that at the family meeting discussing the Kokaua sisters' proposed applications for occupation rights, at which Ms Raymond was present, Ms Utanga's uncle stated that the land sought belonged to the Aitu family. It should be clear from what I have said earlier that I do not accept this submission.

[51] Tai relied on the incorrect plan provided by a private surveyor, Mr Tiro, who owed Tai a duty of care to research the land records of the High Court and the survey records of the Survey Department to ensure his plan's accuracy. Mr Tiro's plan was based on a survey by Reboama Samuels, a surveyor of Kena Enua Services Ltd. No evidence was brought at the hearings regarding who Reboama Samuels was, and whether he was employed as a Survey Department surveyor or a private surveyor.

[52] The Landowners knew that the land had been partitioned in their favour, but Mark Brown did not act when Tearoa Tini told him about the pānui in the Cook Island News, which stated that Tai and Noora Kokaua had applied for occupation rights on the land partitioned in the Landowners' favour. Later, Mr Tini called Mark Brown to tell him that footings had been placed on the land for the construction of a house. Mark Brown took no action to prevent Tai building a house on the land.

[53] I will deal with this matter now. Having heard Mark Brown, I accept what he said that he had no knowledge that the land, in which other members of his family had an interest, was involved. Whether this was due to miscommunication or some other reason, I do not know, but I accept that had Mark Brown appreciated the situation, he would almost certainly have investigated the matter. He did not do so because he did not know. In any event, he was not an owner in the land, so I fail to see how any action or inaction on his part can be used against the owners.

[54] In relation to the Survey Department's liability, counsel for the Survey Department submits that the Court must determine whether or not the Survey Department acted negligently, that is, that it breached a duty of care owed to Tai, causing foreseeable loss. The determination of duty of care is a two-stage test:[7]

a. Was there a sufficient relationship of proximity between the alleged wrongdoers and the person who suffered damage, i.e. could it be in the

[7] *Anns v Merton Borough Council* (1977) 2 All ER 492 at 498.

reasonable contemplation of the former that carelessness on his or her part may be likely to cause damage to the latter?

b. If proximity is established, does anything limit the scope of the duty, the class of person to whom it is owed, or the damages from which a breach of the duty may arise?

[55] The Survey Department accepts that it owes a duty of care, to those seeking its information, to ensure its records are up to date but submits that this duty is limited to amending its records as it is legally authorised to do. Without an order of the Court, it has no authority to prepare a new survey. In this case, the Landowners had not sent the Survey Department a draft or sealed order. The Survey Department says that the evidence tendered at the hearing on 19 October 2010 and 20 October 2011 established that the Department did all that was required by law to ensure its records were kept up to date. No evidence was tendered to explain how or why 107H was labelled "107J-M" instead. Furthermore, in relation to any duty of care owed to Mr Tiro, the Survey Department's liability was limited to approving his proposed plan as being to the required standard.

[56] On the evidence, Tai and the Landowners contributed to the damage caused to the Landowners; liability should be shared between them by two-thirds and one-third respectively.

[57] In relation to quantum, Crown Counsel submitted that it is just and equitable to calculate compensation on the basis of the land's value at the date the Occupation Right was granted. Mr McElhinney's valuation was only for a quarter acre section, but the Court should use this valuation as a benchmark. Accordingly, the Court may fix compensation at $50,000, being the sum of two sections in 2004. This figure should be adjusted by 1/3 to take account of the Landowners' contributory negligence. Tai is liable to pay the Landowners between $16,667 and $33,334 as compensation for any relief the Court grants to her.

Discussion

Liability for compensation

[58] Having perused the file and the documentation submitted I find that on the balance of probabilities the Survey Department was negligent in maintaining its records, such that the land was misidentified in plans held in the Department's possession. The Survey Department has conceded that it owed a duty of care to those seeking its

information to keep its records up to date and accurate (although that duty is limited to amending its records as authorized by law). It was entirely foreseeable that failure to fulfil this duty could result in land being misidentified in the manner that has occurred, or similar.

[59] I do not accept that Tai is responsible for the mistake, for the reasons I already discussed in relation to her entitlement to relief. In relation to the Landowners, I am similarly unconvinced that they bear responsibility for the incorrect plans or the reliance placed on them. I do not agree that the first respondents are responsible for failing to follow up with the sealing of the Partition Order. Mrs Browne submitted to the Court that the letter that she sent to the Survey Department, along with the relevant plans, should have been sufficient for the Survey Department to be aware that it needed to update its records. If the Survey Department required the Landowners or their legal counsel to personally deliver the Partition Order to the Survey Department, they should have responded to the letter to say so.

[60] The Survey Department appears to argue that, despite the receipt of the letter, it was not legally authorised to do a new survey of the land because it had not received a draft or sealed Partition Order from the Landowners. However, a new survey was prepared following the receipt of Mrs Browne's 1991 letter and placed in the Survey Department's records. This is evident because the plans were updated to include reference to 107J-M (which did not exist prior to the partition). However, the lot called 107H was missed out (despite having also been referred to in Mrs Browne's letter). In the absence of an explanation as to how this update of the Survey Department's records happened, one can only reasonably presume that the Survey Department did in fact complete a survey (albeit an incorrect one).

[61] The evidence submitted about Tai's and the Landowners' purported knowledge of the mistake is also not convincing. In its written submissions, the Department posits the applicant's and the first respondent's contributory negligence by arguing that both those parties ought to have known the land had been partitioned and that:

> ...they ought to have known because there are public records held at the Land Division of the High Court which would show that the land had been partitioned and *there was a letter dated 12 June 1991 from the Respondents solicitor with proposal plans at the offices of the Third Party indicating that the partition order had been made and how the land was to be partitioned...* (emphasis added).

I not only reject this argument, but I also take it as an inadvertent admission by the Survey Department that the letter in its possession, detailing the partition order and how the land had been partitioned, was evidence enough, for whoever might see it, of how the land should have been surveyed. Following this logic, I point out that the letter's audience was the Survey Department, not the other parties, and it is the Survey Department's responsibility, not that of the other parties, to maintain the integrity of land records. One is left to wonder what the purpose of a Survey Department might be, if parties are simply expected to inform themselves about pieces of land based on correspondence in the Survey Department's possession, rather than the records themselves.

[62] Furthermore, undoubtedly the parties knew that Pokoinu 107 had been partitioned. However, I cannot see how it follows that they therefore should have known that the plans updated to include those partitions had labelled those partitioned sections incorrectly. Similarly, the fact that the occupation rights to Tai and her sister were advertised in the pānui does not support the Survey Department's case either because the announcements referred to occupation rights over 107J-M; assuming that any of the Landowners did see these announcements, there would have been no way of knowing that the land was actually 107H.

[63] In relation to the parties' conduct in the lead-up to the grant of the Occupation Right and subsequent events prior to 2007, based on the oral evidence presented at hearing I have no reason to believe that either Tai, Ms Raymond, or Henry Brown, were aware at the relevant times of the mistakes in the survey plans, or that they wilfully closed their eyes to mistakes. All parties, the private surveyors included, were entitled to rely on the Survey Department plans and to presume they were correct. It would rather defeat the point of a Survey Department existing if members of the public were expected to treat the surveys and plans it held and disseminated with some suspicion.

Quantum of compensation

[64] The quantum of compensation must take into account that the placement of Tai's home on the land means that the Landowners will have to relinquish more land than simply that upon which the building rests (a half acre section rather than a quarter acre). The Landowners seek compensation of between $60,000 to $70,000. However, these amounts are based on recent sales of leases of nearby sections of land. They are

not necessarily reliable figures upon which to base compensation for a temporary occupation right to the extra land, which I note Mr McElhinney testified was inferior land to those neighbouring sections.

[65] I accept Mr Little's arguments that Mr McElhinney's evidence on valuation related to a 60-year lease and not an occupation right. Furthermore, I note the Survey Department's submission that the valuation was based on a quarter acre section, not half an acre. However, I do not consider this to be fatal to the evidence presented, and I am willing to use the valuation as a benchmark because the balance land is most inferior. I accept Mrs Browne's argument that the valuation evidence would only ever have been indicative given that the land is not being freely leased, but transferred by unwilling owners. However, I note that the occupation right is not a sale of a lease to the land, but effectively a life interest in Tai.

[66] Given Tai is to receive, as far as possible, an interest no greater than that she received in the Occupation Right, I consider it just and equitable that the figure for compensation should take into account the valuation at the date the Occupation Right was granted, that is, in 2004 (being $20,000). However, I note that the size of the land is double that which was valued.

[67] Having reached this point, it will be clear that:

a. I intend to make an occupation order in the same terms as the occupation order cancelled by the Chief Justice.

b. I intend to order compensation. That compensation will be paid by the second respondent.

c. The evidence relating to quantum is unsatisfactory. I bear in mind that the owners could have arranged a 60-year lease, dating from 2004, for the other quarter acre with a third party, but it appears they made no attempt to do so. The measure of their being out of pocket is, subject to further submissions, the value of a lease for the 13 years since the grant of the occupation right in 2004, together with a reasonable assessment of Tai's life expectancy for the years that now follow.

d. I will receive submissions on the exact form of the order. I note that in the applicant's submissions of 8 July 2013, at para 20(iii), it is stated that Tai was then 61 years old. Accordingly, she will now be 65 or 66. In terms of Tai's life expectancy, I do not particularly want to enter into an actuarial assessment; I would prefer to make a reasonable estimate, suggesting that

she will live to 85. Therefore, we are dealing with the 13 years since 2004, plus 20 years from the present time until Tai turns 85, equalling a 33 year lease or, perhaps more accurately, a 60-year lease being assessed in 2004, with 33 years to run.

e. On the basis of the way the matter has proceeded, no issue of annual rental has been raised and I do not intend to complicate the proceedings in that regard.

f. This matter has been long and complicated and I do not intend to let it drift further. The Registrar is to forward to me a copy of the original order in Tai's favour and I will then issue an interim order in the terms I have discussed above.

g. The issue of quantum is not satisfactorily addressed in evidence and I will require the parties to consider, and perhaps even agree, as to the price that would have been received in 2004 for a lease of the half acre with 33 years to run upon that lease. I will then require the parties to consider how that amount is adjusted on the basis that payment has been delayed. That adjustment may well be in terms of interest.

h. The issue of compensation does not now concern Mr Little or his client. I require Mrs Browne and Crown counsel to file and serve submissions within 30 days. If there are contested matters of fact upon which cross-examination is required, we may have to wait until the October court, but I will be guided by the parties in this regard.

Dated at Wellington this 15th day of February 2017.

P J Savage
JUSTICE