IN THE COURT OF APPEAL OF NIUE
(LAND DIVISION)

App No: 11615

UNDER	Section 14 of the Land Act 1969 and section 47(1) of the Niue Amendment Act No 2 1969
IN THE MATTER OF	the land known as Part Limu, Section 1, Block II, Namukulu District
BETWEEN	RONANOVATINA LEONA TAHEGA Appellant
AND	POITOGIA KAPAGA Respondent

Hearing:	13 March 2019
Court:	Isaac J (dissenting) Reeves J Armstrong J
Appearances:	Mr Sioneholo for the Appellant Mr Toailoa for the Respondent
Judgment:	19 May 2020

DECISION OF THE MAJORITY OF THE COURT OF APPEAL

Introduction

[1] On 31 August 2017, Coxhead J (as he was then):

(a) Dismissed an application seeking an injunction to stop Ken Fasi building a house on Part Limu, section 1, block II, Namukulu District (section 1); and

(b) Appointed Poitogia Kapaga as the leveki mangafaoa over that land.

[2] Ronanovatina Leona Tahega appeals that decision. The issue in this case is whether the appeal should be upheld.

Background

[3] This proceeding has a long history which was aptly summarised by Coxhead J in his decision in the lower Court. We reproduce and adopt that background below:

> [2] The common ancestor Laufoli had three grandsons. Part Limu had previously been dealt with by an informal dividing of the land between the three grandsons: Leona, Fasitoga, and Ikihele. Leona occupied the inland area on the bush side of the road, while Fasitoga occupied the coastal area on the sea side.
>
> [3] When determining the land in 1980, the Court also appointed one of Fasitoga's descendants, Ken Fasi, as leveki mangafaoa. Mr Fasi had not been living in Niue prior to his appointment as leveki but had decided that he wanted to return and build a house on the land at Part Limu. The seaward side which Mr Fasi's ancestor Fasitoga had occupied was unsuitable for building on. Mr Fasi approached the Leona family in 1980 to request some of their land on the bush side of the block on which to build his house. Leona and the mangafaoa agreed and set aside a section of land for Mr Fasi, being Section 1 Block 2. Leona wanted Mr Fasi to be leveki over the section that had been set aside for his house and accordingly made an application to the Court to appoint him as leveki over Section 1 Block 2. That application was granted by Justice Donne in 1980.
>
> [4] Many years passed before Mr Fasi acted on the 1980 agreement and began building his house in 2012. In the same year, Mr Fasi applied to the Court to appoint Mr Poitogia Kapaga as his replacement as leveki mangafaoa over Section 1 Block II to help facilitate the build, as Mr Kapaga was living in Niue. Justice Isaac granted this application in March 2013.

[5] In October 2014, Mrs Ronanovatina Tahega sought a rehearing of the decision appointing Mr Kapaga as leveki. She also applied for an injunction to stop Mr Fasi from building his house. These applications were heard before Justice Reeves, who declined both applications in November 2015. Justice Reeves found Mr Kapaga to be a suitable person to be appointed leveki mangafaoa and accordingly declined to rehear the application for his appointment. In regards to the injunction application, Justice Reeves found that Mr Fasi was entitled to build on the land and therefore declined the application.

[6] Mrs Tahega appealed Justice Reeves' decision, arguing that instead of taking a "principled approach" to her decision whether or not to order a rehearing, the Judge simply stated that the Court had an absolute discretion. The appeal was heard on 1 April 2016 and a decision was issued on 17 August 2016. The Court of Appeal granted the appeal in part and directed that the matter be referred back to the lower Court to:

a) rehear the injunction application which was declined by Justice Reeves; and

b) rehear the application heard before Justice Isaac for appointment of Mr Kapaga as leveki mangafaoa.

[4] Both applications were reheard by Coxhead J on 10 November 2016. He then issued his written decision where he dismissed the application seeking an injunction and appointed Mr Kapaga as the leveki mangafaoa for section 1.

[5] Mrs Tahega appeals both parts of Coxhead J's decision. We consider each of these in turn.

The appointment of Mr Kapaga as leveki mangafaoa

What legal principles apply?

[6] Section 14 of the Land Act 1969 ("the Act") provides that:

(a) If an application to appoint a leveki magafaoa has been signed by a majority of the members of the magafaoa, the Court must appoint the person named on that application as leveki.

(b) If such an application has not been made within a reasonable time, or an application has not been signed by a majority of the members of the magafaoa, the Court may appoint a person who it considers suitable for the role. Any such appointment is a matter of discretion.

(c) A leveki does not have to be part of the magafaoa but must reside in Niue and be reasonably familiar with the genealogy of the magafaoa and the history and location of the land.

[7] The evidence before the lower Court indicates that support for the appointment of a leveki for section 1 occurred along family lines, namely the Leona, Fasitoga and Ikihele families. There is no evidence to show the views of the individual members of the magafaoaas a whole, nor is there evidence to indicate that a majority of the members of the mangafaoa support one of the proposed leveki in this case. On that basis, Coxhead J was not compelled to appoint a particular leveki, rather it was an exercise of discretion.

[8] When considering an appeal against an exercise of discretion, it is not the role of the appellate court to consider the case afresh and arrive at its own decision. Rather, an appellate court may only intervene if satisfied that:[1]

(a) The lower court acted on an error of law or a wrong principle;

(b) The lower court failed to take into account a relevant consideration;

(c) The lower court took into account an irrelevant consideration; or

(d) The lower court was plainly wrong.

[9] We adopt this approach.

[1] *Kacem v Bashir* [2010] NZSC 112 at [32]. See also *Matthews v Matthews – Estate of Graham Ngahina Matthews* [2015] Māori Appellate Court MB 512 (2015 APPEAL 512) at [56] and *Hohepa v Piripi – Waima C30A and Waima Topu Blocks* [2019] Māori Appellate Court MB 629 (2019 APPEAL 629) at [18].

What did Coxhead J decide?

[10] When this application was heard by Coxhead J, both Mrs Tahega and Mr Kapaga sought to be appointed as the leveki mangafaoa for section 1. Mrs Tahega was supported by the Leona family. Mr Kapaga was supported by the Ikihele and Fasitoga families.

[11] Coxhead J found that:

(a) Neither Mrs Tahega nor Mr Kapaga had the unanimous support of the members of the magafaoa;

(b) The common ancestor for the land is Laufoli and so the Court has to take into account the views of the Laufoli magafaoa;

(c) He had concerns with Mrs Tahega and Mr Kapaga being appointed as leveki given their diverging views;

(d) Both are domiciled in Niue;

(e) Mrs Tahega is a member of the magafaoa;

(f) Mr Kapaga is not a member of the magafaoa, but he has been acting as the leveki magafaoa for this land for some time;

(g) Mr Kapaga is reasonably familiar with the genealogy of the family and with the history and location of the land;

(h) Mr Kapaga understands that by being appointed as leveki he does not acquire any beneficial rights in the land;

(i) As Mr Kapaga has the support of the wider magafaoa, and has been acting as the leveki since 2013, he should be appointed as leveki magafaoa.

Submissions for the Appellant

[12] Mr Sioneholo argued that while Laufoli was determined as the common ancestor, pursuant to the agreement between the three grandsons, section 1 formed part of the land that had been allocated to the Leona family. Mr Sioneholo submitted that this informal arrangement was undertaken pursuant to Niuean custom. Mr Sioneholo contends that, taking this into account, there should have been direct consultation with the Leona family, and the Court should have placed greater weight on their views.

Submissions for the Respondent

[13] Mr Toailoa argued that, while there was an informal agreement around the allocation of certain areas to the three families, the magafaoa for the land is still the descendants of Laufoli. He submitted that, when appointing a leveki, s 14 of the Act requires the Court to consider the views of the whole magafaoa, not just one family, even if there was an informal agreement that they were to occupy or use certain areas. Mr Toailoa argued that, in the present case, the Fasitoga and Ikihele families supported Mr Kapaga whereas the Leona family supported Mrs Tahega. Mr Toailoa contends that Coxhead J was correct to place greater weight on the views of the wider magafaoa, being the Fasitoga and Ikihele families, rather than just the Leona family.

Discussion

[14] The crux of the appeal rests on Mr Sioneholo's argument that the Court should have placed greater weight on the views of the Leona family, given that this area was allocated to them pursuant to the informal agreement. We do not agree.

[15] When appointing a leveki magafaoa, the starting point is s 14 of the Act. This is clear that support from the magafaoa is a significant factor when deciding who to appoint. The magafaoa for section 1 are the descendants of Laufoli. While section 1 forms part of the area allocated to the Leona family under the informal arrangement, this does not change who is the overall magafaoa for the land. Section 14 of the Act is clear in that regard and we do not consider there is any scope for the Court to rely solely on the views of one family, in this case the Leona family.

[16] We accept that the history of the land, including any informal arrangements entered into between members of the magafaoa, such as occurred here, is a relevant factor. This should be taken into account by the Court when deciding whether to exercise its discretion. However, this is not determinative. When doing so, the Court should also consider all evidence concerning the history of the land, not just one part of it.

[17] This is supported by s 14(5) of the Act which provides that the Court must be satisfied that the proposed leveki is reasonably familiar with the history of the land. Once appointed, the leveki makes decisions around the use and occupation of the land in consultation with the members of the magafaoa. Understanding the background and history of the land is an important factor to consider when a leveki exercises his or her discretion. The same applies when the Court is deciding who to appoint to that role.

[18] Coxhead J did take this into account. He referred to the history of this land in his judgment, including the informal agreement between the three grandsons and the allocation of section 1 to the Leona family. He also set out the subsequent events that took place, such as the agreement between Mr Fasi and Leona to build on section 1, and the delay by Mr Fasi to commence the build.

[19] When deciding who to appoint as leveki, Coxhead J took into account that both Mr Kapaga and Mrs Tahega are resident in Niue. He considered that Mrs Tahega is a member of the magafaoa, and Mr Kapaga is not. He placed weight on the fact that Mr Kapaga has acted as the leveki magafaoa for this land for some time and found that he was familiar with the genealogy of the family and with the history and location of the land. Coxhead J accepted that Mrs Tahega was supported by the Leona family, but he placed weight on Mr Kapaga having support from the wider magafaoa being the Fasitoga and Ikihele families.

[20] Coxhead J also referred to s 14 of the Act, and the factors he had to take into account when appointing a leveki. After considering these matters, Coxhead J exercised his discretion and appointed Mr Kapaga as the leveki for section 1.

[21] Appointing a leveki for this land was always going to be a difficult exercise. The magafaoa were split as to who should be appointed to that role. The leveki can decide whether a member of the magafaoa may use or occupy any part of the land under his or her purview.

There is a clear contest in this case whether Mr Fasi can continue to build on section 1. Appointing either Mrs Tahega, or Mr Kapaga, as the leveki for section 1, will inevitably resolve that issue one way or the other. Coxhead J recognised this difficulty stating that he had concerns with either being appointed given their diverging views. However, on balance, and considering the evidence as a whole, Coxhead J was entitled to reach the decision that he did.

[22] For these reasons, the appeal seeking to overturn Mr Kapaga's appointment as the leveki magafaoa for section 1 must fail.

The interim injunction

[23] An interim injunction seeks temporary or interim relief to protect the applicant's position until his or her substantive application has been determined. An interim injunction is not a stand-alone proceeding. It is dependent on a substantive application also being filed with the Court. Where an interim injunction is granted, the injunction will remain in place until the substantive application has been resolved. At that time, the Court will also consider whether the interim injunction should be discharged.

[24] This can be contrasted with a permanent injunction which is not dependent on any other proceeding. A permanent injunction is not an interlocutory step, it is a substantive proceeding in its own right. It is important to maintain the distinction between an interim and a permanent injunction, as they each have a different purpose, and a different test.

[25] Section 47(1) of the Niue Amendment Act (No. 2) 1968 states:

> **47 Jurisdiction of the Land Court**
>
> In addition to any jurisdiction specifically conferred upon the Land Court by any enactment other than this section, the Land Court shall have exclusive jurisdiction –
>
> …
>
> (e) To grant an injunction against any person in respect of actual or threatened trespass or any other injury to Niuean land;
>
> (f) To grant an injunction prohibiting any person from dealing with or doing any injury to any property which is the subject-matter of any application to the Land Court.

[26] Section 47(1)(e) relates to a permanent injunction. Section 47(1)(f) relates to an interim injunction.

[27] Mrs Tahega sought an interim injunction to prevent Mr Fasi from continuing to build on section 1 until the appointment of a leveki had been determined. We have already upheld Coxhead J's decision to appoint Mr Kapaga as the leveki. Strictly speaking, there is no need to decide whether an interim injunction should be granted as the substantive application has been resolved.

[28] Despite that, we consider Coxhead J erred in his approach when considering the application seeking an interim injunction. While it ultimately has no bearing on the outcome of this appeal, we comment on his approach, in obiter, to assist the lower Court, Court staff, and the parties, with the future conduct of a similar proceeding.

What did Coxhead J decide?

[29] In order to obtain an interim injunction, the applicant must show that:

(a) There is a serious question to be tried;

(b) The balance of convenience is in favour of an injunction; and

(c) It is in the interests of justice to grant an injunction.

[30] Coxhead J found that there was no serious question to be tried in this case and that the balance of convenience and the interests of justice did not support the grant of an injunction. We comment on these findings in turn.

Was there a serious question to be tried?

[31] When considering this issue, Coxhead J found that there was no substantive proceeding filed other than for the appointment of a leveki magafaoa. In particular, no application was filed challenging Mr Fasi's right to occupy section 1.

[32] Coxhead J then went on to consider whether Mr Fasi had a right to occupy section 1, before determining that there was no serious question to be tried. We consider that Coxhead J erred in this approach.

[33] The appellant was seeking an interim injunction to prevent Mr Fasi continuing to build on section 1 until the appointment of a leveki magafaoa had been resolved. In the normal course of events, the application for an interim injunction would have been heard, and determined, before the substantive application. This is the conventional approach for any interlocutory application. In this case, both applications were heard together. It seems that this occurred as, when this Court heard the first appeal against the decision of Reeves J, it directed that the two applications were to be heard 'alongside' each other. This may well have clouded the approach Coxhead J took.

[34] When Coxhead J was considering whether there was a serious question to be tried, he should have assessed the substantive proceeding being the appointment of a leveki. Coxhead J accepted there was no substantive application challenging Mr Fasi's right to occupy section 1, but he then proceeded to consider whether Mr Fasi had a right to do so.

[35] While the substantive application concerned the appointment of a leveki, it is settled that where a leveki is appointed it is he or she who is responsible for managing the land on behalf of the magafaoa. They can decide which members of the magafaoa can use or occupy any part of the land under his or her purview. In the present case, the two proposed leveki, Mr Kapaga and Mrs Tahega, took contrasting views. Mr Kapaga supported Mr Fasi continuing to build. Mrs Tahega did not. As such, the appointment of a leveki either directly, or indirectly, resolved the underlying issue of whether Mr Fasi could continue to build. Accordingly, in deciding whether to grant an interim injunction, Coxhead J should have considered whether there was a serious question to be tried in relation to Mrs Tahega's application that she should be appointed as the leveki.

[36] As noted above, we have upheld Coxhead J's decision appointing Mr Kapaga as the leveki. However, that is not the approach when deciding whether to grant an interim injunction. When doing so, the Court does not resolve the ultimate issue, it simply has to determine whether there is a serious question in favour of the party seeking an injunction. In this case, we consider there was.

[37] The Leona family are members of the magafaoa. It is accepted that their family has a close historical connection with this land. The decision whether to appoint Mrs Tahega, or Mr Kapaga, was finely balanced. Mrs Tahega had a tenable argument that she should be appointed as leveki and we consider there was a serious question to be tried.

Where did the balance of convenience lie?

[38] Coxhead J found that the balance of convenience was in Mr Fasi's favour. He found that Mr Fasi had expended considerable money to facilitate the build and that Mrs Tahega had no immediate plans for the area. Again, we consider Coxhead J erred here.

[39] When deciding where the balance of convenience lies, the Court must consider what detriment Mr Fasi would suffer if an interim injunction was granted, but then discharged in the substantive judgment, against what detriment Mrs Tahega would suffer if an interim injunction was not granted, but then her substantive application was upheld.

[40] In the present case, an interim injunction preventing Mr Fasi continuing to build, pending resolution of who should be appointed as leveki, would no doubt be a source of frustration and inconvenience for him. However, it is not the case that the money he expended would simply be lost. If an interim injunction was granted preventing him from continuing with the build, but that interim injunction was then discharged in the substantive judgment, Mr Fasi could continue with the build as planned. While the delay would cause him some prejudice that would be minimal, particularly given the 30-year delay between the original agreement to build, and when Mr Fasi actually took steps to do so.

[41] On the other hand, if an interim injunction was not granted, but Mrs Tahega was then appointed as the leveki in the substantive application, she would be faced with having the authority to decide who can occupy the land, but Mr Fasi may have already completed his house. That could then give rise to a further and more considerable grievance if she was to determine that Mr Fasi could not occupy section 1.

[42] In these circumstances, we consider that the balance of convenience was in favour of granting an interim injunction. It would have stopped any further building, and would have preserved the status quo, until the appointment of a leveki was resolved.

Where did the interests of justice lie?

[43] Coxhead J found that the overall justice of the case lay in favour of Mr Fasi. He referred to the 1980 agreement, and the 2015 consent, allowing Mr Fasi to build. He also relied on Mr Fasi being a descendant of the common ancestor.

[44] While those are relevant factors, we do not consider them determinative here. We consider that it was in the interests of justice to grant an interim injunction to prevent further building until the ultimate question had been decided. That would have preserved the position of all parties until the substantive application was resolved. That would also have prevented further costs being incurred, and further, likely permanent changes, being made to the land, which would have placed all parties in a more difficult position had Mrs Tahega been appointed as leveki.

Summary

[45] For these reasons, we consider that Coxhead J erred in his approach when deciding whether to grant an interim injunction.

[46] It seems this occurred as the application for an interim injunction, and the application to appoint a leveki mangafaoa, were heard together. The injunction should have been heard first as an interlocutory issue. It also seems the applications were heard together as a result of an earlier appeal decision, and direction, from this Court.

[47] Ultimately this is a moot point as we have also found that it was appropriate to appoint Mr Kapaga as the leveki magafaoa for section 1. As already noted, we make these obiter comments to assist with the future conduct of a similar proceeding.

Decision

[48] The appeal is dismissed.

[49] If the respondent seeks costs, we issue the following directions:

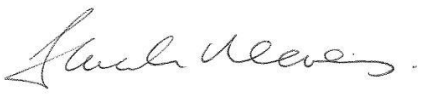
(a) Mr Toailoa is to file and serve any submissions on costs within one month from the date of this decision;

(b) Mr Sioneholo is to file and serve any response within one month from receipt of Mr Toailoa's submissions; and

(c) Mr Toailoa is to file any submissions in reply within two weeks from receipt of Mr Sioneholo's submissions.

[50] We will then decide, on the papers, whether to order costs and if so in what amount.

Pronounced at 12pm in Wellington on the 19th day of May 2020.



S F Reeves
JUSTICE

M P Armstrong
JUSTICE