[2012] UKPC 34
Privy Council Appeal No 0083 of 2010

JUDGMENT

The descendants of Utanga and Arerangi Tumu (Appellants) *v* The descendants of Iopu Tumu (Respondents)

From the Court of Appeal of the Cook Islands

before

Lord Phillips
Lord Walker
Lady Hale
Lord Mance
Lord Carnwath

JUDGMENT DELIVERED BY LORD WALKER AND LORD CARNWATH giving the judgment of the Board ON

22 OCTOBER 2012

Heard on 18-19 April 2012

Appellant
Kate Davenport
Ross Holmes
Justin Wall
(New Zealand and Cook Islands Bar)

(Instructed by Ross Holmes Lawyers L.P)

Respondent
Rebecca Edwards
Tina Browne
Sarah Inder
(New Zealand and Cook Islands Bar)

(Instructed by Brown Harvey & Associates P.C)

LORD WALKER AND LORD CARNWATH:

Background

1. This is the first appeal to the Judicial Committee from the Cook Islands since their people attained internal self-government in 1965. The Cook Islands are two scattered groups of small islands in the Pacific Ocean, the Southern Cook Islands in the general region of 20ºs 160ºw and the Northern Cook Islands in the general region of 10ºs 165ºw. They are therefore on the other side of the International Date Line from New Zealand, of which they formed part during much of the 20th century. This appeal relates to land in Rarotonga, the largest of the Southern Cook Islands. It has an area of about 67 square kilometres. It is roughly oval in shape, with a mountainous core surrounded by a fringe of low ground, some cultivable and some swampy. The indigenous people are Maori. The inhabited parts of the island are divided into three vaka (or tribal territory): Avarua on the north coast, Takitimu on the south, and Arorangi on the west. The land relevant to this appeal consists of three plots within the Takuvaine tapere ((district) in the Avarua vaka (territory).

2. The judgment of the Board in the associated case of *Baudinet v Tavioni* [2012] 35 emphasises the special character and importance of ancestral property to the indigenous peoples of the Cook Islands, which transcends any commercial significance. This has been recognised by domestic legislation since the islands became part of New Zealand in 1901. As will be seen, such property is generally inalienable, subject to restrictive conditions supervised by the courts.

3. By an Order in Council made on 13 May 1901 under the Colonial Boundaries Act 1895, the Cook Islands became part of New Zealand. The Order in Council came into force on 11 June 1901. Shortly afterwards, on 7 November 1901, the General Assembly of New Zealand passed the Cook and other Islands Government Act 1901 ("the 1901 Act"), which was deemed to have come into force on 11 June 1901. It was described as "An Act to provide temporarily for the Government of the Cook and other Islands in the Pacific within the Boundaries of the Colony of New Zealand."

4. Section 2 of the 1901 Act provided as follows:

> "Subject to the provisions of this Act, the laws in force in the said Islands at the commencement of this Act (including the local laws, customs, and usages of the Native inhabitants, in so far as the same are not repugnant to the general principles of humanity) shall continue until

> other provision is made, and, subject as aforesaid, the statute laws of New Zealand shall not be in force in the said Islands:
>
> Provided that the Governor, by Order in Council, may from time to time direct that any of the laws in force in the said Islands at the commencement of this Act, may be modified or repealed."

By section 4 existing courts of justice in the Cook Islands were to continue, but subject to new rights of appeal to superior courts in New Zealand. Section 6 provided as follows:

> "The Governor, by Order in Council, may from time to time establish a tribunal or appoint an officer or officers, with such powers and functions as he thinks fit, in order to ascertain and determine the title to land within the said Islands, distinguishing titles acquired by native customs and usage from titles otherwise lawfully acquired; and may provide for the issue of instruments of title, and generally make such provisions in the premises as he thinks fit."

Section 15 made provision for the setting aside of Crown lands.

5. So apart from Crown lands, the general effect was to keep in place the substance of the land law of the indigenous Maori population, while providing for the introduction of a new system for its administration. This new system was provided for by an Order in Council ("the 1902 Order in Council") made on 7 July 1902. This established the Cook and other Islands Land Titles Court ("the Land Court", that expression being used to include its successor under the Cook Islands Act 1915, initially called the Native Land Court and later the Land Court).

6. Section 3 of the 1902 Order in Council provided as follows:

> "The Court shall consist of such Judges, not less than two, as the Governor may from time to time appoint. One of such Judges shall be the Chief Judge, who shall be a European."

"European" was defined as a person other than a Native, and "Native" as "an aboriginal native" of the Cook Islands. Section 10 set out the jurisdiction of the Land Court in numerous subsections, the first six being as follows:

> "The Court shall have jurisdiction –

(1) To investigate the title to and to ascertain and determine the owners of any land within the said Islands, distinguishing titles acquired by Native custom and usage from titles otherwise lawfully acquired:

(2) To determine the relative interests in any land of the persons entitled thereto, and to partition any land among such persons:

(3) To effect an exchange between Natives on any land owned by them:

(4) To determine any successor:

(5) To grant probate of the will and letters of administration of the estate and effects of any Native now dead, or who shall hereafter die:

(6) To render any land inalienable, or to impose such limited restrictions on the alienation of any land as the Court may think fit, and to vary or remove any restrictions:"

Section 10 (15A) (which was, despite its unusual numbering, part of the statute from its original enactment) gave the Land Court jurisdiction,

"(15A) To rehear any claim or other matter whatsoever the finding in relation to which has been appealed against within two months from the date thereof. Every such rehearing shall take place before at least two Judges, and the finding thereon shall be final and conclusive, and shall be substituted for the original finding, which shall thereupon become void:"

Section 13 provided that the Chief Judge, or any other judge who was European, might exercise all the powers of the court while sitting alone. Section 25 provided as follows:

"All amendments necessary to remedy or correct defects or errors in any proceeding or document, or to give effect to or record the intended decision in any proceeding, may be made at any time by the Court, whether applied for or not, and upon such terms as to the Court may appear just."

7. By an Order in Council made on 14 July 1902 the Governor of New Zealand appointed judges and officials of the Land Court: Lieutenant-Colonel Walter Edward Gudgeon ("Colonel Gudgeon") to be a judge and also Chief Judge; Pa Ariki Maretu (an ariki or tribal chief of the Takitumu vaka) to be a judge; Edward Blaine to be the registrar; and Stephen Savage to be an interpreter. Colonel Gudgeon had been present in the Cook Islands as Resident since September 1898, and from 1903 he held the offices of Resident Commissioner (under section 5 of the 1901 Act) and Chief Judge until he left the Cook Islands in 1909 (returning, as explained below, in 1913).

8. In 1902 Colonel Gudgeon made detailed rules and regulations for the conduct of proceedings in the Land Court. They were procedural in nature, but from the rules and the schedule of standard forms (40 in all) it is possible to discern how the Chief Judge exercised his jurisdiction under section 10 of the 1902 Order in Council. There were forms of application and forms of order for investigation of title; partition; determination of relative interests as between co-owners; succession to land (on intestacy); probate or letters of administration; exchange; removal of restrictions on alienation; and confirmation of alienation. Form No 2 (order on investigation of title on certified plan) set out the form of schedule to be included in such orders (it appears on the back of the printed form which was sealed with the court seal and signed by the Chief Judge and the registrar). The schedule was in this form:

First Column		Second Column	Third Column
Name	Sex, and if Minor, Age	Relative Interest	Part declared Inalienable

9. The Land Court held its first sitting on 2 April 1903. This appeal is concerned with three orders of the Land Court made by Colonel Gudgeon sitting as Chief Judge together with Judge Pa Ariki. The three orders were drawn up and signed by him on 10 November 1905 after hearings in April and July of that year. The three orders were altered on 13 May 1912 after a hearing on that date before Judge MacCormick, who was appointed as a judge of the Land Court (but not as Chief Judge) by an Order in Council made on 13 January 1912. The essential issues in this appeal are whether the alterations were invalid and if so whether they were properly validated by the order of Williams CJ made in these proceedings on 24 June 2008, from which the Court of Appeal of the Cook Islands dismissed the appellants' appeal on 10 July 2009.

10. Before going further into the law it may be useful to sketch in what happened between 1905 and the enactment of the Cook Islands Act 1915 ("the 1915 Act"). During the decade before the 1915 Act, and especially after Colonel Gudgeon left the Islands, the Land Court seems to have suffered something of a malaise. Pa Ariki Maretu, the Maori judge, died in 1906 and was not replaced. Captain James Eman-

Smith was appointed as a judge, and also as Chief Judge, and sat from October 1909 until September 1911, Judge MacCormick being his successor as judge (but not Chief Judge). Judge MacCormick sat from March 1912 until December of that year. An Order in Council made on 11 August 1913 provided that the Lands Court should thereafter consist of the Chief Judge and such other judges as the Governor might appoint. Colonel Gudgeon was reappointed as Chief Judge for three months from 20 August 1913. He was given the task of reviewing all the orders of the Land Court made since the death of Pa Ariki Maretu in 1906, and taking such action as was necessary to validate them. He corrected a number of orders, but not Judge MacCormick's order of 13 May 1912 which is in issue in this appeal.

11. It is an agreed fact (but not, the respondents say, relevant) that the Land Court's record-keeping at this time was chaotic. Chief Judge Harvey, who made an official report on the problem in 1945, commented in his report:

> "Although the Court commenced sitting in 1903 and had by 1910 investigated most of the titles in Rarotonga and many in Aitutaki, no attempt was made to record the Orders of the Court in a manner befitting their importance. It is only recently that a record existed whereby one could be sure of ascertaining the true position of the title to any Block, and it is only since owners have been able to discover the state of a title that mistakes, errors and omissions are alleged against it."

He also quoted Mr F D Baxter, an experienced solicitor:

> "One has only to see the record books ... before these Registers were compiled [by the then Registrar Mr H J Morgan] to know that the position was chaotic. Not only are the old records dirty and untidy but also there are inter-alienations and notes written into them without apparent authority but would show that relevant information was scattered through numerous files (not necessarily in the Registrar's office) without adequate references to enable a searcher to trace the information directly."

12. Chief Judge Harvey also commented in his report on the difficulties facing Colonel Gudgeon and his successors:

> ". . . in Rarotonga however the Judge of the Land Titles Court was not entirely free to do justice without fear or favour. A more just and upright Judge that [sic than] Col. Gudgeon never existed, yet if he had, from the outset in Rarotonga, insisted upon the arikis proving their title against the occupiers, a start would never have been made to clothe the

> real owners with titles and trade would have languished to the discredit of his administration.
>
> Throughout his judgments one senses his exasperation at being forced to adjudicate in favour of noble applicants for no reason other than that the real owners offered no opposition to their arikis, Mata'iapos or rangatiras [different degrees of tribal status] as the case may be. In some cases these real owners may have permitted the Court to assume a tacit consent through apathy or a natural dullness; but in far too many cases it appears that the owners were afraid to oppose their upper class."

13. In 1914 a report from the then Resident Commissioner called for legislation by the New Zealand Parliament to "extricate the present Island laws from their chaotic state". In particular:

> "The proceedings in the Land Titles Court from the 7th Feb 1906 to the 19th August 1913 (both dates inclusive) require to be validated, as there was no properly constituted Court during that period, though a great many claims were adjudicated upon..."

The Cook Islands Act 1915

14. The response was the 1915 Act. It was a monumental enactment, running to 660 sections, providing for all aspects of the government of the Cook Islands. The Land Titles Court was replaced by a Native Land Court renamed the Land Court in 1964). This court was given exclusive jurisdiction to investigate title to customary land and to determine the interests in it (section 421). They were to be determined "according to the ancient custom and usage of the Natives of the Cook Islands" (section 422).

15. The ancient custom and usage was however qualified by strict controls on the disposal of native lands. Some of these controls went further than seems to have been the position in Colonel Gudgeon's day. In particular, any disposition of native land by will was to have no effect (section 445), whereas section 10(5) of the 1902 Order in Council and the rules and regulations made by Colonel Gudgeon had provided for probate and letters of administration (with will annexed) in relation to native land. Moreover Colonel Gudgeon did not treat all native land as inalienable. When the 1915 Act came into force alienation of customary land or of any interest in it was prohibited (section 467); as was alienation in fee simple of native freehold land, otherwise than to the Crown for public purposes (section 468), and as was alienation by way of lease or other interest for more than 60 years (section 469). Exchange of land was subject to the order of the court, to be allowed only where the court was

satisfied that the exchange was not contrary to the interests of the owners affected, that the interests were approximately equal in value and any difference was compensated, and that all those interested agreed to the exchange (sections 438 to 444).

16. The powers of the court to review or confirm previous orders were limited. Three provisions are potentially relevant to the present proceedings:

> *Section 399 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 Courts 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 any 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.

…

> (3) No such order shall be signed or sealed until and unless it has been assented to by the Attorney-General in writing…."

17. Also relevant to the proceedings before the Chief Justice was section 390A of the 1915 Act (added by section 16 of the Cook Islands Amendment Act 1950). That enabled the Chief Judge to make an appropriate remedial order 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]… 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] … has decided any point of law erroneously,…"

An order made by the Chief Judge under this section amending, varying, or cancelling any prior order was subject to appeal, but there was to be no appeal against the refusal to make any such order.

Orders in 1905 and 1912 relating to the three plots

18. The starting-point is the investigation by the Chief Judge, Colonel Gudgeon, which resulted in the three orders made on 10 November 1905 ("the 1905 Orders"). They affected plots of land designated as Taurupau section 69, Rarokava section 70 and Te Piri section 73, all in the Takuvaine subdistrict of the Avarua vaka. Each order was on the same printed form, completed in manuscript, sealed with the court seal, and signed by the Chief Judge and the registrar. It recorded that both the Chief Judge and the native judge were present. The order was to the effect that "the Natives", whose names were set out in the schedule, were declared to be the owners of the relevant parcel of land in equal shares. In each of the three schedules there appear the names, not only of Iopu Tumu (or "Tumu"), but also of Utanga Tumu, and of Mere, Arapau, Makiroa, and Maria Arerangi. Utanga was Iopu's younger brother and Mere was Iopu's sister. Arapau, Makiroa and Maria were Mere's daughters. There was no entry in the "part declared inalienable" column. In the case of section 69 there was a seventh name, Kairangi, who was recorded as having a life interest (she died in 1921). The Board was shown some extracts from the records of the proceedings before the court. There is nothing to suggest any error in the form of the orders, or that they did not properly reflect the intention of the then judges.

19. The next step was a letter from Iopu Tumu dated 7 September 1908 to Colonel Gudgeon, relating to the three plots:

> "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 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…"

Nothing seems to have happened until 29 February 1912 (shortly after the appointment of Judge MacCormick), when the letter was advertised as an amendment application in the Cook Islands Gazette.

20. On 15 March 1912 a letter in the Maori language was submitted to the court, apparently signed by Utanga, Mere Arerangi and two of her daughters (Maria having by now died). It referred to the request of Iobu (sic) Tumu to "strike out" their names in the three land sections, and stated:

> "we approve of that request because we did not join in helping Tumu during the proceedings and disputes before the Land Titles Court. He has not however forgotten us."

The letter then referred to other lands which Iopu Tumu "has put in our names."

21. It seems that Iopu Tumu's application was considered by Judge MacCormick on 13 May 1912. The minute book for that day records:

> "Appln made in 1908 by lopu 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.
>
> Mere, Arapu, 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 excind. The 3 lands altogs [sic] 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."

22. Judge MacCormick seems to have been misinformed about, or to have misunderstood, the family relationships. Although it is not clear from the agreed statement of facts, the documentary evidence indicates that Mere was Utanga's sister and that Maria (who had died) was Mere's daughter. There appears to have been no formal order giving effect to the judge's decision, nor any other record signed by him. In the schedules to the three 1905 orders, the five names were deleted in manuscript with a note "struck out 13th May 1912" (initialled by Mr Blaine, the registrar).

23. Some indication of Judge MacCormick's thinking appears from a letter written a few days later (21 May 1912) to the responsible New Zealand Minister:

> "There is one aspect of my Land Titles Court work here on which I think I should report to you now.
>
> A considerable number of applications have been made for amendment or reopening of existing titles to land, practically applications for rehearing. The Court at present has no power to grant any such applications.
>
> Nor do I think that it would be wise to give any general power of the kind as it appears to me it would be taken advantage of and be the cause of rehearing of a very large number of titles, although an error had been shown, it would in fact have the same disastrous effect here as section 50 of the Native Land Act 1909 had in New Zealand. Great expense and delay would be caused if any such general power of rehearing be granted. You will understand I am referring to old titles in respect of which the time for appeal had gone by.
>
> Nevertheless recognising that injustice may have occurred I have thought it advisable to hear every such application brought before me with the intent that if I were satisfied that a real injustice had taken place I would make some recommendation to remedy it. In one or two instances I made amendments by consent of parties concerned where manifest slips had occurred.
>
> But apart from that I have not so far come across a case where it seemed to me that the applicants for rehearing would have any prospect of

> ultimate success. At present therefore I see no need for taking any action at all.
>
> If later on I do come across a case that seems to call for action I shall report to you especially upon it."

24. The statement in the letter that the court "at present" had no power to reopen its decisions, is naturally read as addressing the fact that the time for reopening decisions under section 10(15A) of the 1902 Order in Council had long since passed, rather than the lack of a second judge as required by section 3. This is confirmed by the later reference to "old titles in respect of which the time for appeal had gone by." There is no suggestion of concern that the court was improperly constituted for other purposes. Those concerns arose about a year later, as already noted.

The commencement of these proceedings

25. As explained in the judgment of the Chief Justice, the genesis of the present proceedings was a dispute over the clearing and levelling of some land at Ruatonga in the Avarua district. This land was occupied by Mrs Tara Scott (née Utanga) one of the present appellants. She wanted to have a place to sell eggs at the roadside. There was a house on the land which had been the Utanga family home since the 1930s. Mrs Scott had been born and raised there. Mrs Mere Raith (who is a descendant of Iopu Tumu, and one of the respondents) objected to the clearing and levelling of the land and applied for a partition of the land. This limited dispute developed into a more general dispute over the Tumu lands, but by the time of the hearing before the Chief Justice it had narrowed again and was limited to the three plots subject to the 1905 Orders and Judge MacCormick's order of 13 May 1912 ("the 1912 Order").

26. On 16 October 2001, the Utanga and Arerangi family groups brought proceedings in the High Court Land Division for orders under section 390A of the 1915 Act that the 1912 Order was ultra vires, erroneous and founded on mistakes of law and fact. Allegations of fraud were included initially but later abandoned. The matter was referred to the Land Court for enquiry and report under section 390A(3) of the 1915 Act. On 19 August 2003, Smith J submitted a report to the Chief Justice (then Greig CJ) recommending that the application should be dismissed. The report summarised the facts and contentions and identified two grounds relied on by the applicants: that the purported agreement of the parties whose names were struck out was a fiction, and that the 1912 Order was made in excess of jurisdiction.

27. On the first ground, the report emphasised that the 1912 Order was made "by consent with all the parties present or consenting in writing" and expressed the view that "the Chief Justice must rely upon the best evidence available, rather than

interpretations placed on evidence by subsequent generations." There was no adequate evidence that the parties appearing in the Land Court did not understand the full impact of the order. On the second ground, the report expresses the view that the 1912 Order could now be drawn up, signed and sealed under section 415 of the 1915 Act, or validated under section 416.

28. This report was addressed to Greig CJ, who plainly had some reservations about it. In a minute dated 6 July 2004 the Chief Justice identified six points which had not been fully canvassed in counsel's submissions or in the judge's report. These were set out in para 4 of his minute:

> "(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 Applicants' Appendix VII Minute Book at p302 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 initialed 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 section

> 416 Cook Islands Act it would be difficult to be affirmative in equity, and good conscience with fraud allegations unresolved."

29. The point in para 4(c) of the minute seems to be mistaken as the agreed bundle contains a copy of the Cook Islands Gazette for 21 February 1912 publishing the Order in Council of 13 January 1912 appointing Judge MacCormick. Much of para 4(f) also became irrelevant when allegations of fraud were dropped. But the last sentence remains relevant, (since equity and good conscience cannot be limited to absence of fraud), as do the points in para 4(a), (b), (d) and (e). After consideration of this minute counsel prepared and filed further submissions between September 2004 and October 2005. During that period Greig CJ retired.

The judgment of Williams CJ

30. The new Chief Justice, Williams CJ encountered some case-management difficulties. At one stage he proposed to decide the case on the lengthy written submissions without a further oral hearing. But then he called for simplified written submissions and held an oral hearing on 31 March 2008. He handed down a very thorough judgment, running to 137 paragraphs, on 24 June 2008.

31. In his judgment (para 89) the Chief Justice summarised the issues before him under three heads:

> "(a) Was the 1912 Order invalid for any of the following reasons:
>
> > (i) mistake, error or omission of fact or law in terms of section 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 section 390A(1);
>
> (c) If yes to (ii) or (iii) above, can the order nevertheless be validated by virtue of section 416 of the Cook Islands Act 1915."

32. He held, as regards section 390A, that there had been no mistake, error or omission in the 1912 Order, and he rejected arguments based on lack of formality. He held, however, (para 114) that the order had been made without jurisdiction, because it was not made by a Chief Judge with a second judge as required by the Order in Council; but (paras 132 to 135) this was an "irregularity of practice and procedure" and one which could and should be validated under section 416 (consent for that purpose having been granted by the Attorney-General under section 416(3)).

33. By section 390A(2), there was no right of appeal against the dismissal of the application under that section. However, on 28 November 2008 the Court of Appeal granted permission to appeal against the validating order under section 416.

34. That appeal was dismissed by the Court of Appeal (Barker, Fisher and Grice JJA) in a single judgment of the court delivered on 10 July 2009, which was the day after the hearing. The judgment identified the only live issue as whether the court was satisfied that having regard to equity and good conscience, the 1912 order should be validated. On that issue the Court of Appeal agreed with the Chief Justice. (The material parts of their reasoning are set out later in this advice.)

The grounds of appeal to the Board

35. The appellants' submissions before the Board can be reduced in substance to three main points:

(1) The 1912 Order was made without jurisdiction and was therefore invalid from its inception.

(2) In consequence, there was no jurisdiction under section 416 of the Cook Islands Act 1915 to validate it in accordance with the equity and good conscience proviso.

(3) Alternatively, if there was such jurisdiction, the decisions reached by the Chief Justice and the Court of Appeal regarding equity and good conscience were flawed.

36. That the 1912 Order was made without jurisdiction is scarcely open to argument. This is not because of the various procedural failings discussed in argument, since they did not go to jurisdiction. Much more significant was the fact that the order was made by only one judge. Apart from section 25 of the 1902 Order in Council (which was in the nature of "slip rule"), the only power to reopen the 1905

Orders was under section 10(15A), which required an appeal within two months, and a hearing before two judges. Judge MacCormick could not act under section 10(15A) on his own, even assuming that he could have extended the time for appeal. His letter belies any suggestion that he was purporting to exercise that jurisdiction. Rather he was asserting a power to correct "manifest slips", presumably under section 25, at least where there was consent of the parties. Consent of the parties could not by itself confer jurisdiction which did not otherwise exist.

37. The Chief Justice saw some merit in the theory that there was a mistake in the 1905 Orders, either by the later inclusion in the title of persons other than Tumu, or on the basis that Tumu's interest was as the adopted son of Iopu Kamoe. However, the "adoption theory" was not relied on, (para 101), and the Chief Justice made no conclusive finding on either point. He concluded (para 106):

> "For whatever reason, Utanga and Arerangi consented to the removal of their names. That removal does not seem so odd in the 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."

38. In the light of the contemporaneous records (as to which the appellants have made painstaking researches in archives at Wellington and elsewhere) the Board is unable to accept this interpretation of the proceedings leading up to the 1905 Orders.

39. The documentary evidence as to events before and after the drawing up of the 1905 orders, including the minutes of the hearings after which the orders were made, are inconsistent with such an interpretation. The minutes were recorded in manuscript, apparently by Colonel Gudgeon himself, and then typed as numbered pages inserted in a minute book.

40. These minutes show that there were hearings relating to the Tumu lands on four days before the orders were formally drawn up: that is on 10, 18 and 19 April and 12 July 1905. The minutes show that Colonel Gudgeon found some aspects of the hearings exasperating. But his evident determination to resolve the problems makes it most unlikely that the orders as finally drawn up and signed did not represent his intention.

41. The hearings were as follows:

(1) On 10 April 1905 the Chief Judge considered applications relating to sections 69 (Taurupau) and 70 (Rarokava). The manuscript notes show that Tumu appeared and claimed these lands, and that in respect of section 69 the Chief Judge made an order in favour of Tumu and his two siblings and three nieces (and in favour of Kairangi for a life interest), all the names except Tumu's being written in small script, suggesting an insertion. In respect of section 70 both the manuscript and the typed minutes are hard to decipher, but appear to state "Order in favour of Tumu a [male adult] and those in section 69 same obligations as regards Ariki House".

(2) On 18 April 1905 there seems to have been a lengthy hearing on section 73 (Te Piri). The Chief Judge's notes record the evidence, with his own comments. They conclude "the Court holds that Te Piri is the land of Tumu and awards it to him". But this is immediately followed by an order in favour of Tumu Iopu (is uncertain whether this is one or two persons) and Iopu's siblings and nieces, these names having no appearance of being written in later. But then Tumu is recorded as having said "I ask that my name only be put in". Another quite different claimant, Tamarua, then joined in to challenge the order. So the Chief Judge adjourned the hearing.

(3) The adjourned hearing continued on 19 April 1905. The Chief Judge's notes record "in every sense this has been a most unsatisfactory case". He then described in detail the lack of merits in Tamarua's case, adding (and this is perhaps indicative of his experience in the Land Court) "Parakoti whose role in life appears to be to bolster up bad cases had better have kept out of this. He is always on the wrong side and his action is mischievous". The minutes conclude "Order on page 380 of Book 1". This was the order set out in (2) above.

(4) Minute Book No 2, page 142 has an entry in these terms (with the omission of notes of court fees) "Tumu's lands. Many names added to list as follows: Utanga, Mere Arerangi, Arapou Arerangi, Maria Arerangi, Makiroa Arerangi. Sitting held on 1st August 1905 to fix perman[en]tly list of names in above two sections." It seems very probable that this entry referred to sections 69 and 70. It is a matter of conjecture whether it was at this stage that more names were added to the minutes of the hearing on 10 April 1905.

42. In the light of this documentary evidence, the suggestion that the Chief Judge made a mistake seems most improbable. It is much more likely that it was an

example of his going to pains to see that the elevated status of the tribal chief was not used to prejudice the rights of other family members.

43. In line with this, Iopu Tumu's letter of 7 September 1908 to Colonel Gudgeon does not allege any mistake, as opposed to asserting a change of mind on Iopu's part. In the English translation it states "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". This way of putting it also seems to ignore the fact that Colonel Gudgeon seems to have overruled Tumu's wish (expressed on 18 April 1905) for the land to be in his sole name. Colonel Gudgeon seems to have taken no action in response to this letter. Iopu was more successful in his approach to Judge MacCormick who was a newly appointed judge (and who seems, from his letter of 21 May 1912, to have been aware of his lack of jurisdiction).

Invalidity of the 1912 Order

44. The Board concludes that in making the 1912 Order, Judge MacCormick was exceeding his powers. Given the confusion that he found on his arrival on the islands, it is perhaps understandable that he adopted what he saw as a pragmatic approach. As the Court of Appeal observed (para 6):

> "It is hard to be critical of someone operating in the early days of the twentieth century when the New Zealand colonial administration of the Cook Islands was in its infancy and communications were rudimentary."

However, neither he, nor anyone else who was familiar with the 1902 Order in Council, can have had any real doubt about the legal position. For this reason, and with respect to the arguments of the respondents, the Board does not consider that any help is to be gained from the doctrine of "de facto judge" (see Hale LJ in *Fawdry & Co (A Firm) v Murfitt* [2003] QB 104, para 22). This point was mentioned by the Court of Appeal in granting leave, but rightly not pursued in their substantive judgment.

45. In the view of the Board, it is clear that the amendments were made without jurisdiction, and were for that reason invalid. For the same reason, they could not benefit from the presumption of validity in relation to defects of "practice or procedure" under section 399, since that does not extend to orders made "without or in excess of jurisdiction" (section 399(2)). The live area of debate therefore is in respect of the second and third submissions: was the invalidity within the scope of section 416? If so, was the exercise of discretion by the courts below flawed to such extent as to justify the interference of the Board?

46. The appellants submit that in this case the invalidity goes beyond anything which can be corrected under section 416 because either –

> (1) the lack of a second judge (as required by section 3 of the 1992 Order in Council) between 1906 and 1913 meant that during that period there was no Land Court in existence, and therefore no power to do anything (whether valid or invalid);
>
> (2) alternatively, section 416 should not be read as covering "flagrant invalidity" such as occurred in this case.

47. In the Board's view the first submission gives unrealistic force to section 3 of the 1902 Order in Council. The court was constituted by section 2. Section 3 was directory in nature. It specified the constituent elements of the court, including judges and officers. Important as some of those requirements were (notably the requirement for a native judge), there is nothing to suggest that the court would cease to exist if they were not satisfied for any period. On the appellants' argument, following the death of the native judge in 1906, the court would have had to stop all activity until his successor could be appointed. Allowing for the timescale of communication between the Cook Islands and New Zealand at that time, even reasonable expedition would presumably have meant a gap of some months. It cannot sensibly have been intended that the work of the Land Court should cease altogether.

48. The problem in this case was not that the Land Court lacked power to do anything at all. Section 13 specifically empowered the European judge, sitting alone, to exercise all the powers of the court. But, as is common ground, this did not extend to the jurisdiction under section 10(15A), which in terms required two judges for its exercise.

49. The term "flagrant invalidity", as used in the second submission, comes from the judgment of Cooke J (as he was then) in the New Zealand Court of Appeal in *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1, 4:

> "When a decision of an administrative authority is affected by some defect or irregularity and the consequence has to be determined, the tendency now increasingly evident in administrative law is to avoid technical and apparently exact (yet deceptively so) terms such as void, voidable, nullity, ultra vires. Weight is given rather to the seriousness of the error and all the circumstances of the case. *Except perhaps in comparatively rare cases of flagrant invalidity*, the decision in question is recognised as operative unless set aside. The determination by the Court whether to set the decision aside or not is acknowledged to

> depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account." (Emphasis added)

The respondents accept that "flagrant invalidity" of the kind referred to by Cooke J, cannot be corrected under section 416, but argue that such cases are exceptional and that this case is not among them. They point out that the 1912 Order was made at a time when the facts relating to the 1905 Orders were fresh in everyone's minds, and that the affected parties were all in court and gave their consent. Neither they, nor their descendants, challenged the decision during their lifetimes, and while their recollections could be tested. The 1912 Order has been treated as valid by all parties for nearly a century until the present proceedings.

50. When a differently constituted Court of Appeal declined, in a judgment dated 18 June 2010, to recall the earlier judgment of 10 July 2009, it stated (para 13) that there appeared to be an issue estoppel arising out of that portion of the Chief Justice's judgment, relating to section 25 of the 1902 Order in Council, which remained unappealable. The Board considers that there must have been a misunderstanding here. When the Chief Justice stated (in para 137(a) of his judgment) that "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" he appears to have been relying on the reasoning in paras 109 to 113 of his own judgment. That reasoning was independent of his reasons for thinking that the 1905 Order may have been mistaken.

51. Although the use of the term "flagrant invalidity" was not in issue between the parties, the Board respectfully doubts its utility in the present case. Cooke J's statement was of course an important, early statement of the now familiar principle that in administrative law there are no rigid distinctions between what is void and what is voidable, and that even an "invalid" order may remain legally effective until set aside by a court with jurisdiction to do so. However, the issue in this case is not one of general administrative law, but of the construction of a particular statutory provision in its own historical context.

52. Section 416 applies when there arises "any question ... as to the validity of any order" made by the Land Court. Those words are apt to include questions of validity of any kind, however "flagrant" the circumstances. There is no reason to limit their scope. On the contrary, given the highly confused state of the Land Court's proceedings before the 1915 Act, it seems likely that the legislature would have wished to give the widest possible powers to remedy defects, so far as required by "equity and good conscience". The courts below were accordingly right to hold that they had jurisdiction under section 416 to validate the 1912 Order. Nor was it

necessary, as the Chief Justice seems to have thought, for it to be an error of "practice or procedure".

Equity and good conscience

53. The Chief Justice held:

> "133. The question that remains is the operation of the principles of 'equity and good conscience' within section 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 section 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."

The Court of Appeal reached the same conclusion (para 11):

> "This Court agrees with the Chief Justice that the equity and good conscience of the situation requires a validation order to be made. The land concerned has been leased and subdivided many times over the last 97 years. Many persons unconnected with the ancient dispute of 1912 have acquired rights in good faith. It could be unconscionable to expose such persons to the uncertainty that would be generated by a refusal to validate the 1912 order. Moreover, we agree with the Chief Justice that

the fact that the order was made by consent strengthens the notion of equity and good conscience applying."

54. In challenging those conclusions, the appellants accept that they are asking the Board in effect to review a judicial exercise of discretion, and that in such a case an appellate court should only intervene where it has been exercised on a wrong principle or the decision is plainly wrong. They submit that these conditions are satisfied because:

(1) The Chief Justice (and in agreeing with him, the Court of Appeal) wrongly placed the burden of proof on the appellants to show why validation should not occur.

(2) Even accepting that the 1912 Order was not wholly without effect, the intensity or degree of the invalidity remains highly relevant to the exercise of jurisdiction under section 416. The courts below failed to pay regard to the nature of the invalidity.

(3) The courts below failed to pay due regard to the general concept of the inviolability of orders on investigation of title, which was implicit in the 1902 Order in Council, and confirmed by the 1915 Act and the Constitution of the Cook Islands.

55. They join issue with the factors relied on in the reasoning of the courts below:

(1) *Consent* They question the weight placed by the courts below on the parties' consent, given that consent of the appellant's ancestors could not have enlarged the jurisdiction of the court, nor enable it to give effect, even by agreement, to an alteration which the law did not authorise.

(2) *Lapse of time* The delay is explicable on the basis that the historical information needed to challenge the 1912 Order was not available until the historical research required for the present applications. In any event, "equity and good conscience" do not justify allowing an unauthorised excess of power to gain force merely by the passage of time. Section 641(3) of the 1915 Act provides that "No right, title, estate, or interest in Native Land shall be acquired or lost by prescription."

(3) *Third party interests* The appellants point to the lack of specific evidence as to the existence or extent of third party interests. It was incumbent

on the respondents to provide the evidential foundation for their application under section 416, and in the absence of such evidence the court's conclusion was mere conjecture. In any event, this concern is met by the appellants' undertaking to respect third party rights acquired for value and in good faith, and their willingness to accept an order that all recorded leases and occupation rights in favour of the respondents should continue until their expiry on the same terms as previously.

56. In reply, the respondents emphasise again the consensual nature of the 1912 Order, and the fact that it was not challenged during the lifetimes of those directly concerned. They rely on previous decisions of the court as to the importance of consent in land matters, citing *Tukura Uti Tou v Tuakana Toeta* [1995] CKCA 3. They adopt the reasoning of the courts below, in particular their reliance on the consensual nature of the orders, and their findings that the land "has been leased and subdivided many times" since 1912, that many persons unconnected with the dispute have acquired rights in good faith, and that it would be "unconscionable" to expose them to the uncertainty resulting from a refusal to validate the orders. Protection for third party interests acquired in good faith is given expressly by section 390A. There is no equivalent protection under section 416. The undertakings offered by the appellants cannot cure what would amount to a fundamental change in the ownership of land over the last 100 years.

57. In considering these submissions, the Board takes as its starting point the exercise of discretion by the courts below. As the appellants acknowledge, it is only if they are shown to have erred in principle or reached a decision which is plainly wrong, that an appellate court can properly interfere. This principle applies with even greater force, where the subject-matter of the dispute, involving a special legal regime designed for the protection of native rights, is much more familiar to the local courts than to the Board. On the other hand, it seems that the Board has had the benefit, in some respects, of more detailed research and legal argument than may have been available to the courts below.

The Board's conclusions

58. Under section 416(1) of the 1915 Act the Land Court has jurisdiction to validate an invalid order only if it "is satisfied that having regard to equity and good conscience such order ought to be validated." This is a precondition to the exercise of the court's discretionary power. The 1912 Order was not merely irregular but was, as both lower courts held, made without jurisdiction. It had the effect of divesting the interests of Iopu Tumu's siblings and nieces which Chief Judge Gudgeon had (as appears form the minute books) been at pains to put on the titles. Their names were entered as a deliberate decision, and not by accident. Judge MacCormick himself seems to have been uneasy about the 1912 Order, and his reference (in his letter of 21

May 1912) to "manifest slips" is simply not appropriate as a description of the 1905 Orders.

59. In these circumstances the condition as to equity and good conscience is much more than a ritual formality. It presented Williams CJ, and the Court of Appeal on reviewing his decision with a real problem: how could they be satisfied that it would be in accordance with equity and good conscience to validate an order which appeared to enrich the head of the family at the expense of junior members, when the grounds for doing so were never clearly stated, let alone supported by evidence and examined by Judge MacCormick? These points (among others) were raised in the minute written in 2004 by Greig CJ, who retired before the matter came to trial. It is true that Williams CJ had taken account of those points in deciding that the 1912 decision was not affected by mistake for the purposes of section 390A. However, that section proceeds on the basis of a decision made within jurisdiction. In the Board's view, the decision under that section, even though not itself open to appeal, could not limit the scope of the matters to be taken into account under section 416 in deciding whether to validate an order made without jurisdiction.

60. On this point the courts below relied primarily on the 1912 Order having been made by consent. They appeared to attach little or no weight to the doubts expressed by Greig CJ as to whether Utanga and Mere and her two surviving daughters understood what was proposed and gave free and informed consent to it. Furthermore even free consent might not have been enough. One of the principal legislative purposes of the 1915 Act (reflected also in the 1902 Order in Council and the rules and regulations made under it) was to protect the indigenous people of the Cook Islands against exploitation, either by their own tribal chiefs or by people of European origin. Freehold native land was in general to be inalienable. Any permitted alienation was to be in writing. Partitions and exchanges were to be subject to the supervision of the Land Court to ensure fairness. These provisions, whether or not they may today seem paternalistic, have always been an essential part of the land law system in the Cook Islands, and in a system of that sort consent, even if assumed to have been freely given, is not sufficient to override its operation. On the issue of consent Mrs Rebecca Edwards, (for the respondents) relied in her written case on the decisions of the Land Appellate Court in *Re Enua deceased* Appeal 213 of 1940 and the Court of Appeal in *Tukura Uti Tou v Tuakana Toeta* [1995] CKCA 3. Both were succession cases raising factual issues of genealogy. In the latter case there is a passing reference to an order in 1968 having been made by consent, but only in the context of an assessment of the evidence before the court on that occasion. In *Re Enua* there was an issue as to whether consent to an order was given "freely voluntarily and willingly." The court examined that issue closely and concluded that it was so given. Neither case supports the notion that consent could confer jurisdiction, or otherwise override the general law.

61. The courts below also attached weight to the lapse of time, and the likelihood of third parties having acquired interests in good faith. The period that has elapsed since the 1905 and 1912 Orders certainly is remarkable. But under a land law system which makes freehold native land generally inalienable (either inter vivos or by will), and which excludes the acquisition of title by prescription, lapse of time becomes less significant as a factor in the exercise of discretion. The appellants have had to undertake a heavy burden of research, much of it at archives outside the Cook Islands, in order to present their case, as the lower courts acknowledged. It might also be said that the lapse of time cuts both ways. It is, after all, the respondents who were seeking an order validating the 1912 Order, and they did so only by way of reaction to the appellants' claim.

62. The Court of Appeal stated (para 11) that "The land concerned has been leased and subdivided many times over the last 97 years. Many persons unconnected with the ancient dispute of 1912 have acquired rights in good faith." It is not clear how far these observations were based on oral or documentary evidence. The records of title for sections 69, 70 and 73 are in the agreed bundle that has been used in place of an official record, but they do not seem to be up to date. So far as they do go they show little more than the death of Kairangi in 1921 (section 69), succession orders following the death of Tumu in 1943, two subsidiary succession orders in 1970 (section 69) and three leases which had already expired (sections 70 and 73). The persons who took under the succession orders no doubt took in good faith, but they did not acquire their rights for value. The Board has already noted the terms of the appellants' offered undertaking to respect existing rights of occupation (whether obtained by succession or acquired by third parties). In principle there seems no reason why such an undertaking should not be effective. The form of the order, and its implementation, should be matters for the domestic courts.

63. With great respect to the Chief Justice and the Court of Appeal, who carefully considered this unusual and difficult case, the Board concludes that their orders cannot stand. There was no sufficient material on which they could be satisfied in the matter of "equity and good conscience", which was a precondition for the exercise of the power conferred by section 416 of the 1915 Act. They may also have erred in their approach to lapse of time and third party rights, but it is the failure to satisfy the precondition that must be determinative.

64. The Board will therefore humbly advise Her Majesty that this appeal should be allowed. The matter should be remitted to the Court of Appeal to settle the form of the undertaking if not agreed. On the appellants giving such undertaking, the validation order under section 416 should be set aside and the 1905 Orders restored to their original form. Written submissions as to costs should be made within six weeks.