

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

OA 1028/2022

IN THE MATTER of the Infrastructure Act 2019

AND

IN THE MATTER of certain lands that comprise and
adjoin the Manihiki Airport

AND

IN THE MATTER of the need for an order of the Court
to allow the construction of new
infrastructure on those lands

AN

APPLICATION by **JOHN-MARY NIMETI
NIMETI**, as Executive Officer of
the Manihiki Island Government
acting as Infrastructure Manager

Applicant

Hearing: 27 February 2023

Appearances: Mr T Arnold for the Applicant, supported by Mr Herman (CIIC)
Mr R Holmes for the Woonton family, Helen McKenzie, E David and the
Mairi-David family
Mrs T Browne for some of the customary landowners and the Nikoro family

Judgment: 2 March 2023

JUDGMENT OF KEANE, CJ

[1] On 27 February 2023 I granted to the Executive Officer of the Manihiki Island Government an order, under the Infrastructure Act 2019, enabling him to construct new infrastructure – a substantial upgrade and rebuilding of the Manihiki Airport established in 1985.

[2] The full terms of that order are set out in an enduring agreement it incorporates, between the customary owners of the airport land and HM The King, acting by and through the Cook Islands Investment Corporation and Infrastructure Cook Islands.

[3] Once the upgrade is complete larger aircraft will be able to land on Manihiki, connecting the northern island group more reliably and economically with Rarotonga, 1300 km to the south. Amongst the benefits anticipated, airfares are likely to halve.

[4] Conversely, the capital cost is now likely to exceed NZ\$20m and increase with inflation; and so, since the application was filed on 25 August 2022, the need for wide consultation has had to reconcile with the need for a prompt decision. Time has become of the essence.

[5] By Friday, 23 February 2023 at the fourth public case conference called, it had become increasingly likely that the enduring agreement underpinning the order applied for would be able to be agreed subject then to an issue of compensation. But not agreed unanimously.

[6] One family group, the Tumu Vaakore family, was divided in their opinion. Some aligned with the majority of customary landowners in endorsing both the project and the draft enduring agreement. Others, who had heard about the application just weeks before, found the agreement unsatisfactory.

[7] Over the course of the ensuing weekend the majority of customary landowners on Manihiki and elsewhere then supporting the proposal, and those within the Tumu Vaakore family opposing it, were able to review their respective positions.

[8] At the fifth and final public case conference on Monday, 27 February 2023, at which I made the order, I spoke first with those within the Tumu Vaakore family still opposing the project.

[9] They continue to believe they received insufficient notice of the application and, while they support the upgrade of the airport, they do not consider the terms set out in the draft agreement serve the best interests of the people of Manihiki.

[10] They have little confidence in the valuation processes and reports, and in the survey advice. They disagree with the way compensation has been structured. They question the lack of any economic impact analysis.

[11] I spoke next with counsel for the applicant, and those for the majority of customary landowners, who confirmed that full agreement had otherwise been reached; and that it had been endorsed at meetings of the customary landowners living on Manihiki.

[12] I was then satisfied, having reviewed the Act, the draft enduring agreement and order, and the wider supporting papers, that although there was not complete unanimity, the order applied for was fully justifiable and should be made with immediate effect.

[13] In this decision I explain why the enduring agreement I approved had to be by court order, and the issues that gave rise to. I describe what an enduring agreement is and outline the agreement here. I explain why I made the order applied for with immediate effect.

Application for order

[14] When this application was made on 25 August 2022, the customary owners of the airport lands living on Manihiki had already endorsed, in principle, both the upgrade and the indicative terms of an enduring agreement.

[15] The upgrade had first been discussed by the people of Manihiki with their counsel at a meeting on 18-20 February 2021. Then on 3-4 May 2022, at a public meeting, attended by the Minister of Infrastructure, from which their counsel was absent, customary landowners wanted to sign the then draft indicative agreement there and then.

[16] To enter into an enduring agreement with the customary owners, however, the Crown needed to engage not just with those on Manihiki, fully confident that they had taken advice, but also with owners in New Zealand and Australia and, perhaps, further afield.

[17] The Crown could then have advertised as widely as I later directed, myself, when I first reviewed the application on 27 September 2022. But the Crown would still have faced the risk that, if it contracted only with those it could identify, other owners might emerge.

[18] The Crown was therefore 'unable' under the Act, before this application, to enter into an enduring agreement with all possible customary owners; and that entitled the Executive Officer to apply for an equivalent order.¹

[19] The application was extensively advertised. Owners could read the papers at two offices on Manihiki. It was advertised in Rarotonga newspapers, and on television. Owners could read the papers at the Courthouse. It was posted on Facebook on New Zealand and Australian Manihiki sites.

[20] At the first public case conference on 21 December 2022, on zoom, customary owners in New Zealand and Australia took part, or were represented by counsel. The issues were debated and three such conferences followed in February 2023 at the last of which I made the order applied for.

[21] The ultimate issues on which the Crown and the customary owners had to agree were those I had to be satisfied about myself before making the order. The fact that some owners opposed the order underlined that necessity.

[22] One issue I had to be mindful of before making the order was whether to require first a general meeting of owners to attempt to reconcile those supporting the order with those opposing it.²

[23] I decided not to require any such meeting. All the customary owners on Manihiki and in New Zealand and Australia had been in constant contact with their counsel; and they unanimously consented to the order and incorporated agreement.

[24] The members of the Tumu Vaakore family, who opposed the order, had deep-seated convictions, and there was no prospect that anything would be accomplished by a wider meeting of owners. Time had also become a more acute concern.

¹ Infrastructure Act 2019, s 46(1).

² Section 46(3).

[25] The issue that I had to be satisfied about, finally, whether it was ‘reasonable and appropriate in the circumstances’ to make the order applied for,³ turns on two categories of question:

- a) Has the infrastructure manager taken all reasonable steps to obtain the consent of owners served, and complied with the Act?
- b) Are ‘the conditions of the order ... fair and reasonable to all parties’?⁴

[26] I was satisfied throughout as to the infrastructure manager. Whether an order is ‘fair and reasonable’ depends on such issues as how rights of access to the land are to be secured, how and when specific work may or must be done, and whether compensation is payable and if so how much.⁵

[27] I will return to that second larger question at the end of this decision after describing enduring agreements generally, and outlining the present agreement.

Enduring agreements generally

[28] Enduring agreements are a new way for the Crown to obtain the exclusive use of customary or freehold land to construct, maintain and operate essential public works like roads, water and wastewater and electricity networks; and ‘wharves, harbours, and airports in the Pa Enua’.⁶

[29] An enduring agreement between the owners of the land and an infrastructure manager, in this case the Executive Officer of the Manihiki Island Government, once signed by all parties, governs all related essential practicalities, including compensation.⁷

³ Section 47(1)(b).

⁴ Section 47(1)(c).

⁵ Section 47(2).

⁶ Section 6, ‘Infrastructure’.

⁷ Section 8(1).

[30] An enduring agreement does not affect the title of the land owners. The Crown does not assume their title by warrant, or take a leasehold interest in their land. Instead, the agreement ‘runs with the land described in it’, and is not affected by any sale or transfer, or any lease, occupation right or vesting order coming to an end, or anything else.⁸ It is able to be brought to an end, or varied, by agreement or court order.

[31] In the Pa Enua the Island Government concerned is to be the infrastructure manager, but has the ability to delegate.⁹ Where Parliament has appropriated money, an acceptable qualified project manager must be engaged.¹⁰ And the Financial Secretary must support the project comprehensively.¹¹

[32] Finally where, as has happened here, this Court, in its civil jurisdiction¹², makes an equivalent order under the Act¹³:

that order is to be treated as if it were an enduring agreement, unless or until, and only to the extent that, it is subsequently varied by agreement ... or by the Court.¹⁴

This present agreement

[33] The enduring agreement I have approved confirms that Infrastructure Cook Islands, in partnership with Cook Islands Investment Corporation, is to be the actual infrastructure manager of the Manihiki Airport project.

Land

[34] The agreement begins first with the undivided customary land, which the airport occupies now and is to occupy after the upgrade:

- a) It defines the land now occupied by a 2008 survey plan mapping the traditional boundaries between the customary owners.

⁸ Section 8(2).

⁹ Section 24(1).

¹⁰ Section 25.

¹¹ Section 26.

¹² Section 6, ‘Court’.

¹³ Section 47.

¹⁴ Section 8(3).

- b) It provides that the further land the upgrade will call for, which is not within the 2008 plan, is to be mapped similarly.
- c) It gives priority to the Land Division of this Court sitting on Manihiki, recognising the customary owners' distinct interests by grants of freehold title.

[35] Secondly, the agreement secures, during its life, the existing and future status of the customary lands as an airport:

- a) The customary owners, as a matter of Manihiki custom and by the agreement, recognise 'the continuing rights of the Crown to use the Manihiki Airport for general aviation purposes as set out within the Civil Aviation Act 2002'.
- b) The Crown must continue to operate the airport as it has in the past, and upgrade the airport, as agreed, in partnership with Infrastructure Cook Islands and Cook Islands Investment Corporation.
- c) The Crown must, led by Air Authority Cook Islands, operate a public airport, like the Rarotonga and Aitutaki Airports, serving amongst other things, 'tourism, fishing, deep sea exploration and mining, maritime reconnaissance, surveillance and search and rescue'.
- d) The Crown and its agents will have access to 'build, service and maintain the airstrip, the airport terminal and other plant and equipment that will belong, at law, to the Crown'.
- e) The Crown and its agents will have access to 'operate aircraft and carry on ... passenger and freight handling, refuelling, maintenance and servicing', as the agreement prescribes.
- f) The Crown will only be able to change the uses it makes of the land with the written agreement of the customary owners and, if appropriate, by payment of compensation.

- g) In addition to the rights the Crown has under Manihiki custom, it is to 'to continue to enjoy the same degree of possession ... in the future as it, and users of the Manihiki Airport have enjoyed in the past ... until the grant is terminated in accordance with the terms of this agreement'.
- h) The customary owners promise that the land is theirs, and that they will defend their rights to it, and will support the rights of the Crown under the agreement.
- i) The Crown undertakes to keep the lands in good condition and to comply with the related law; and to keep all installations and utilities safe and secure so as to minimise risk.

Compensation

[36] Thirdly, the agreement requires the Crown to pay to the customary landowners two forms of compensation:

- a) A \$100,000 goodwill payment, at the outset, to recognise the contribution the present customary landowners are making for the benefit of the public.
- b) A \$15,000 annual rent, at the beginning of each year, to begin on 1 January 2024, increased by any increase in the Cook Islands consumer price index in the 12 months before.

[37] The goodwill payment is acceptable to the current customary owners, the agreement records, because they retain title. If the Crown had taken their land by warrant, that loss would have entitled them to \$1,992,800 compensation under s 359 of the Cook Islands Act 1915.

[38] The rental payment, the agreement records, replaces the landing fees customary landowners have been paid since the airport opened. Those fees will be retained by the Crown. The base rental and the fees are likely to equate, leaving aside CPI rental increases over the life of the agreement, which will be significant.

[39] The Crown is responsible for the safe operation of the airport, including repairs and maintenance. It is to meet the costs of the customary landowners' counsel on this application. Also their costs capped at \$50,000, and air fares, when freehold titles are determined at a five-day hearing on Manihiki.

Future transfer

[40] Fourthly, the customary land rights the Crown acquires are circumscribed by this agreement and may only be exercised by those within the Cook Islands Government, or those owned by the Crown. The Crown may not transfer those rights; or use the land for any other purpose.

Immunities

[41] Fifthly, the agreement does not constitute a partnership or joint-venture between the Crown and customary owners. They are not liable for the upgrade, maintenance and operation of the airport. The Crown indemnifies them, and will carry public liability insurance.

Termination and amendment

[42] Sixthly, the Crown may terminate on 12 months' notice. The Crown must give notice of abandonment if flights cease and no valuable public purpose will be served by retaining the land. The Crown must within 24 months remove any infrastructure and leave the land clean and tidy.

Dispute resolution

[43] Finally, if there is any dispute as to the meaning of the agreement, or its performance, that is to be resolved by mediation and arbitration.

Conclusions

[44] On 27 February 2023 I made the order incorporating the enduring agreement, because I was fully satisfied that it was 'reasonable and appropriate in the circumstances'.

[45] I was reassured, firstly, by the fact that members of almost all family groups holding or claiming customary interests in the airport land had engaged in the Court's process, and had instructed and taken advice from counsel.

[46] I was reassured, secondly, by the active way in which counsel for the customary owners had scrutinised the application and supporting documents, and had negotiated with the Crown the final terms of the enduring agreement and order.

[47] I was reassured, thirdly, by the steps taken to define the scope of the project and the land called for, and to ensure that the customary boundaries dividing the lands were established by survey; and by the priority given to the issue of freehold titles.

[48] I was reassured, fourthly, by the active steps taken to establish the capital value of the land; and by the balance struck between compensation payable to current owners, sharing the goodwill payment, and future owners, who will share the annual rental enhanced by increases in the consumer price index.

[49] On my own review of the order and the enduring agreement, set against the purposes and principles of the Act, I was fully satisfied that they are 'fair and reasonable to all the parties'; and, therefore, made the order with immediate effect.



P J Keane, CJ