Chapter 3: The hearing

This chapter provides general information about hearings in the Land Court, including the nature of hearings, roles and conduct of Commissioners and others at the hearing, pre-hearing processes and preparation, and Court protocols. The general structure of a hearing is provided, along with guidance for dealing with disruption and misbehaviour.

Contents

1 Introduction

All hearings in the Land Court are formal, whether they involve just a single party, or two or more parties.

All such hearings are to be conducted in a courtroom. However, in proceedings relating to land disputes, part of the hearing may have to be conducted on the land in question where inspection of that land by the Court is necessary. This is called a site visit.

The Court may comprise:

- The Chief Justice or a Judge;
- at least two Commissioners; or
- a panel of five Commissioners.

The Court composition for the hearing of any case by Commissioners cannot be changed until the Court has given its final decision. This means that those Commissioners who start to hear the case must continue to hear the case until their final decisions are made.

The panel is chaired by the most senior Commissioner, but every Commissioner hearing the case has an equal voice in all aspects of the hearing.

Hearings follow procedures that are a combination of custom and court convention.

- Parties are required to apply in writing and give oral and/or documentary evidence to support their claims.
- Commissioners will question parties and their witnesses and try to assist parties to resolve the issues.
- Parties may cross-examine witnesses.
- The Court applies customs and usages, and law affecting custom.

Where such customs and usages do not apply, the Court proceeds in such a manner as seems "just and convenient in that particular case": s 43 Niue Amendment Act (No 2) 1968 (the "Amendment Act").

2 Roles

2.1 Roles of the Registrar and Court Registry staff

All things being ready (applications prepared, signed, sworn, filed, published and served on all other parties, and the date, time and place of hearing duly notified, in accordance with the requirements of the law), the Registrar and Court Registry staff:

- conduct a thorough and methodical research of the full information on the history of the matters in dispute and forming the basis of proceedings;

- prepare and give to the sitting Commissioners a comprehensive and factual report on the background of the case, including:
- certified true copies of every application;
- certified true copies of previous related decisions;
- related written agreements;
- notices of publication and service;
- maps, plans of survey carried out or sketch plans prepared during inspections;
- make available all related files and registers for perusal and examination by the Court;
- immediately inform the Court on any development likely to affect the hearing of the case, for example, the non-service of documents or notices on parties;
- attend to any arrangements relating to the hearing as the Court may direct;
- generally provide administrative support including, among other things:
- traditional welcoming of parties and the public;
- swearing of parties;
- collecting written statements from parties;
- reading party statements in open Court;
- interpreting aspects of proceedings where necessary.

You will be attended by the Registrar/Clerk of the Court who produces all documents and court records when required during the hearing.

2.2 Roles of the Commissioners

Commissioners sit as a panel, so it is important for those on the panel to agree to a process for handling hearings and out-of-court deliberations.

Since views from the Bench should be seen to be as one, the accepted practice is for the panel to be presided over by the most senior Commissioner.

The Chair

The role of the Chair is to manage the proceedings. From the perspective of the public and those in the courtroom, he or she is in charge of the courtroom. This involves (unless delegated to another Commissioner):

- handling all procedures;
- issuing all directions, summons, decisions and orders;
- announcing all decisions of the Court;
- asking questions from the Bench to witnesses (note that any Commissioner may do this);
- ensuring all before the Court understand what is going on and are treated with respect;
- structuring and guiding any panel discussions out of Court, ensuring the discussions are purposeful and relevant and all Commissioners have the opportunity to be heard.

The Chair should know the Commissioners' strengths and weaknesses and make the most of their strengths and expertise whenever possible. He or she should ask the opinions of each Commissioner, listen to them and treat each contribution as important.

The Chair may ask other Commissioners to undertake specific tasks, for example, taking evidence, announcing the decisions of the Court and referring to legislation and this *Bench Book*.

Other Commissioners

The role of the other Commissioners involves:

- listening attentively and taking notes to prompt their own memory when the case is discussed by the panel;
- appropriately drawing the Chair's attention to particular matters of significance or procedure;
- undertaking tasks as required by the Chair, for example, recording the proceedings in the Minute Book;
- questioning parties and witnesses, as necessary;
- working in partnership with the Chair and other Commissioners to decide the case.

2.3 The role of the parties

The role of each party involves:

- presenting themselves at the hearing;
- tending their written statements to the Registrar/Clerk of the Court before or on the date of hearing, and in good time before proceedings begin;
- informing the Court of their leader/representative/counsel and witnesses;
- presenting their case, including producing any documentary evidence;
- answering Commissioners' questions during examination;
- making statements (written or oral) in reply to issues or matters raised by other parties;
- cross-examining other parties' witnesses.

3 Preparing for a hearing

Always arrive for court sittings in good time. This will ensure that you have time to study the list and to mentally prepare for Court. It will give the Registrar/Court Clerk time to explain the nature of the cases to be heard that day, produce the files for you to read, and advise you of any problems. Going through the list will often help you spot some potential problems, such as a party who is well known to you. If you have any relationship to a party or have any interest in the matters in question, you must not hear the case.

Before the Court convenes:

- ensure you have considered the files you will be dealing with;
- note who the parties are;
- make sure you have the relevant legislation at hand;
- note the issues in dispute and the relief sought;
- check that appropriate notice has been given; and
- agree the roles for the Commissioners on the panel.

4 Ethics and the rules of natural justice

A fundamental principle in our justice system is that justice should not only be done but should be seen to be done. In your role as Commissioner, you should always consider how the citizen sitting in court may see what is done. In other words, you must be objective about the things you do and say in Court.

There are also fundamental rules of natural justice which must always be considered when conducting hearings. You must consider your actions and adopt another approach if these rules are in any way prejudiced. The following two rules must always be considered.

1. No one may be a judge in their own cause.
2. Affected parties have the right to be heard.

4.1 No one may be a judge in their own cause

You must not have any interest in—or bias or prejudice about—the question at issue before the Court of which you are a member.

A financial or personal interest, however slight, disqualifies you from presiding. This disqualification is strictly interpreted by the Court and so you should decline to act in such situations.

The following are examples of interest that could disqualify you.

- Family relationships between you and a party or witness.
- An employment relationship or membership of some organisation involved in the proceedings.
- Personal hostility or personal friendship between you and a party, or group or section of the community.

See the *Niue Judicial Code of Conduct* for more guidance.

Exceptions

Note the following exceptions to the rules that no one may be a judge in their own cause.

Necessity: For example, when no other Commissioners are available ***and*** when hardship may result if the case is not dealt with promptly.

Insignificant possibility of conflict of interest or bias: If the matter giving rise to a possibility of conflict is insignificant or a reasonable and fair-minded person would not be able to make an argument in favour of disqualification, you may hear the case.

Consent: A party may consent to a Commissioner hearing and deciding the case although the Commissioner may have a personal interest.

In any of these instances, you should always state in open Court the fact of your interest and ask whether any of the parties has any objection. If there is an objection, you should immediately withdraw. For example, a Commissioner may commence the hearing of a case without knowing or realising that one of the witnesses is a personal friend until that witness is about to give evidence. In that case, the hearing should be abandoned and recommenced before other Commissioners, unless consent is given by both parties.

Always make sure there is a note in the record that the interest has been stated and the reason for continuing to sit (for example, parties have consented or the matter is so slight as to make it inappropriate to excuse yourself).

4.2 Affected parties have the right to be heard

It is a well-established principle, evolved from common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before a decision is made.

This principle focuses on the **procedural** steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision.

Under this principle, you have to consider what has to be done to allow a person to be heard. This extends to allowing the person sufficient notice to prepare their case, to collect evidence to support their case and to rebut or contradict the other party's evidence.

Note that a person may be heard but the view they have expressed does not have to prevail. You are entitled to reject it for what might be a good reason. The relevance and weight of the information is to be determined by you.

There are three aspects to the principle.

1. Prior notice

- You should be satisfied that adequate notice has been given, as prescribed by law. Rule 7 of the Land Court Rules sets out the requirements relating to service.
- Notice must be sufficient to allow the person to prepare their case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow them more time.

2. Fair hearing

- The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.
- The rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with a new and relevant issue.
- It always requires you to ensure you have all the relevant facts and materials before deciding.

3. Relevant material disclosed to parties

- All relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into account. In practice, the Court Registry staff ensure that all materials are copied to the parties.

Before a hearing is concluded, you should ask yourself, "has each party had a fair opportunity to state their case?"

5 Courtroom conduct for Commissioners

5.1 Start on time

Start Court on time and rise at the expected time. This is not only for you and your colleagues' benefit but also for the parties, their representatives and Court Registry staff.

5.2 Courtroom conduct

You should exhibit a high standard of conduct in Court so as to reinforce public confidence in the Judiciary.

- Be courteous and patient.
- Be dignified.
- Be humble—if you make a mistake, you should apologise. There is no place on the Bench for arrogance.
- Continually remind yourself that a party is not simply a name on a piece of paper. The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially and with unquestionable integrity.
- Never make fun of a party or witness. A matter which may seem minor to you may be very important to a party or witness.
- Show appropriate concern for distressed parties and witnesses.
- Never state an opinion from the Bench that criticises features of the law. Your duty is to uphold and administer the law, not to criticise it.
- Never say anything or display conduct that would indicate you have already made your decision before all parties are heard.
- Do not discuss the case or any aspect of it outside of the panel.

His Honour Judge White has stated:
If there comes a moment on the bench when you feel your patience is being over extended, or you find yourself a little short on courtesy, it might be helpful to recall:

(i) that judging at all levels is a most privileged occupation – there is hardly a day on the bench when you will not, by a judgment or order, greatly affect some person's life; and
(ii) that whether the case before you lasts ten minutes or ten days, it will be of supreme importance to those involved, and it may their only experience in a lifetime of the judiciary.

5.3 Maintaining the dignity of the Court

Ensure that all people appearing before the Court treat it with respect by:

- keeping order in Court; and
- being polite and respectful and expecting the same from them.

Deal effectively with unruly parties, witnesses and spectators by:

- decisive and firm action;
- dealing promptly with interruptions or rudeness; and
- clearing the Court or adjourning if necessary.

See "12 Disruption and misbehaviour", below, for guidance on managing disruption.

6 Court protocol

6.1 Modes of address

Commissioners would normally be addressed as "Your Worships" or "Sir" or "Ma'am.

Commissioners must also address those who appear before the Court politely by referring to them as Mr, Mrs or Miss.

It is always good practise to ask the Registrar/Court Clerk to ascertain who is appearing for whom. Lawyers and representatives who are not already known to Commissioners should introduce themselves; if they do not it would be quite proper to ask them to do so.

6.2 Dress

There are no specific rules about how Commissioners should dress. However, you should dress in a manner in keeping with the responsible nature of your duties.

The standard of dress of parties varies considerably. No comment should be made about unorthodox dress. Nor must unorthodox dress affect the impartially with which parties are treated. If you feel that comment must be made, proceed with caution. It is better to say "Mr X, are your dark glasses worn for medical reasons?" or "Mr X, is there any particular reason why you are wearing dark glasses in the courtroom?", rather than ordering the glasses to be removed. There may be very good reasons why they are being worn, for example, they may have an eye infection or be wearing light-sensitive prescription glasses.

7 The Court record

7.1 The file

The file should contain the following things.

- The application.
- Information relating to the property in question, including, a plan of the survey and certificate of title.
- Genealogy information.
- Conditions/terms of the Leveki Magafaoa.
- Investigation report completed by Court Registry staff.
- Correspondence, for example, notices, written consents and minutes of meetings of Magafaoa, memorandums, emails.
- Submissions.
- If previous hearings:
  - the Judge's/Commissioners' directions, if any;
  - Court minutes;
  - orders of the Court.

Check that all the necessary documents are on the file and the details within each are correct.

You should read through the file before the hearing and note any discrepancies or any new developments.

7.2 Keeping the record

The official record of the Court is the Minute Book. This holds notes of the proceedings, and all orders, directions and other decisions of the Court.

Neatness, precision and full information are essential.

Standard information includes:

- name of the parties;
- name of counsel or other representatives;
- notes of the proceedings;
- all directions;
- any conditions;
- a list of witnesses;
- the orders and directions made.

8 The procedures of the Court

8.1 Land Court Rules 1969

The Land Court Rules 1969 (the "Land Court Rules") set out the processes and forms for the Land Court. You should be familiar with these.

Note that:

- the "Court" means the panel presiding;
- where the Rules do not extend and there is no guidance on a matter under legislation, the Court should proceed "as it thinks fit and shall dispose of the matter as nearly as may be in accordance with any rules affecting any similar case or, if there be no such rules, in such manner as the Court thinks best calculated to promote the ends of justice" and "in such manner as seems just and convenient in that particular case: s 43 Amendment Act and r 48 Land Court Rules;
- failure to comply with the Rules does not render any proceedings void unless the Court so directs, although the Court may set aside proceedings (in whole or part) as irregular, or amend them in any way: r 6 Land Court Rules.

8.2 How proceedings are commenced

Rule 12 of the Land Court Rules sets out how proceedings are commenced, that is, by way of written application by:

- any person claiming to be interested in Niuean land or any person authorised by Cabinet on its behalf : s44 Amendment Act; or
- the Registrar: s 52 Land Act 1969.

The application should be in form 1 or similar, and set out:

- the full names, address and occupation of the applicant;
- each statutory provision, section of the Niue Amendment Act and rule in reliance of which the application is made;
- the nature of the order sought;
- the grounds on which the application is made;
- the full names of the person filing the application; and
- a Niuean address at which notices and other documents relating to the application may be served on the applicant.

Every application must be signed by the applicant or their agent and filed at the Court office. Every application must have attached to it all documents that are required to be filed with it, such as the required consents. The Registrar must attach to each application all particulars and extracts from the records of the Court as necessary to enable the Court to deal effectively with the application at the hearing: r 14 Land Court Rules.

Note rr 15, 16 and 18 relating to applications on behalf of persons under a disability.

The Registrar may refuse to accept an application if he or she thinks the application is not properly made.

8.3 Service and notice

In order for all those with an interest to have the opportunity to be heard before a decision is made by the Court, the Registrar gives notice of all applications (except *ex parte* applications—see below) in the *Gazette* at least 14 days of the hearing of an application: r 19 of the Land Court Rules.

Then any person interested in or may be affected by any application has a chance to file a notice of intention to appear. See "8.4 Who may appear and be heard", below.

At least three days before the commencement of the hearing, the Registrar gives in writing notice of the time and date to:

- the applicant;
- those who have filed a notice of intention to appear; and
- anyone else the Registrar thinks fit, or a Judge or Commissioner directs to be served.

The Court may require the Registrar or the applicant or any other party to proceedings to give such notice as the Court thinks necessary to anyone that appears to the Court to be affected by the application: r 21 Land Court Rules.

Rule 7 covers how notices are served.

Ex parte applications

An exception to the requirement for notice is in respect of an *ex-parte* application.

The term "*ex parte*" is a Latin phrase meaning "something made in the interests of one side only", so an *ex parte* application is one that the Court can determine on the evidence of the applicant only and there is no need to notify or inform other parties.

Apart from those relating to procedural matters, the only applications that may be made *ex parte* are those for interlocutory injunctions (short term orders requiring another to do something or preventing them from doing something, until the full application is heard by the Court). See "14 *Ex parte* applications" in Chapter 4 "Common applications".

8.4 Who may appear and be heard

Anyone interested in or affected by an application is entitled to appear and be heard: r 23(1) Land Court Rules. Note that "interested in" means having a real interest at stake, not just mere curiosity.

Anyone who is not named in an application and who wishes to be a party to and be heard on an application should file a written notice (in form 3) before the hearing starts, of their intention to appear, stating (r 23(2)(a) Land Court Rules):

- whether they support or oppose the application;
- the grounds of their support or opposition; and

- a Niuean address for service.

However, they will not be prevented from appearing and being heard just because they have failed to file a notice of intention to appear. In that case, the Court may set "reasonable and proper" conditions as it thinks fit: r 23(2) Land Court Rules.

The Crown, the Minister or the Registrar are entitled to appear and be heard on any application without filing or giving any notice of intention to appear: r 23(3) Land Court Rules.

Parties may appear personally or, by leave of the Court, by an agent or representative. Note that "leave of the Court" means the permission of the Court.

If the applicant fails to appear, the Court may dismiss the application, but at a later date, the applicant may reapply or the Court may reinstate the application: r 26 Land Court Rules.

8.5 Overview of the hearing procedure

Entering the courtroom

The Registrar/Court Clerk leads the full panel into the courtroom, calling out "All stand for their Worships" or words to that effect.

The Commissioners walk onto the Bench in a dignified manner, face the public gallery, bow slightly, and then sit.

The Registrar/Court Clerk announces "This sitting of the High Court Land Division for [date] is now in session". He or she then introduces the Commissioners.

The Commissioners may choose to start the proceedings with a prayer from a member of the public.

The Registrar/Court Clerk calls the first case. If the parties are present, they come forward and sit at counsels' tables.

The Commissioners must ensure that one of the panel is given the responsibility of recording what is said by the parties in the Minute Book. All Commissioners should take their own written notes to refresh their memories later.

Structure of the hearing

Remember that the hearing of Land Court matters is dealt with under the **inquisitorial** system rather than the adversarial system which is used in the criminal and civil courts. That means that Commissioners should inquire into the matter in dispute by gathering information. The parties should be clear that the Commissioners have a dual role of investigation and adjudication, and that any agreement or order is binding on all parties, subject, of course, to the right of appeal or review.

However, the hearing should still run in a structured way.

There are four main parts:

1. Preliminary matters.

- Introductions.

- Explanation of the process.
- Any preliminary matters to be dealt with.

2. Gathering the information.

- Applicant's case: evidence, cross-examination, questions from the Bench.
- Objector's case: evidence, cross-examination, questions from the Bench.

3. Assisting the parties to resolve the dispute (if any).

4. Making a decision.

1. ***Preliminary matters***

The Chair:

- welcomes the parties and their supporters, introduces the Commissioners on the panel and seeks introductions from leaders/representatives/counsel;
- explains the nature of the hearing and what will occur;
- addresses and rules on any preliminary matter raised by any party, for example, amending an application, unavailability of parties, adjournment, unless he or she considers that circumstances warrant discussion of any such matter by the full panel;
- admits the inclusion of additional parties upon the application;
- announces the order in which parties will be called;
- ascertains from each party the names of their leaders and witnesses;
- gives a brief explanation about how the hearing will be conducted.

2. ***Gathering the information***

<u>Applicant presents their case</u>
The applicant is called to present their case first. They provide their evidence by oral testimony and/or documents. They may also call witnesses to give their evidence.

NOTE: Before giving testimony all witnesses must either be sworn or permitted to make an affirmation if they elect to do so: r 27. No witness can be forced to take an oath on the Bible if it is against their religion or conscience.

<u>Cross-examination</u>
If there are matters in dispute, the objector is called to ask questions on and only on the evidence that the applicant submitted (referred to as the "cross-examination").

The objector is also given the opportunity to cross-examine witnesses produced by the applicant in support of their application.

Questions during cross-examination must relate to the evidence actually produced by the applicant. The purpose of such questioning is to raise doubts as to the truth of the evidence submitted by the applicant.

Questions from the Bench
The Bench may also ask questions at the completion of cross-examination of the applicant and his or her witnesses.

Objector's case (for matters in dispute)
At the completion of the applicant's case and cross-examination, the objector is then given the opportunity to present their case to the Court, by giving their testimony and providing other evidence in support of their objection.

Cross-examination and questions from the Bench will also follow in the same manner as mentioned earlier.

Upon completion of the examination of all parties, each party should be given limited time to make statements (oral or written) in reply to important points raised by other parties during the Court's examination.

See "9 Gathering information: The fact-finding phase of the hearing", below.

3. Assisting parties to resolve the dispute

Given the nature of disputes in the Land Court—they can be highly personal and parties have to continue to live alongside each other—it is best if the parties themselves can come to an agreement. It is always a good idea to adjourn to allow the parties to attempt to resolve disputes before retiring to make your decision. The Registrar or other Court Registry staff can facilitate a meeting of the parties to that end.

See "10 Assisting the parties to resolve the dispute", below, for general guidance on what you and Court Registry staff can do to facilitate a resolution.

4. Making a decision

See Chapter 6 "The decision" for guidance.

8.6 Hearing matters "on the papers"

You may be expected to consider applications "on the papers" at times. This will be in relation to:

- undisputed applications, for example, the consented appointment of a Leveki Magafaoa; and
- *ex parte* applications.

Although considering matters on the papers avoids the formality of an open sitting of the Court, your responsibility is greater because the process is not carried out in public.

The volume of paper placed before you, the absence of parties and the informality of sitting at a desk may tend to cause you to act almost as a rubber stamp. You must constantly remind yourself that you are acting as a judicial officer and you must exercise the same judgement, care and skill as you would in open Court.

You must ensure all relevant documents are attached to the application and be satisfied that the appropriate order should be made.

8.7 Adjournments

An adjournment is an order by which proceedings are postponed, to be continued at a different time or place before the same Court. The power to grant an adjournment during the course of proceedings is provided for under r 11 of the Land Court Rules.

During the course of proceedings there may be a number of breaks for a variety of reasons, for example:

- something needs to be done by Court Registry staff before the hearing can progress;
- there is a disruption in proceedings and a break is needed;
- Commissioners wish to discuss some issue in chambers or to take a short break for some other reason;
- scheduled meal breaks;
- Commissioners want time to make the decision in chambers.

Adjournments may be either *sine die* or to some other time or place: r 11(3). "*Sine die*" means without any day appointed for the resumption of the business on hand, so an adjournment *sine die* is an adjournment without appointing any day to resume the hearing. If the matter is adjourned *sine die* it may resume at such time and place and upon such notice to the parties and others as the Court may direct: r 11(5). However, it is **good practice to clearly state a time, date and place** for the matter to resume.

Any party to proceedings may apply for an adjournment—and the Court may set conditions if it thinks fit—or the Court may grant an adjournment of its own motion.

On the application of a party

The Court may be asked for an adjournment by any of the parties if they are unable to proceed with the case. Sometimes another party may dispute a request for an adjournment.

The party seeking an adjournment should show "good cause" before an application for adjournment is considered. Good cause includes, but is not limited to, the reasonably excusable absence of a party or witness.

Adjournment should generally not be allowed due to a lack of preparation by one of the parties. However, parties must be given a reasonable opportunity to prepare their case and if no adjournment would mean that there is not a fair hearing, then grant the adjournment. Note the difference between an unprepared applicant and other parties who are unprepared. It can be reasonably expected that the person making an application should be prepared.

The rules of natural justice dictate that an adjournment may be granted in any case where:

- an application is brought, and the Court is satisfied that inadequate notice has been given to a party; or
- inadequate time has been given to enable a party to prepare their case.

Unnecessary adjournments should be avoided as they waste the time and resources of the Court and other people in the case, and in some cases lead to long delays. Every effort should be made to advance the case before you, so consider the merits of each application for adjournment before granting it.

On the Court's own motion

At any stage in the proceedings the Court may adjourn the proceedings to refer a question of law to a Judge, or for hearing and determination in its entirety by a Judge: r 39(8) and s 47B of the Amendment Act.

There will be other instances where it is appropriate for the Court to adjourn proceedings on its own motion, such as lunch breaks, when there is disruption or misbehaviour, the need for an interpreter, the need for some evidence to be produced, and to enable the parties to attempt settlement of the issue.

9 Gathering information: the fact-finding phase of the hearing

9.1 Purpose of this phase of the hearing

The fact-finding phase of the hearing, including examination by Commissioners of every party to the proceedings, is most important. This is central to the operation of the Land Court.

The purpose of this part of the hearing is to draw out the facts that are relevant to the issues at hand and to enable the Court to arrive at a finding of facts which will ultimately form the basis of its final decision.

It serves other useful purposes as well.

- It lets the parties on each side of the dispute express their feelings about the issues, uninterrupted.
- It gives each set of parties an opportunity to hear how the other side sees the situation.
- It helps develop trust and co-operation between the Commissioners and the parties.

Failure to bring out the relevant facts is inexcusable. That is the central purpose of the fact-finding phase of the hearing.

9.2 Some guidance

The art of conducting skilful examination of parties and witnesses in a hearing cannot be learned from any textbook. Skilful examination is a measure of ingenuity, innovation, common sense and experience. However, here is some guidance you may find useful.

Direct the parties to speak directly to the Commissioners

At the fact-finding stage of the hearing, you are trying to get each set of parties to tell you how they see the situation. You want them to concentrate on their evidence, and to start listening to each other. If a speaker from one of the groups is looking at or confronting the other parties at this stage, this may provoke a slanging match (tauamuamu) which may be difficult to break up.

It is more likely the parties will keep to their account of the dispute if they are speaking directly to the Commissioners, and if you maintain eye contact with them, than if they voice all their hostility and concerns directly to the other party.

Let the parties tell their stories

It can be tempting to probe and question the parties as they tell their stories. In practice, pursing a particular line of questioning at an early stage can interfere with the parties' recollection of significant facts. It can impede the

disclosure of useful information relating to the issues. Your job is to help the parties deal with their dispute, and to ensure that each side has an opportunity to tell their side of things. Leave your questioning until later if you can.

Clarify the issues and sequence of events

The parties will often relate events in a rambling and out-of-sequence way. You can greatly assist the resolution process by helping the parties clarify significant events and what they want.

Summarise and report back to each party in turn. Summarising:

- acts as a check that you are following the statements of the parties accurately;
- assures each of the parties that you understand their perceptions; and
- relays to the party who is waiting to speak what the person opposite has said. The opposing party may be more likely to 'hear' what you as a neutral figure are reporting than what is being said by the opposing party.

Deal firmly with interruptions

Turning the head or body towards the speaker, or raising ones hand slightly, will probably be sufficient to stop interruptions. Reminding parties that the Commissioners will hear the views of each party will also usually be effective. Assure the person interrupting that they will be heard, but that at present the Commissioners are listening to someone else.

Prevent repetition and lengthy speeches

The parties must be able to tell their stories freely but they need to do so only once. Parties who repeat the same matters again and again should be stopped. Similarly parties who want to make speeches need to be kept to the point.

Speaking

Make sure you know what to say before you say it.

Always express yourself simply, clearly and audibly. It is important that:

- the party examined and every other party understands what is happening in the Court and why it is happening;
- the Commissioners and Court Registry staff are able to hear what is being said for accurate note-taking; and
- the public in the courtroom are able to hear what is being said.

Use simple language without jargon and avoid a patronising or unduly harsh tone.

Listening actively

Be attentive and be seen to be attentive in Court. Maintain eye contact with the speaker.

Make accurate notes.

Questioning

Ask questions that are simple, brief and to the point for extracting the truth and/or exposing any falsehood. Deal fully with the relevant matters and issues of the case. You need to ensure all the relevant facts can be ascertained.

Avoid interrupting during submissions. If possible, wait until the party has finished their submissions. Likewise, avoid interrupting a party or witness half way through an answer, unless it is necessary to bring them back on track.

Never:

- allow your questioning to descend into an argument with a party or witness;
- try to persuade or influence a party to agree on a settlement or reconciliation in the course of your examination;
- express or attempt to impress your own opinion on a party.

Avoid making long unnecessary statements.

It is unwise and improper to make a show of prolonged questioning of a party when there is no reason to believe that any further meaningful information can be gained.

Dealing with parties who do not understand

You may be confronted with unrepresented parties who do not appear to understand what the proceedings are about. It is your responsibility to ensure that the parties understand the matters in issue and the procedures of the Court.
Take care to explain:

- what is expected when the party comes to speak; and
- to an applicant, that they have to tell you what they want and why.

Dealing with language problems

The Registrar/Court Clerk should be able to translate from Niuean to English and from English to Niuean. In any case a translator should be available.

10 Assisting the parties to resolve the dispute

Agreed settlements, as opposed to imposed orders, have distinct advantages for the affected parties. There tends to be less tension among the parties and community at large, and orders by consent are more likely to be complied with.

Commissioners and Court Registry staff can assist the parties to resolve the dispute.

10.1 Adjourning to consider settlement options

Commissioners can adjourn to allow a facilitated meeting once the information-gathering phase is over. The Registrar or a Court Registry staff member facilitates this meeting. Make it clear to the parties that they will be given an equal opportunity to be heard, without interruption, and that views must be able to be expressed openly and freely. Parties are free to leave at any time but if they do so they forfeit the opportunity to resolve the matter by settlement and the Court will then make the decision.

The agreed outcome must comply with the law, for example, they cannot agree that Mr X from Auckland will be the Leveki Magafaoa because he does not live in Niue and that does not comply with the law, and they cannot agree away their children's interests to land.

10.2 Some ideas for facilitating settlement

Here are some general notes on facilitating settlement. Remember, these are not for the information-gathering phase of the hearing, but rather the facilitated discussion between the parties.

Go through the sequence of events of the dispute.

Stress the positives:

- Focus on the joint benefit of an ongoing relationship.
- Focus on a common objective or theme.
- Identifying shared and compatible interests as "common ground" or "points of agreement" is helpful.
- Focus on 'interests' rather than 'positions'. This tends to direct the discussion to the present and future, and away from the difficulties of the past.
- Focus on areas of agreement before moving on to disputed issues. This may help the parties to see that there is more common ground than they previously realised.
- Affirm and name existing goodwill and continue to build rapport.
- Acknowledge points of principle.
- Acknowledge the strengths of each party's arguments and their right to their point of view.
- Affirm the positive aspects of other related matters.
- Point out the benefits of settlement.
- Reframe the parties' accounts of the dispute to encourage them to see it from another angle.

Identify the underlying problem/s.

- Break them down into manageable areas if the issues are complex.

People are the all-important focus.

- Concentrate on settling the people rather than the dispute.
- See if an apology is warranted and helpful.
- Allow the parties the opportunity to save face.

- Address power imbalances, for example, one party may be highly educated and articulate and another may be shy and fearful. Assist the weaker party to express what they need to say.

Generate options.

- Ask how the parties think that the hearing can move on.

10.3 If agreement is reached

If the parties agree and the outcome is lawful and the Court accepts it, then the Court records the order in the Minute Book and that becomes the order. You should ensure there is no ambiguity; the order has to be clear, cover all the necessary matters and must match with what the parties actually agreed to.

The Commissioners may decide that the agreement is not in the interests of justice and does not have to make the order.

10.4 If the parties cannot agree

If the parties cannot agree, the Commissioners retire for discussion, and makes a decision.

11 Making and delivering the decision of the Court

See Chapter 6 “The decision”.

12 Disruption and misbehaviour

12.1 What you can do when people misbehave in the courtroom

Courtrooms can be highly emotional places. At times, a party or a member of the public may behave in a disruptive manner. Most times, “judicial deafness” or a stern remark will be appropriate, but at times you will need to exert your authority more strongly.

Parties and members of the public who do not behave while in Court will usually respond to polite but firm requests to stop the offending behaviour. Failure to respond should be followed by a warning and a threat to have them removed from the Court or charged with contempt.

Take a moment to assess the situation first. Sometimes emotional people want to have a brief rant and will then calm down. You might express some understanding of the strength of emotion they feel and then emphasise the need for dignity and respect in a courtroom and state that further outbursts may lead to their removal. Speak sternly if necessary. If the misbehaviour continues you will have to have the persons concerned removed and dealt with. Do not allow yourself to become involved. Retain your firmness, dignity and courtesy at all times and do not leave the Bench (except of course to remove yourself from potential danger if a situation escalates).

12.2 Contempt of court defined

See ss 58 to 66 of the Amendment Act.

Contempt in the Land Court is defined in s 58 of the Amendment Act:

58 Contempt of Court defined

(1) Every person is guilty of contempt of the Land Court who—

(a) Knowingly disobeys any order of that Court or of a Judge of it, otherwise than by making default in the payment of any sum of money payable under such an order; or

(b) Uses any abusive, insulting, offensive or threatening words or behaviour in the presence or hearing of the court; or

(c) Assaults, resists, or obstructs, or incites any other person to assault, resist or obstruct, any constable or officer of the court in serving any process of the court or in executing any warrant or order of the court or of a Judge of it; or

(d) By any words or behaviour in the presence or hearing of the court, obstructs in any manner the proper and orderly administration of justice in the court; or

(e) Does any other thing which elsewhere in this Act or in any other enactment is declared to be a contempt of the Land Court; or

(f) Aids, abets, counsels, procures, or incites any other person to commit contempt of the Land Court.

(2) Every person shall be guilty of contempt of the Land Court who—

(a) Having been served with a summons requiring him to appear before the Land Court at a time and place mentioned in the summons, neglects or fails without sufficient cause shown by him to appear or to produce any document which he is so required to produce; or

(b) Whether summoned to attend or not, is present in court and, being required to give evidence or to produce any document then in his possession, refuses, without sufficient cause shown by him, to be sworn or to give evidence or to produce that document; or

(c) Having been sworn to give evidence in any proceedings, neglects or fails without sufficient cause shown by him to appear at such time as the Court directs for the purpose of giving further evidence in the proceedings.

12.3 Contempt of court is a last resort

Commissioners have the same power as a Judge to deal with contempt of court. You should only use contempt of court in very serious cases. Some guidelines are:

- unless the action or conduct is deliberate or intentional, no contempt has been committed;
- sometimes it may be more prudent not to hear an involuntary remark (called "judicial deafness");
- in many situations, a calm but firm attitude by the Commissioners will prevent behaviour developing to a situation where an order of contempt is needed;
- if there is any further interruption or misbehaviour, the person concerned may be ordered out of Court, and if they fail to leave immediately, they may be removed by a constable. If they leave but then re-enter they may be charged with contempt of court.

The guide to the exercise of the power has been stated by the Privy Council as follows:
This power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a Court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised.

Only use contempt of court as the very last resort.

12.4 Procedure for contempt of court

If you hear or see behaviour amounting to contempt, you may direct a constable, officer of the court or anyone else to arrest the person and bring them before you to explain him or herself and offer an apology or reason why they should not be convicted of contempt. Generally a sincere apology will suffice. If they do not accept the alleged behaviour or do not accept that it amounts to contempt, they must be given a hearing on the matter. Only in extreme cases would you convict, in which case you may impose a penalty of imprisonment for up to six months or a fine not exceeding one penalty unit (that is, $100).

If contempt is committed out of the sight or hearing of the Court, for example under s 58(2)(a) for failing to appear on a summons, you may issue a warrant for that person's arrest to appear to face the charge of contempt of court.

Contempt proceedings are not brought in the usual way by laying an information. No written charge is prepared. If the Commissioners consider that what a person has said or done is serious enough to deal warrant contempt proceedings, take the following steps.

1. The Commissioners should ask a constable to take the person into custody. The person is then arrested by the constable and brought forward towards the Bench and asked their name and address.

2. Advise the person what the alleged contempt is. If he or she apologises, take the matter no further.

3. Advise the person that he or she will be held in custody until he or she has received legal advice.

4. Order a police constable or Court officer to take the disruptive person into custody.

5. Arrange for counsel to see the person while in custody and to advise him or her that he or she will be brought before the Court after a suitable period for contemplation, to be dealt with for contempt of court.

6. Once there has been time for such consultation, and a period of time for the person to consider his or her position, he or she should be brought back before the Court.

   Often an apology and time spent in custody will suitably resolve the matter, but if that apology is not forthcoming, or the matter is disputed, then you will need to conduct a hearing to establish the contempt and, if established, to consider an appropriate penalty. It may be beneficial to organise experienced counsel to assist the Court in the prosecutorial role, should the issue of contempt be contested.

7. If the contempt is established, offer the person the chance to apologise. An apology plus a short (1-2 hour) period in custody should be sufficient. If no apology is made, record a formal finding that the contempt is established, hear submissions in mitigation and impose a suitable sentence. The Registrar will advise you about any necessary warrant of commitment.