IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD IN AUCKLAND

CA 6/04

IN THE MATTER	of Article 60 of the Constitution and Rule 17 of the Court of Appeal Rules
AND	
IN THE MATTER	of Section 390A, Cook Islands Act 1915
AND	
IN THE MATTER	of an Application to Rehear the Succession Order to AKAITI (F, Deceased) made on 30 November 1921 MB 9/117
AND	
IN THE MATTER	of an Application by Matarii Exham on 24 July 2001
AND	
IN THE MATTER	of a decision by Mr Chief Justice L Greig dismissing the application on 6 May 2004-11-15
BETWEEN	MATARII EXHAM of Rarotonga, on behalf of the children of EXHAM HEATHER Appellant
AND	RUTA TUORO of Arorangi Respondent
Hearing date:	12 November 2004
Coram:	Barker JA (Presiding) Henry JA Smellie JA
Counsel:	N George for Appellant T Browne for Respondent
Date of judgment:	November 2004

JUDGMENT OF THE COURT

Introduction

[1] The applications before the Court seek an enlargement of time to appeal against the judgment of Greig CJ of 6 May 2004 and special leave to appeal. The appeal is approximately four months out of time and special leave is required pursuant to Article 60(3) of the Constitution.

The onus on the would-be appellant

[2] In *Avery v No. 2 and Public Services Appeal Board* (1973) 2 NZLR 86 (Court of Appeal) at page 91, Richmond J held as follows:

> When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.

Jurisdictional points deferred

[3] For the respondent, it was argued that there is no right of appeal in any event. Reliance was placed upon ss 390A(2) and 451 of the Cook Islands Act 1915. The appellant/applicant, on the other hand, relies upon Article 60(3) of the Constitution.

[4] The Court elected to first examine the "justice of the case" leaving the jurisdiction issue to be dealt with later should that be necessary.

The judgment of the Chief Justice

[5] The learned Chief Justice had before him an application to set aside a succession order made over 80 years earlier on the 30 November 1921. The application is based on an allegation that the 1921 order was obtained by fraud.

[6] Initially, this application was referred to Smith J for a report pursuant to s390A of the Cook Islands Act 1915. The report recommended the application be dismissed. After a careful consideration of the report and the source documents, the

Chief Justice dismissed the application. In doing so, he noted that the 1921 order had been challenged in 1942, also on the grounds of fraud. No finding as to fraud one way or the other was made on that second application. But the application was dismissed because during the hearing there had been an agreed exchange of land resolving the matter.

The justice of the case on these applications

[7] Despite Mr George's spirited submission to the contrary, we reach the firm conclusion that both applications (enlargement and special leave), should be dismissed, for the following reasons:

[i] The order sought to be overturned has stood for over 80 years – only a very strong case should get leave in such circumstances.

[ii] The second challenge over 60 years ago was also dismissed.

[iii] Both the 1921 and the 1942 challenges alleged fraud. It is a well established principle that a high standard of proof is required in such a case before an applicant can succeed: see *Honda NZ Ltd v New Zealand Boilermakers Union* (1990) 4 PRNZ 330 (CA). Edwin Exham, who claimed to be defrauded, is now dead. His daughter is the applicant and she can only give hearsay evidence to support the fraud allegation. Such weak second-hand evidence would have limited prospect of success.

[iv] Quite apart from the difficulties of proving fraud more than 80 years after the alleged deceit, the minute book entry of the 1942 proceedings records exchanges between the party opposing the applicant, the applicant, and the Court. The Chief Justice construed those entries as recording an agreed exchange of land which settled the dispute by consent and thereby prevented the present applicant from re-opening it.

[8] We have looked carefully at the record and consider the conclusion reached was well open to the Chief Justice. We are not prepared to interfere with it.

Decision

[9] Assuming, without deciding, that we have jurisdiction, nonetheless for the reasons set out above, we would decline to exercise our discretion in favour of the applicant in respect of the relief sought.

[10] Both applications are dismissed.

[11] The respondent is awarded costs against the appellant/applicant in the sum of $1000.00, which sum includes all incidental expenses.

R. D. Barker J. A.

Barker JA

Henry JA

Robert Smellie JA

Smellie JA

Solicitors:
Mr N George for Appellant/Applicant
Mrs T Browne for Respondent