IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 3/08

IN THE MATTER	of the Cook Islands Act 1915 ss 390A, 391 & 409(e)
AND	
IN THE MATTER	of the lands known as Mangaiti Kairoa 30 &54 No. 1, Auautangata 56, Vaitakaia 59, Nauparatoa 60, Te Matepa 61, Vairoa 64 & 64B (Ruatonga) Taurupau 69, Rarokava 70 Te Piri 73 (Takuvaine) Koterau 88, Taratiu 93 (Ruatonga) Anga Kopua 125 (Takuvaine), Rimatara 127N (Araitetonga) Nokii 182 (Ngatipa) Aretura & Takakoka 188E N, Vaiokura 19B Rangimaru 191G (Upper Tupapa) – "the Tumu Lands"
BETWEEN	the descendants of Utanga and Arerangi Tumu **Applicants**
AND	the descendants of Iopu Tumu **Respondents**

Before: Barker JA (Presiding)
Fisher JA
Paterson JA

Counsel: Mr M C Mitchell for Applicant
Mrs T P Browne for Respondents

Date of hearing: 24 November 2008
Date of judgment: 28 November 2008

JUDGMENT OF THE COURT

Procedure History

1. On 18 October 2001, the Applicants made application under s. 390A(1) of the Cook Islands Act 1915 ('the Act') seeking to invalidate orders made in 1912 in respect of certain lands in Avarua known as the 'Tumu lands'. They sought, too, an injunction restraining the respondents from dealing with any part of the land until further order of the Court.

2. On 23 November 2001, Greig CJ made the following order:

> *"Order by way of interim injunction until further order of the High Court prohibiting any person from dealing with any part or parts of the Tumu Lands (as described in the Title to these proceedings) whether by way of partition, alienation, leasing or making any application to the Court in respect of any such dealing or for a succession order or in any other way so as to affect the ownership title or occupation of the Tumu Lands."*

3. On 23 November 2001, Greig CJ also referred the s. 390A(1) application to the Land Division of the High Court for inquiry and report pursuant to s. 390A(3) of the Act.

4. After hearing submissions from the parties, Smith J issued his report to the Chief Justice on 19 August 2003. He recommended that the application be dismissed.

5. On 6 July 2004, Greig CJ issued a memorandum, listing a number of issues which he considered had not been dealt with in Smith J's

report and called for submissions which were duly filed by the parties.

6. Greig CJ retired before he had finally disposed of the s. 390A application. After calling for and considering further submissions and holding a hearing on 31 March 2008, Greig CJ's successor, Williams CJ, delivered a judgment on 24 June 2008 in which he held that *"the applicant's claims fail on all grounds."* (Para. 136).

7. In a list of formal orders in the Chief Justice's judgment, an order dismissing the s. 390A application does not feature. However, counsel agreed that para. 136 of the judgment had that effect.

8. The list of formal orders and declarations reads as follows:

> *"[137] The Court finds and declares as follows:*
>
> *(a) 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; and;*
>
> *(b) The 1912 Order of Judge MacCormick is hereby validated under s. 416 of the Cook Islands Act. This validation will not take effect until the validation of the 13 May 1912 Order is first, assented to in writing by the Attorney-General and second, drawn up signed and sealed by a Judge of the High Court. Once that has taken place, the Order will take effect from the date it was made, i.e. from 13 May 1912.*
>
> *(c) In compliance with s. 416(3) of the Cook Islands Act 1915, the respondents are ordered to prepare a submission to the Attorney General which will include a copy of this judgment, requesting that the Attorney-General assent to the validation. Once the assent is obtained, the respondents are to submit the Order to the High Court for drawing up, signature and sealing.*
>
> *(d) The existing injunction issued by Greig CJ on 23 November 2001 shall remain in place until either (i) the Attorney-General's assent is received and the Order referred to in (c) above has been sealed, signed and drawn up by this Court, or (ii) a further Order of this Court is made discharging the injunction.*
>
> *(e) The applicants have no legal interest in the following sections:*

(i) Te Piri Section 73, Takuvaine;
(ii) Taurupau Section 69, Takuvaine and
(iii) Rarokava Section 70, Takuvaine.

(f) The respondents are entitled to their reasonable costs of and incidental to the proceedings up to the date of this judgment. The parties shall endeavour to agree on costs. Failing agreement, the respondents shall lodge submissions as to costs within 42 days from the date of delivery of this judgment. The applicants shall then have 21 days to reply in writing. Thereafter the Court will issue a decision "on the papers" unless it considers a further hearing in costs is necessary."

9. For reasons that are not apparent, the formal order of the Chief Justice, as sealed, encapsulated only paragraphs a),b) and c) of the list of orders and declarations cited in the preceding paragraph. The sealed order bore the written assent of the Attorney-General, as required by section 416(3) of the Act for any validation under that section.

10. The sealed order recorded a finding of Williams CJ that the 1912 order had been made without jurisdiction but that the irregularity had been one of practice and procedure of the Court and did not go to the substance of the order itself. Hence it was capable of validation under s. 416, provided the Attorney-General assented.

11. Strangely, the formal order, as sealed, said nothing about the dismissal of the s. 390A application which was obviously the principal matter to have been decided. Nor did it address the question of the 2001 injunction on the terms set out in para. (d) of the Chief Justice's list of orders and declarations.

12. We observe that there is a clear responsibility on both counsel and the registrar to ensure that sealed orders of the High Court cover all matters raised in a judge's reasons for judgment.

13. On 7 July 2008, the applicants filed in this Court an application for special leave to appeal pursuant to Article 60(3) of the Constitution. We were informed from the bar by counsel that application was deliberately made to this Court and not the High Court. Counsel accepted that this Court's decision in *Ariki v Upokotini* (2 June 2006) held that Article 60(2) of the Constitution and s. 390A(2) of the Act prevented the High Court from giving leave to appeal a decision of the Chief Justice declining an order under s. 390A.

14. The Chief Justice however, by minute issued on 16 October 2008 purported to remove the application into this Court pursuant to Section 53 of the Judicature Act 1980-1. Whilst we agree that, had the application for leave to appeal been made to the High Court such a course would have been appropriate. In this case, removal was not necessary since the application for leave to appeal had been made to this Court ab initio.

15. Article 60 of the Constitution provides:

> *"160. Jurisdiction of Court of Appeal – (1) Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to hear and determine any appeal from a judgment of the High Court.*
>
> *(2) Subject to the provisions of this Constitution, and except where under any Act a judgment of the High Court is declared to be final, an appeal shall lie to the Court of Appeal from a judgment of the High Court –*
>
> *(a) As of right, if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of this Constitution;*
>
> *(b) As of right, from any conviction by the High Court in the exercise of its criminal jurisdiction whereby the appellant has been sentenced to death or to imprisonment for life or for a term exceeding 6 months or to a fine of not less than $200 and from any such*

sentence (not being a sentence fixed by law);

(c) As of right, when the matter in dispute on the appeal amounts to or is of the value of $400 or upwards;

(d) As of right, from any judgment of the High Court involving any question as to the interpretation or application or effect of any provision of Part IVA of this Constitution.

(e) With the leave of the High Court in any other case, if in the opinion of that Court the question involved in the appeal is one which by reason of its general or public importance, or of the magnitude of the interest affected, or for any other reason, ought to be submitted to the Court of Appeal for decision.

[(3) Notwithstanding anything in subclause (2) of this article, and subject to such limitations as may be prescribed by Act, the Court of Appeal may in any case in which it thinks fit and at any time, grant special leave to appeal to that Court from any judgment of the High Court, subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit.

(4) In this Article the term "judgment" includes any judgement, decree, order, writ, declaration, conviction, sentence, or other determination.

16. S 390A(2) of the Act provides:

> *"(2) Any order made by the Chief Judge upon any such proceedings amending, varying, or cancelling any prior order shall be subject to appeal in the same manner as any final order of **[[**the Land Court**]]** but there shall be no appeal against the refusal to make any such order."*

17. Ariki v Upokotini decided that because s. 390A(2), expressly states that there is no appeal against the refusal of the Chief Justice to make an order under s. 390A(2), it comes within the ambit of Article 60(2): i.e. *"except where under any Act or judgment of the High Court is declared to be final."*

18. However, counsel for the applicants sought to differentiate the position under Article 60(3) from that under Article 60(2). He

stressed that the words in s. 390A(2), *"declared to be final"* cannot be read as a *"limitation"* under article 60(3) which has to be read *Notwithstanding anything in subclause (2) of this Article."*

19. We cannot accept this argument. Although the phrase *"subject to such limitations as may be prescribed by Act"* in Article 60(3) is differently worded to the phrase "*except where under any Act a judgment of the High Court is declared to be final...",* the intent of both is the same. The Constitution envisages that there will be some situations where the legislature might consider that, for policy reasons an appeal to the Court of Appeal might need to be excluded by Act of Parliament. It is not hard to see the policy reasons behind the prohibition of appeal against a refusal to grant an order under s. 390A(2). An end to land disputes going back often for more than a century would be seen as desirable. If after careful scrutiny of an application to re-open an old land dispute by the Chief Justice – usually supported by a report from a Land Division Judge – no justification for re-opening is found, Parliament has said "enough is enough."

20. Accordingly the application to appeal that part of the Chief Justice's decision which refused an order under s. 390A is declined.

21. However, that is not the end of the application. The Chief Justice made a number of order and declarations as set out in para 8 above. The principal one was to validate a decision of a Judge MacCormick. There were questions as to whether he had been properly appointed and whether sitting alone, he had lacked jurisdiction to make the order which was the subject of the s. 390A application.

22. The Chief Justice held that Judge MacCormick's lack of jurisdiction was capable of being validated under the provisions of section 416 of the Act which provides as follows:

"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.

(2) No such order shall be of any force or effect until drawn up, signed and sealed.

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

(4) Every such order shall take effect as from the date of the order validated thereby."

23. The Chief Justice rightly observed that he had the power of a "Land Court" judge under s. 416, by virtue of Article 47(4) of the Constitution. He also referred to s. 399 of the same Act which provides:

"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."

24. Accepting that the 1912 order was made without jurisdiction, the Chief Justice then ruled that this was an 'irregularity' - one of the practice and procedure of the Court - and therefore a candidate for validation under s. 418. Because the 1912 order had been made

by consent, he considered that it would be contrary to principles of equity and good conscience not to validate it.

25. It is of course trite law that jurisdiction cannot be conferred by consent. Moreover, we wonder, without deciding, whether a lack of jurisdiction is capable of being validated since the order in question must be deemed always to have been a nullity.

26. S. 390A(2) precludes appeals against orders of the Chief Justice refusing to amend, varying or cancelling any prior order. It says nothing about validating orders under s. 416. Therefore, an order of validation must be eligible to be appealed under the general authority of Article 60 of the Constitution.

27. The application for leave to appeal to the Court was made promptly after the Chief Justice's decision was given. Therefore delay factors, which usually accompany Article 60(3) applications, are refreshingly absent in this case.

28. Leave to appeal against the order of the Chief Justice validating the 1912 Orders of Judge MacCormick is granted. It may be relevant in this context for the Court when the appeal is before it to consider the doctrine of the de facto judge, as exemplified in such cases as *Barbados Mills and others v Attorney-General of Fiji* (Fiji Court of Appeal 2004).

29. By virtue of the Attorney-General's assent being received, and the Chief Justice's orders having been sealed (albeit imperfectly), under clause (d) of the list of orders, the injunction of Greig CJ became automatically discharged. Counsel for the applicant had overlooked this occurrence.

30. In order to preserve the status quo pending the hearing of the appeal, we reinstate that injunction on Mr Mitchell's oral application.

31. Leave to appeal against the validation order is given to the applicants under Article 60(3) of the Constitution in the following terms:

(a) The applicants are to file their case on appeal within 3 months and to prosecute the appeal with all diligence.

(b) The appeal is to be set down for the next sitting of the Court of Appeal in Rarotonga in 2009.

(c) The applicants pay into Court $3000 for security for costs within 2 months.

(d) The injunction of Greig CJ is reinstated pending further order of the High Court.

32. The question of costs on this application is reserved.

Barker JA Fisher JA Paterson JA

Solicitors:

Charles Little PC for applicants

Browne Harvey and Associates PC for respondents