IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION)

CA: 1/11
Application No: 188/2010

IN THE MATTER	of Section 54 of the Judicature Act 1980-81
A N D	
IN THE MATTER	of Sections 448 and 450 of the Cook Islands Act 1915
AND	
IN THE MATTER	of the lands known as **AVARUA SECTION 190A1, AVARUA SECTION 190A2, TE TAORA SECTION 128D, TUTAKIMOA SECTION 14E, TAPATEA SECTION 107B1, TAPATEA SECTION 107B2, TAPATEA SECTION 223, PARAKO SECTION 134, AVARUA**
BETWEEN	**1. TAUPINI JOHN TEARIKI** **2. OTENIERA JOHN TEARIKI** **3. TEREEMI JOHN TEARIKI** **4. RIMATUTOKO TERAI JOHN TEARIKI** **5. JOHN JOHN TEARIKI AND** **6. VAIORA JOHN TEARIKI** **Appellants**
AND	**MATANGARO SANDERSON nee MARAU** and her siblings **Respondent**

Coram: Barker P
FisherJA
Williams JA

Hearing: 8 June 2011

Counsel: Ms S Inder for Appellants
Ms R Edwards for Respondent

Solicitors: Browne Harvey & Associates P.C. for Appellants
T Arnold for Respondent

Judgment: 19 October 2011

JUDGMENT OF THE COURT

Introduction: Nature of the Appeal

[1] This is an appeal from a decision of Hingston J of 23 February 2011 in the Land Division of the High Court in which he dismissed an objection by the Appellants which sought to strike out an application made by the Respondent and her siblings dated 22 April 2010 ("the Application").

[2] The Application was made under section 450 of the Cook Islands Act 1915 which states:

> "**450. Revocation of succession orders** – A succession order made in error may be at any time revoked by [the Land Court],[1] but no such revocation shall affect any interest theretofore acquired in good faith and for value by any person claiming through the successor nominated by the order so revoked."

The Application was filed by Mrs Tere Carr, Land Agent for the Applicant.

[3] The Application was for orders revoking all succession orders in respect of the estate of Tuokura Maeva made on 29 May 1968 in favour of Emma Maetaua. The succession order related to eight parcels of land in the Avarua area some of which are leased by the Appellants to commercial enterprises and others are leased for residential purposes.

[4] The grounds upon which the Application was made were as follows:

> "1. There are more persons entitled to succeed to Tuokura Maeva than that who succeeded to her interests in the above mentioned lands at the time the relevant succession orders were made;
>
> 2. That the applicant's father Marau was the natural son of Tuokura Maeva;
>
> 3. That the applicant is entitled to new Succession Orders."

It may be noted that neither the Application nor the accompanying memorandum nor the supporting affidavit made explicit reference to any alleged error in the judgment of the Court in 1968.

[5] Emma Maetaua was granted a succession order in relation to the Estate of Tuakura Maeva because it was held by Morgan CJ in the Land Court in 1968 that Tuakura Maeva had no issue.[2] Therefore, according to customary law, Emma, as the adopted child of

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1 Pursuant to Constitution Amendment (No 9) Act 1981 – 1982 the reference to Land Court must be read as a reference to the Land Division of the High Court.

2 See judgment of Morgan CJ, Vol 2, Case on Appeal, page 25 where he said:

> "Upon the line from Taiviterangi dying out (it is not denied that Tuokura was the last) the present Makeanui claims that the land should revert to her as Ariki."

Tuakura, was entitled to a succession order. In his judgment Morgan CJ addressed in detail the rights under customary law of an adopted child to inherit property. The Land Appellate Court in 1968 affirmed his judgment. In the course of its judgment that Court stated that it "finds as a fact that Emma is the only surviving claimant".

[6] Emma died in 1982 without issue and the Appellants, her uncles and aunts, were her successors. Succession orders were made in their favour in 1996 by Dillon J in relation to the eight parcels of land.

[7] The case made for the Respondent in the Application was that Marau, the father of the Respondent Mrs Sanderson, was the maternal son of Tuokua Maeva. Therefore the succession order made in favour of Emma should be revoked. The genealogical background to the Application is best understood by reference to the genealogical chart (Appendix 1) provided by the Respondent at the request of the Court.[3]

[8] The precise orders sought under the Application were as follows:

> "a. Revoke all Succession Orders to the interests of TUOKURA MAEVA made on 29 May 1968 (M.B 28/162) in favour of:
>
> 1. Emma Moetaua f.a. Solely
>
> b. Grant new Succession Orders to TUOKURA MAEVA that includes both Emma Moetaua and the issue of Marau (deceased 2000), the son of Tuokura and the grandson of Turepu Maeva as follows:
>
> | | | | |
> |---|---|---|---|
> | 1. | Emma Moetaua | | |
> | 2. | Matangaro Marau | f.a. | (Applicant) |
> | 3. | Terepai Marau | f.a. | |
> | 4. | Ngatokorua Marau | f.a. | |
> | 5. | Miimetua Marau | f.a. | |
> | 6. | Marau Marau | m.a. | |
>
> c. That the Court restrict Emma Moetaua to Life Interest as I believe my siblings and I represent the blood line of Turepu Maeva ad Tuokura. This would be inconsistent with the decision given by Judge Morgan at M.B 28/304 restricting Emma to "Life Interest" on the Uritaua lands. This does not disadvantage Emma in any way as she subsequently died with no issue but I would ensure that the lands of Tairi te Tangi remain with the blood line."

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[3] The Claimant also produced a genealogy. There was no material difference between the two genealogies. Counsel were agreed that the one minor difference between their charts was not material to the issues in the appeal. The Court therefore accepts the Respondent's chart as a fair representation of the relevant genealogy.

[9] The affidavit of the Applicant, Mrs Matangaro Sanderson, in support of the application concluded as follows:

> "36. I believe evidences submitted with this affidavit show that:
>
> a. On the 29th May 1929, my father Marau was born and recorded in the Old L.M.S. Records as the son of Tuokura and Maki Katuke;
>
> b. On the 31st May 1929, my father Marau was officially registered in the Court records as the child of Maki Katuke and Tutai by his grandfather Turepu;
>
> c. Turepu is the same person as Maeva who was also the holder of the Tairi te Rangi Rangatira title until his death in 1931;
>
> d. Tuokura was Maeva's only child and is the birth mother of my father Marau, which enabled Turepu (Maeva) to name himself as Marau's grandfather in 1929.
>
> 37. I submit that my siblings and I are entitled to succeed with Emma Moetaua to the interests of Tuokura Maeva as evidences submitted with this affidavit clearly establishes that we are the blood descendants of the historical owners of the lands in question, namely the Tairi te Rangi family."

[10] In spite of the fact that the Application for revocation was made 42 years after the making of the succession order neither the affidavit in support nor the accompanying memorandum contained any explanation of the long delay in making the application. The supporting Memorandum filed by Respondent referred to the Practice Notice of Hingston J of 12 December 2007. In fairness it should be noted that the Practice Notice did not require any such explanation. It directed only that:

> "... all applications for Revocation of Succession Orders are to have attached the following:
>
> (a) Title details highlighted to show chain of title;
>
> (b) Copy of minute making the order complained of and any evidence given at the Hearing;
>
> (c) A short statement outlining why revocation is sought;
>
> (d) Supporting minutes to be relied upon;
>
> (e) Genealogy, (if any) relied upon highlighted with minute book references and copies of such minutes."

[11] When Counsel for Respondent was asked by this Court to explain the delay the only response was to refer to paragraph 31 of the affidavit of the Respondent where it was stated:

> "While the records show that my father Marau did not pursue any rights to the lands of Turepu Maeva and Tuokura, it would have been impossible for my father to claim any rights without the necessary evidence required to establish his rights. It has only been since he passed away in June 2000 (Exhibit 23) that I have carried out extensive research which clearly shows my father Marau was the grandson of Turepu (Maeva) and therefore the natural son of Tuokura.

Ruling of Hingston J

[12] In the submissions of the Respondents to Hingston J dated 15 October 2010, it was argued as follows:

> "1.1 This is an application to revoke the Succession Order to Tuokura Maeva on the following grounds:
>
> 1. There are more persons entitled to succeed to Tuokura Maeva than that who succeeded to her interest in the above-mentioned lands at the time the relevant Succession Orders were made.
>
> 2. That the applicant's father Marau was the natural son of Tuokura Maeva.
>
> 3. That the applicant is entitled to new Succession Orders.
>
> 1.2 In support the applicant relies on the following:
>
> 1. That the LMS records state that Tuokura was the natural mother of Marau.
>
> 2. That the person who registered the birth of Marau, Turepu, was referred to as the "grandfather".
>
> 1.3 This application can only succeed if the Court is satisfied that Tuokura was the birth mother of Marau."

Paragraph 1.3 therefore indicated that the case for the Applicant would involve no question of law but only the effect of additional evidence on the concurrent finding that Tuokura Maeva left no natural issue and that Emma was the only surviving claimant.

[13] The contentions of the Appellants before Hingston J are evident from his Ruling which is discussed below. In short, they were, first, that the application of the doctrine of precedent precluded Hingston J from hearing the matter and secondly, that res judicata principles barred Respondent from pursuing the matter since her privies had been

involved in previous unsuccessful applications to revoke the 1968 succession order. Once again, there was no explicit assertion that any errors had been made by the Land Court in 1968 or the Land Appellate Court in affirming the judgment of Morgan CJ.

[14] Hingston J heard the objection on 22 and 23 February 2011 and in a short judgment on 23 February discussed the preliminary objection as follows:

> "[1] Mrs Browne's first ground is that the Court cannot rule on or deal with the substantive matter because of the Court of Appeal 1968 decision. This would be accepted if the facts were the same; assuming Mrs Carr can prove her "Marau" is the child of Tuakura. The Court of Appeal was dealing with a different factual situation, i.e. Tuakura had no Issue and no close blood relation.
>
> [2] The doctrine of precedent does not apply where the authoritative decision is clearly distinguishable on the facts, whatever the ranking of the Appellate Court.
>
> ***Res judicata***
>
> [3] Mrs Browne relies upon the statement of Marau in the 2007 Court when the succession by Emma to Tuakura was challenged.
>
> [4] Marau was not a "party" to those proceedings. She made a statement claiming that her father was next-of-kin and does not appear to have taken matters any further.
>
> [5] The question before me was, was what she said sufficient to allow a plea of *res judicata* against her? I think not. What was before the Court and dealt with did not encompass her statement. Of course, if she was a party or had acted throughout as a party against the Order to Emma, *res judicata* would be a proper plea by Mrs Browne.
>
> [6] The procedures of the Land Court are sufficiently flexible to allow for statements or objections from the "floor" so to speak; to close these offerings legalistically could have the effect of dissuading observers from making statements.
>
> [7] If Marau had filed a written objection and supported that in Court then she would have been a party.
>
> [8] Similar considerations pertain to the statement of Mii Collier. It was not germane to the issue before the 2007 Court.
>
> [9] Having decided that neither Mrs Collier or Marau (sister of the applicant, Mrs Sanderson), would themselves be subject to a successful plea of *res judicata* notwithstanding the close relationship, I do not believe Mrs Browne's objection under this head could succeed. On the preliminary question, should Mrs Carr's client proceed to a full trial, the answer is yes."

It may be noted that Mii Collier made an application in 1999 under Section 450 in respect of some of the eight parcels of land in issue in the present case. It was heard by

Smith J who dismissed the application concluding that he was bound by the Land Appellate Court decision of 1968 and that res judicata principles were relevant.

Grounds of Appeal

[15] The grounds of appeal in this Court were as follows:

> "3. That His Honour erred in that:
>
> i) His finding on the Doctrine of Precedent is contrary to the established principles of Stare Decisis.
> ii) He wrongly determined that the decision of the Land Appellate Court in 1968 was not binding on the Lower Court.
> iii) He wrongly determined that the Court of Appeal in 1968 was dealing with a different factual situation.
> iv) He failed to give proper weight to the decision of the Court of Appeal dated 30th November 2007 in *Taupini John Teeariki and Others v Howard Tairiata Strickland* Barker (Presiding) Weston JA, Grice JA.
> v) In determining whether the principles of res judicata applied he failed to give proper weight to the previous Application by Mii Collier to revoke the succession order to Tuokura.
> vi) He failed to give proper weight to the statements made by Marau in Court in 2007."

[16] To understand ground (iv) it is necessary to refer at some length to the *Teariki v Strickland* case in 2007. There the present Respondent successfully appealed against the grant of a rehearing involving a direct challenge to the 1968 judgments on the basis that Emma, as an adopted child, should have taken a life interest only rather than an unrestricted interest.

[17] This Court at paragraphs 18 – 33 made the following observations:

> "[18] The application referred to in paragraph [13] came before Dillon J in the High Court. This s. 450 application was made by a Mrs Parker in relation to two of the eight parcels of land. It appears to be accepted that the issues raised by Mrs Parker were essentially the same as those now being advanced by the Respondent. Mrs Parker argued that a succession order made in 1918 should be revoked because Pau Tairi had not died without issue, contrary to the assumption made in 1918.
>
> [19] Dillon J, in his decision of 31 January 1996, rejected Mrs Parker's application. Mrs Browne appeared as counsel in that case to oppose the application. Mr Lynch as counsel appeared in support. On page 2 of his judgment, Dillon J referred to both counsel making submissions. This seems to put paid to Mr George's suggestion that Mrs Parker was unrepresented.

[20] Mrs Browne argued that Dillon J was bound by the 1968 decision of the Land Appellate Court. However, the Judge was not necessarily persuaded by this, preferring to base his view on the evidence before him (it appears that the hearing had occurred on 13 December 1994). In the event, he was not satisfied that the evidence adduced provided any basis to revoke the relevant succession order. Hence the failure of the application.

[21] Later, in or about November 1996, Dillon J made succession orders in relation to the eight parcels of land (these were not before the Court but it is common ground that such were made). Emma had died without issue. The succession orders were made in favor of her uncles and aunts. We understand that such would be a properly orthodox order if Emma held the parcels of land on an unrestricted basis (as Mrs Browne argues). Mr George's subsequent application (see below) focused on these succession orders.

[22] Three years later, further applications were brought pursuant to s. 450 of the Act. These applications resulted in two judgments of the High Court, given by Smith J, on 14 December 1999. Hearings had been conducted before Dillon and McHugh JJ but both had died before giving judgment.

[23] The first of Smith J's judgments concerned another application by Mrs Parker. He dismissed the application, concluding there was no substantive new evidence before him. He said new evidence was little more than an elaboration upon the evidence rejected by Dillon J in January 1996.

[24] The second of Smith J's judgments concerned an application by Mii Collier. It is not entirely clear from the judgment which of the eight parcels of land was involved. It involved at least one of them but possibly more.

[25] The judgment records a submission by the applicant that, in 1968, the family had "consented" to Emma succeeding because her adoptive mother "left a will". There seems to be good evidence that Tuokura desired that Emma should succeed to the eight parcels of land. This application, like the first, failed. The Judge considered himself bound by the Land Appellate Court decision of 1968 and referred, further, to the doctrine of res judicata.

[26] In October 2003 this Court issued its judgment in *Maui Short v Whittaker and Others* (CA 3/2003). Mr George, in large measure, based in his case on this, and we return to it below.

[27] On 3 March 2005, the Respondent was formally declared by Smith J to be the title holder Tairi Te Rangi Rangatira. It appears that Mr Strickland has been recognized in this title since 1990. Mr George relied on the formal declaration in 2005 as justifying the steps then taken by Mr Strickland. But, as will become clear, we do not believe that declaration is particularly relevant.

[28] In 2005, the Respondent brought an application in his name pursuant to s.450. It concerned all eight parcels of land. The Respondent sought to revoke the succession orders made by Dillon J in late 1996. There was

no express attempt to challenge the unrestricted succession orders made in 1968 in favour of Emma.

[29] This application was dismissed by Smith J in a judgment dated 19 September 2005. In short, he considered he was bound by the 1968 judgments. Smith J mentioned Mr Strickland's status as title holder. But he clearly did not consider it determinative.

[30] Mr Strickland was not satisfied with Smith J's decision. Mr George, on his behalf, filed both an appeal to this Court and, also, an application for a rehearing pursuant to R 221 of the Code. He elected to proceed with the application for rehearing and in our view must be taken as having abandoned the appeal.

[31] Hingston J was prepared to entertain the R 221 application but did not say that he was doing so. As noted below, we believe he acted incorrectly. Following prompting from the Court, Mr George accepted that he had proceeded under R 221 because he thought he stood a better chance of succeeding compared to the proper route using an application under s. 390A of the Act. While we commend his candour, we do not approve the course taken by him. We understand, however, that that course may reflect a practice that has grown up in the Land Division of the High Court. If there is such a practice, we deprecate it.

[32] Hingston J heard evidence and argument in February 2006 and issued his judgment, a brief two pages, in August 2006. This is the judgment under appeal. We discuss this judgment in more detail below.

[33] This superficial summary (even so, it is longer than we might desire) illustrates just how many times the respondents have had to resist attack in relation to the subject land. While we express no view on the merits, we note it is entirely unsatisfactory that they should have faced so many challenges, even though all (or virtually all) appear to have raised essentially the same issues. And Hingston J's telescoped decision to allow the rehearing would have generated a further hearing still."

The observations of this Court in paragraph [31] are pertinent to the issues on this appeal. This Court deprecated the attempted use of R221 of the Code of Civil Procedure instead of utilizing s 390A of the Cook Islands Act.

[18] The Court of Appeal also addressed the question of whether an applicant may bring successive applications to revoke a succession order. In a passage which doubtless encouraged the Appellant to object to the Application it said:

> "On the face of Section 450 of the Act an applicant can bring successive applications to revoke a succession order where there has been an error. But this is not a right to be exercised in a vacuum. It does not entitle an applicant repeatedly to raise the same objection. Issues of precedent and res judicata inevitably impact on the process. We have not felt it necessary to deal with such argument at any length in this judgment because we have already concluded quite easily that Hingston J erred."

Arguments of Appellant

Doctrine of Precedent

[19] It was contended that, to determine the validity of the Appellants' contention, it was necessary to ascertain what was the ratio decidendi of Morgan CJ's 1968 judgment. Only then was it possible to decide whether a favourable decision for Respondent would conflict with the doctrine of precedent. An analysis of the judgment of Morgan CJ revealed that the ratio decidendi was to be found in the concluding paragraphs of his judgment:

> "The Court if aware that, on numerous occasions, direct evidence has been given to the effect that adopted children, not of the blood, can receive no more than a life interest in lands ... the Court cannot accept, as a statement of the full custom, the bare claim that they can receive no more than a life interest."

This decision established a proposition of law that adopted children can succeed to the land of their adoptive parents and their interest is not restricted to a life interest.

[20] As far as the Land Appellate Court is concerned, it was noted that in affirming Morgan CJ that Court said (at Record Vol 2, page 35):

> "The argument of the Respondent in effect, is that the line did not die with the death of Tuokura but continued because of the existence of the adopted child Emma. In order to succeed the Appellant must convince this Court that a legally adopted child has no right at all in any circumstances to unconditional succession and thus the appellant has not done this Court finds as a fact that the appellant has not done. The Court finds as a fact that Emma is the only surviving claimant. In the opinion of the Court the claim of the appellant to a right to succeed is far too remote to be successful. There is no certainty that her assertion that native custom requires the head of the clan to succeed when a line dies out is correct. The Court has carefully considered all the evidence submitted and the submissions made. It is of the opinion that the appellant has failed to establish that the decision of the Court appealed from is incorrect in fact or law."

The question therefore was whether the grant of the present application would involve direct conflict with the decision of Morgan CJ, as affirmed by the Land Appellate Court. The argument for the Appellants was that the whole thesis behind the current application was to challenge the proposition that Emma was the only surviving claimant and retrospectively grant Emma a life interest only. (In that respect reference was made to the affidavit of Ms Sanderson in support, para 38(c) which has been set out above.) Moreover, it was asserted that if Emma was confined to a life interest the result would be the Respondent's ownership would be extinguished since if the Respondent's case were

to succeed at all based on Marau being a child of Tuokura it would follow that Emma's interest would be limited to a life interest.

[21] This Court does not accept the argument that the granting of the Respondent's application would involve a departure from the ratio of the 1968 rulings. What the Respondent seeks to do is challenge as a matter of fact the concurrent findings of fact in the judgments of Morgan CJ and the Land Appellate Court that the line from Tairi Te Rangi had died out.

[22] If such was established then it might follow that Emma as an adopted child would be entitled under native custom only to a life interest. That is what occurred in relation to the Uritaua lands where Morgan CJ denied Emma absolute succession and granted her a life interest only at the request of the next of kin to Tuokura in those lands. The error which is apparently now alleged as to the 1968 decision is that Emma was wrongly held to be solely entitled to succeed. The legal rights of an adopted child are not challenged nor are the correctness of the 1968 decisions as a matter of law.

Res Judicata – the Rule in Henderson v Henderson

[23] The legal principles were not in dispute and a convenient summary of the applicable principles is found in Cross on Evidence, 7th NZ Edition 2001 at 12.6 and 12.7.

> "12.7. **Claims which could have been advanced** - The idea underlying cause of action estoppel extends to claims which, though not the subject of formal adjudication, could have been advanced as part of the cause of action in the proceeding which resulted in the judgment alleged to constitute an estoppel. In the frequently quoted words of Wigram V-C:
>
> > "[W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."
>
> The precise scope of the doctrine enunciated by Wigram V-C in *Henderson v Henderson* still awaits clarification. In *Brisbane City Council v Attorney-General*

> *for Queensland* the Privy Council declared that abuse of process is its true basis, and that "it ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing a genuine subject of litigation"...."

[24] The rule in *Henderson v Henderson* applies to privies of the parties in the first action. In *Shiels v Blakeley* [1986] 2 NZLR 262, 268, the Court of Appeal defined privies as follows:

> "The next question is whether the present plaintiff, Mr Shiels, who was not a party to the first action, is nevertheless estopped from bringing the present action because he was a privy of one or more of the plaintiffs in the first action. Privity in this sense denotes a derivative interest founded on, or flowing from, blood estate, or contract, or some other sufficient connection, bond, or mutuality of interest. No case has yet sought to define exhaustively the degree or nature of the link necessary to render a person privy in interest. That this is so is not surprising for the necessary connection may arise in a variety of ways and its existence falls to be tested in the light of the object of the rules about estoppel by res judicata and their effect in preventing the party in the subsequent proceeding from putting his case in suit. ...
>
> We conclude that there must be shown such a union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent proceeding, that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped."

[25] The case for the appellant was put on two separate grounds. First, it was suggested that when the case of *Teariki v Strickland* was brought in 2006, the Respondent's sister raised objections on the same basis as in the Respondent's current application at the first call of the Strickland application for a rehearing. The fact that such an objection was made was not disputed. However, as the Respondent demonstrated, her sister had never been heard during those 2006 proceedings. The record appears to show that although the Respondent's sister did raise an objection she was not given any opportunity to pursue it in the proceedings, especially since Mr Strickland's application for a rehearing was declined. The Court finds that there is no basis for the application of the *Henderson v Henderson* principles in respect of the *Strickland* case.

[26] The Appellant also contended that the Respondent could have participated in Mii Collier's 1999 application to revoke the 1968 succession orders. However, as the Respondent correctly noted, Mii Collier's claim did not involve claiming that Tuokura Maeva had a blood son, as was now contended by the Respondent. The issues in the Mii Collier application were different in that the Mii Collier application involved a direct attack on the rights of an adopted child to succeed. In any event it was further

contended by the Respondent that there was insufficient interest between Mii Collier and the Respondent to make them privy for this purpose. Although they were challenging the succession orders, they had different and opposing interests. The Respondent's claim that she is directly descended by blood from Tuokura Maeve if successful, would preclude any claim by Mii Collier that she was the next of kin by blood. The Court upholds the Respondent's submissions and finds that the *Henderson v Henderson* principle is inapplicable to the Mii Collier proceedings.

The Scope of "Error" and the Discretion under R450

[27] Although the scope of "error" and the question of discretion under Section 450 were not addressed before Hingston J, they were much discussed in exchanges between the Court and counsel during the hearing, as was the relationship between Section 450 and Section 390A. Because the question of the scope of error involved a question of jurisdiction, the Court considered that it must confront that issue on this appeal, especially since, as stated in section 55 of the Judicature Act 1980-81, "all appeals to the Court of Appeal shall be by way of rehearing". Since those matters had not been fully argued, the Court, in order to ensure fairness, by way of a memorandum to the parties on 28 June 2011 gave the parties an opportunity to make further submissions on the following matters:

(a) What is the meaning and scope of the word "error" in Section 450 taking into account, inter alia, the wider provisions under Section 390A of the Cook Islands Act 1915?

(b) What is the error the Respondent suggests has been made and which is said to found jurisdiction under Section 450?

(c) Could the Respondent have pursued his case under Section 390A of the Cook Islands Act 1915?

Submissions were duly filed and the Court then gave the parties the opportunity to reply to the opposing submissions. The opportunity to reply was not taken up.

Supplementary Submissions for the Appellants

[28] As to issue (a) counsel noted that Section 450 gives the Court a discretion to revoke a Succession Order made in error. As to the term "error" it was not defined in the Act. Reference was made to the ordinary legal meaning of "error" as stated in the Free Online Law Dictionary:

> "A mistake in a Court proceeding concerning a matter of law or fact, which might provide a ground for a review of the judgment rendered in the proceeding. The Respondent must therefore establish a "mistake in a Court proceeding".

[29] It was accepted that the wording of Section 450 indicated that, even if there was an error, the Court nevertheless has a discretion whether or not to revoke a Succession Order. It was submitted that this discretion would apply to an "harmless error" where, despite its occurrence, the ultimate outcome of the case was not affected or changed by the error and the error was not prejudicial to the right of the party who claimed that the error occurred.

[30] Turning to s 390A it was submitted that the jurisdiction provided in that section appeared to be wider since it gave the Chief Justice jurisdiction to remedy any order made through "any mistake, error or omission whether of fact or of law however arising".

[31] Reference was made to the established process adopted by successive Chief Justices in dealing with Section 390A applications. That involved a two step process:

(a) The application is considered by the Chief Justice. Some of the matters which the Chief Justice requires the Applicant to address include:

(i) There must be an arguable case or the Applicant must establish a prima facie case that there was a mistake, error or omission in the judgment complained of which requires the Court to remedy.

(ii) If there is any delay in filing the application, an explanation as to the delay.

(iii) If there is an application to introduce new evidence, the Applicant must satisfy the Chief Justice as to why it was not tendered at the hearing that gave rise to the judgment.

(iv) The Respondent is given an opportunity to respond to the application.

(v) If the Applicant fails to provide a satisfactory excuse for the delay in filing the application and if the Chief Justice is satisfied that the Applicant has failed to establish a prima facie case the application is dismissed at the outset.

(b) If the Applicant is able to establish a prima facie case and the Chief Justice is satisfied with the explanation as to the delay in filing the application the Chief Justice normally refers the application to a Justice of the Land Division for inquiry and report pursuant to 390A(3). On such references hearings were often held. Thereafter, the Chief Justice decides whether to adopt the report and recommendation of the Land Division.

[32] As to issue (b), the identification of the error in this case, the Appellants submitted that there was no error. The judgment had been given based on the evidence given at the time. Marau was 39 years old in 1968 and not only did he not appear in Court to object to the application, he did not make any claim throughout his entire life. The Judge cannot be said to have made an error in 1968 on matters that were clearly not before him. The Respondent's case was not about an error in the 1968 judgment. It was based on a claim that Tuokura had a natural child, which was evidence not before the Court in 1968 and in respect of which the Respondent now wished to tender fresh evidence.

[33] In respect of the Court's question (c), as to whether the Respondent could have pursued the case under s 390A of the Cook Islands Act, the Appellant submitted that they could have filed an application under Section 390A except that they would still have to establish that there was a mistake, error or omission in the 1968 judgment. Given the process adopted by the Chief Justice in dealing with Section 390A applications, the safeguards that were in place and the necessity for the applicant to apply for new evidence to be introduced, and given the lack of these safeguards under Section 450, the Court ought to favour the more cautious approach under Section 390A.

Supplementary Submissions for Respondent

[34] It was submitted that the word "error" as used in section 450 meant <u>any</u> type of error, whether of law or of fact, and whether substantive or administrative in nature. The definition of "error" in Black's Law Dictionary, 9th ed. was cited:

> "**error**, n. (13c) 1. An assertion or belief that does not conform to objective reality; a belief that what is false is true or that what is true is false. MISTAKE."

As it appears in s 450, the word "error" was unqualified by any other surrounding words. It was not limited to factual errors, or errors of law, or errors which result in some defect on the face of the order. The word "error" should therefore be given its full meaning and effect, without limitation. The lack of any qualifiers in s 450 was in contrast to s 390A, where "error" appeared with the words "mistake" and "omission" and is further qualified by the opening words in the section:

> "... [the Land Court] or the [Land Appellate 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."

[35] These qualifying words suggested that the Chief Justice's jurisdiction under s 390A was limited to errors which were in the nature of oversights or omissions made by the Court in the course of making the order or during the original hearing. For example, if the Court omitted to deal with the relative interest of one of the parties before it during the hearing, or if it misinterpreted the genealogical evidence presented to it, then this would be an "error" falling within s 390A.

[36] However, it was submitted that the jurisdiction under s 390A would not extend to the correction of errors in orders over which the Land Court has exclusive jurisdiction.[4] The correction of an error in a succession order requires the revocation of the existing order and the grant of a new succession order. The jurisdiction to make succession orders is conferred exclusively on the Land Court pursuant to s 448 and would not therefore be included within the s 390A jurisdiction conferred on the Chief Justice.

[37] The fact that a Chief Justice may deal with an application without formal sittings or a hearing in person, and the lack of an appeal right in the event that an order was not

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4 The reference to the Land Court was mistaken. Section 7 of the Constitution Amendment (No 9) Act 1981-82 created three divisions of the High Court, one of which was the Land Division. The Land Division has jurisdiction in relation to Revocation orders because Article 48 of the Constitution states that:

> "(2) Subject to subclause (3) of this Article, the Land Division shall have all the jurisdiction and powers in relation to land that immediately before the commencement of this Article were conferred on the Land Court of the Cook Islands, and shall have such other jurisdiction as may be conferred on it by enactment."

However, it is a separate question, discussed below, as to whether that jurisdiction is exclusive as suggested by Respondents so as to result in an inability in revocation cases, to invoke the s 390A jurisdiction.

made (s 390A(2) and (3) respectively), also indicated that the nature of the error which the Chief Justice might remedy pursuant to s 390A was one of oversight or mistake by the Land Court in making an order, as opposed to the hearing and determination of a new substantive claim to an interest in land which, if accepted, would render the prior order to be in "error". Similarly, the limitations in s 390A (10) on the types of orders which may be amended by the Chief Justice also confirmed the legislature's intention to confer a more limited form of jurisdiction on the Chief Justice to amend or correct orders containing "errors".

[38] In summary, it was contended the word "error" in s 450 was unlimited and unqualified and therefore extended to all types of errors, whether substantive or administrative and however and whenever they may arise. In contrast, the plain meaning of s 390A is that the "errors" which form the basis of the Chief Justice's jurisdiction under that section were those of oversight or omission made during the course of making the order or during the hearing.

[39] As to (b), and the determination of the error which the Respondent suggested had been made and which was said to found jurisdiction, it was that Emma Moetaua succeeded to the interests of Tuokura Maeva "solely". This was an error because the Respondent claims that her father (Marau) was the natural born son of Tuokura Maeva and therefore should also succeed to the interests of Tuokura Maeva, together with Emma Moetaua. The Respondent sought an order revoking the order by which Emma Moetaua took solely, and a new succession order by which Marau and his descendants succeed to the interests of Tuokura. If this order was made, then a further application to revoke the 1996 orders by which the current Appellants succeeded to the interests of Emma Moetaua might also be necessary, as those orders would also be in error in that they would exclude the interests of the blood descendants of Tuokura Maeva, namely the descendants of her son, Marau. In the Cook Islands custom, these errors were of critical importance because, left uncorrected, they would result in the direct blood descendants of Tuokura Maeva without rights to succeed to the land. As the Court of Appeal noted in *Re Pauarii* (CA 3/85, 28 August 1985):

> "The retention of the use or control of land within the group is a central feature of Polynesian philosophy throughout the Pacific. Land is often scarce and it is always precious; it must be retained for those of the tribal blood and not eroded by allowing others of different descent to occupy it. Native custom is moulded by

> this inherited instinct and has made blood connection the primary consideration in succession to native land." (p 3)

[40] As to question (c), and whether the Respondent could have pursued the case under s 390A, the Respondent contended Section 450 was the appropriate section for the Respondent to pursue her case. That was because s 450 dealt specifically with the revocation of succession orders, whereas s 390A does not. The correction of the error in this case also required the grant of a new succession order and that was a matter which was within the exclusive jurisdiction of the Land Division pursuant to s 448. The error in this case was not a matter of oversight or accidental omission during the course of he hearing. The error in this case only became apparent after 2000 when the Respondent began researching her father's ancestry and uncovered evidence which suggested he was the natural born son of Tuokura Maeva. In that respect, the "error" was not one which falls within s 390A. A review of succession order cases in the High Court over the last 20 years also showed that the pursuit of the Respondent's case under s 450 accorded with general practice.

Analysis of the Court

[41] It is appropriate to begin by contrasting s 450 and its related provisions with s 390A. As to the former, the provisions are as follows:

> "448. **Succession orders** – On the death of a Native [or descendant of a Native] leaving any interest in Native freehold land [the Land Division of the High Court] shall have exclusive jurisdiction to determine the right of any person to succeed to that interest, and may make in favour of every person so found to be entitled (hereinafter called a successor) an order (hereinafter called a succession order) defining the interest to which he is so entitled."
>
> "449. **Effect of succession order** – A succession order shall, while it remains in force, be conclusive proof of the title of the successor therein named to succeed to the interest therein named if and so far as such interest formed part of the estate of the deceased."
>
> "450. **Revocation of succession orders** – A succession order made in error may be at any time revoked by [the Land Division of the High Court], but no such revocation shall affect any interest theretofore acquired in good faith and for value by any person claiming through the successor nominated by the order so revoked."
>
> "451. **No action without succession order** – No successor shall be capable of instituting in any Court, other than [the Land Division of the High Court], any action or other proceeding relating to his interest as such successor until and unless a succession order has been made in his favour."

> "452. **No alienation without succession order** – No successor shall be capable of making any alienation or disposition of the interest acquired by him as successor (other than an alienation or disposition by will in the case of a European) until and unless a succession order has been made in his favour."

[42] Section 390A appears in Part IX of the Cook Islands Act which deals with The Land Court (now the Land Division of the High Court). Although the title to the section speaks of "Amendment of Orders after Title Ascertainment", its language is very wide. It empowers the Chief Justice if he deems it necessary to "amend, vary, or cancel any order made by the Land [Division] or revoke any decision or intended decision of [that] Court". In our opinion the powers under s 390A are exercisable in relation to succession orders, at least in relation to succession orders involving disposition of land. Section 390A states in material part:

> "390A. **Amendment of orders after title ascertained** –
>
> (1) 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 Division**]]** ... 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 Division of the Court of Appeal**]]** has decided any point of law erroneously, the Chief Justice may, upon the application in writing of any person alleging that he is affected by the mistake, error, omission, or erroneous decision in point of law, make such order in the matter for the purpose of remedying the same or the effect of the same respectively as the nature of the case may require; and for any such purpose may, if he deems it necessary or expedient, amend, vary, or cancel any order made by **[[**the Land Division**]]** or **[[**the Land Court of Appeal**]]**, or revoke any decision or intended decision of either of those Courts.
>
> (2) Any order made by the Chief Justice 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 Division**]]** but there shall be no appeal against the refusal to make any such order."

Jurisdictional Issues

[43] While it is true that the question of Native Succession is dealt with separately in Part XIV of the Cook Islands Act 1915 and, as noted earlier, that the Land Division has primary jurisdiction over matters of succession by virtue of Article 48(2) of the Constitution, there is nothing to indicate that Part XIV was intended to be a code and that applications under s 450 were the only way to challenge a succession order made by the Land Court or the Land Division. On the contrary, s 390A(1) speaks of an order made by the Land Court

or the Land Appellate Court[5] and it does not specifically exclude succession orders. In addition, the definition of order in s 2 of the Cook Islands Act states:

> "Order means in respect of the Land Court any order, judgment, decision or determination of that Court."

In short, while the Land Division has jurisdiction to consider applications for revocation under Section 450, that is not an exclusive jurisdiction.

[44] The Court therefore rejects the Respondent's suggestion that s 450 bestows jurisdiction on the Land Division to the exclusion of the jurisdiction of the Chief Justice under s 390A. It is correct that the Justices of the Land Division of the High Court have jurisdiction to make revocation orders under s 450 to the exclusion of other High Court Justices. This follows from the provisions of Part IV of the Constitution as substituted for the original Part IV by s 7 of the Constitution Amendment (No 9) Act 1981-82. That constitutional amendment established three divisions of the High Court, namely a Civil division, a Criminal division and a Land division. While Article 47(4) of the Constitution provides that a Judge of the High Court may exercise any of the jurisdictions and powers of a Judge of any division and correspondingly Article 47(5) provides that "nothing in this article shall prevent a Judge of any division from exercising any of the powers of a Judge of the High Court, whether or not in his capacity as a Judge of that division", Article 48(2) provides that "... the Land Division shall have all the jurisdiction of and powers in relation to land that immediately before the commencement of this Article were conferred on the Land Court of the Cook Islands, and shall have such other jurisdiction as may be conferred on it by enactment".

[45] The result is that while an application for revocation of a succession order can be made to the Land Division, it is not possible to read that as amounting to the creation of exclusive jurisdiction so as to deprive the Chief Justice of the power to deal with applications for revocation orders under s 390A. Section 390A is a very distinctive and important provision fashioned especially to provide an inexpensive and expeditious way to address alleged judicial error in land matters. It is obvious from the wide scope of s 390A that it was designed to allow for reconsideration and reversal if found appropriate of <u>any order</u> of the Land Division. If it had been the intention of the legislature to exclude

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5 Now to be read as references to the Land Division of the High Court and the Court of Appeal – see the Constitution Amendment (No 9) Act 1980-81 ss 19 and 20.

application for revocation orders under s 450 from the operation of s 390A, it would most assuredly have so stated. In this respect it is important to note that the section does provide in s 390A(10) that s 390A shall not apply to any order made upon investigation of title or partition save with regard to the relative interest defined thereunder. If the legislature had intended any other exceptions they would have been specified.

The Scope of "Error"

[46] The Court considers that the word "error" standing on its own, conveys, as indicated in both dictionary definitions cited by counsel, "a mistake". Other dictionary definitions are to the same effect. Thus, the Compact Oxford English Dictionary defines error as "something incorrectly done through ignorance or inadvertence: a mistake". This has been the accepted definition of the word "error" for centuries: thus Dr Johnson's Sixth Dictionary of 1785 defines error as "(1) mistake; involuntary deviation from truth; (2) a blunder: an act or assertion in which a mistake is committed". In the legal setting of the Cook Islands Act 1915, the meaning of the word "error" standing alone is similar to that used in civil procedure "slip rules" such as that found in Rule 158 of the Cook Islands Code of Civil Procedure and the successive New Zealand slip rules.

[47] The Cook Islands provision is as follows:

> "158. Clerical mistakes and slips – Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court."

[48] The current New Zealand High Court slip rule is r 11.10(1) which states:

> "A judgment or order may be corrected by the Court or the Registrar who made it, if it —
>
> (a) contains a clerical mistake or an error arising from an accident or slip or omission, whether or not made by an officer of the Court; or
>
> (b) is drawn up so it does not express what was decided and intended.

In short the word "error", standing alone, has a meaning broadly similar to that used in the slip rules. It is designed to cover procedural mistakes as opposed to mistakes of law or fact. Those are left to be addressed in the case of Land Court or Land Division orders by s 390A of the Cook Islands Act 1915 or by way of appeal to the Court of Appeal.

[49] Thus, the Court considers that the word "error" involves a simple clerical mistake or error which can be corrected easily because it is so obvious. The New Zealand slip rule cases of *Hanmore v Ganley (No 2)* (1995) 9 PRNZ 25 (HC) and *Brickell v Attorney-General* (2002) 16 PRNZ 557 (HC) assist in identifying the occasions when the Court may correct an error and when it should not. The difference is between, on the one hand, the situation where after the delivery of the judgment it is apparent that there has been a technical error, oversight or omission which can be corrected without any further evidence or hearings, and on the other hand, a case where the correction would involve the reconsideration of evidence and further deliberation and decision from the Court. Thus, in *Hanmore v Ganley*, an omission to award interest by way of a pure oversight when interest was not contested could be corrected but not so in *Brickell v Attorney-General* where the correction sought a declaration as to whether the damages awarded for breach of an employment contract were taxable or non-taxable. That would have involved a reconsideration of evidence and an additional judgment from the Court.

No Error in this Case

[50] In this particular case it is not possible to say that the Chief Judge Morgan or the Land Appellate Court made an error of any kind on the evidence presented to them. On the contrary, as found by the Land Appellate Court, on the material before Chief Judge Morgan, the judgment was perfectly sound. What is now sought to be accomplished, by means of "fresh evidence" never put before the Judge, is a reversal of his order. Section 450 was never intended for such cases which require a rehearing of evidence. In short, this is a situation where if any claim was to be pursued it should have been pursued under s 390A.

[51] It follows from the foregoing that there was no jurisdiction available for the Land Court to correct the 1968 order by way of s 450. If any case is to be made it must be made under s 390A which allows for applications involving new evidence, additional argument, and another considered appraisal of all aspects of the case. The kind of application exemplified by this case is far more suited to treatment under s 390A especially since the language of s 390A is very broad and speaks of a mistake, error or omission whether of fact or of law, however arising. In addition, the s 390A procedure is far more suited to alleged errors of fact because the Chief Justice is able to refer the application to the

Land Court for inquiry and report and, in practice, when this is done, the Land Division will often, if not always, hold hearings for the receipt and testing of new evidence.

[52] Moreover, if it is decided to vary or cancel an order then the provisions of s 390A(5) provide more extensive protections of persons who have acquired any right or interests or value and in good faith under any instrument of alienation executed before the making of the order of the amendment than the concluding part of s 450.

Discretionary Matters

[53] It was accepted by both sides that a decision as to whether to revoke a succession order is discretionary and that the factors to be considered in the exercise of the discretion were not limited in any way. In the course of argument the President mentioned concerns about extensive delay and said:

> " ... the difficulty in principle I have with this case is that, the situation's been static for many years, like 40 or maybe more; Emma and her successors have withstood many challenges of various sorts, of Strickland and others, and all of a sudden out of left field comes your client saying, oh, I'm sort of a lost tribe or something, I've been - never made a claim before and I'm the natural descendant of the natural son of Tuakura.
>
> Now, I mean, I know there's no limitation provision in the legislation, but it just seems wrong that somebody who has a good faith, who have gone through all the Court processes, who enjoyed the ownership of this land for so long to suddenly be at risk. ..."

Although section 641(3) of the Cook Islands Act 1915 provides that no right, title, estate or interest in Native Land shall be acquired or lost by prescription or limitation, it is obvious that long unexplained delay may be a discretionary factor under s 450 as well as s 390A.

[54] However, it is not necessary for the purpose of this case to discuss in any detail what factors should be considered because of the Court's decision that there is no jurisdiction to consider the Applicant's case under s 450. Obviously the s 450 discretion cannot be unbounded and must be governed in particular by the statutory context which gives rise to it and perhaps by reference to principles as to native custom as well as contemporary social considerations: see *Myers v Myers* [1972] NZLR 476 (CA) at 479 per Woodhouse J. It would encompass the kind of distinctions made in the two New Zealand slip rule cases to which we have referred.

Result

[55] In the result, the application was misconceived and there was no jurisdiction to grant the kind of relief that the Plaintiff sought under s 450. In this case there is no error within the true meaning of that term as used in s 450. Therefore the appeal is allowed and the application is struck out.

Costs

[56] The Appellants have succeeded but not on the grounds which they advanced in support of their appeal. Moreover, it appears that the Respondent may have launched her application based upon earlier practice of the Land Division which allowed matters of the kind agitated in this case to be considered under Section 450. In all the circumstances the Court makes no order as to costs and costs will lie where they fall.

Barker P Williams JA Fisher JA

Appendix 1

Relationship Between Claimants and Respondent