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

APPLICATION NO. 5/11

IN THE MATTER	of the Cook Islands Act 1915 Sections 390A and 416
AND	
IN THE MATTER	of the land known as **TEPUKA SECTION 106C, AVARUA**
BETWEEN	**ELLENA TAVIONI** on behalf of **THE SUCCESSORS OF MAKEA TAKAU**
	Applicant
AND	**COOK ISLANDS CHRISTIAN CHURCH INCORPORATED** of Avarua, Rarotonga
	Respondent

Hearing:	28 March 2012
Counsel:	Mr Manarangi and Mrs Carr (Land Agent) for the Applicant Mrs Browne for the Respondent
Date:	28 March 2012

ORAL JUDGMENT OF CHIEF JUSTICE WESTON

Introduction

[1] In October 2011 the applicant applied to the Court for the exercise of the Chief Justice's jurisdiction under s 390A of the Cook Islands Act 1915. At that time, submissions were filed and those submissions attached detailed materials in support of the application.

[2] A notice of opposition was received from the Church, an affidavit from Mr Iaveta Short, together with a Bundle of Documents in support of the notice of opposition. Some of those documents doubled up with those already before the Court and others were new.

[3] The applicant, Ms Tavioni, then filed an affidavit in November 2011 which set out a number of issues including certain criticisms in relation to the handling of an Interim Injunction application that she had brought in the Land Division of the Court but which had, by that time, failed. The materials were considered by me late 2011 and early 2012. On 2 February 2012 I issued a detailed Minute setting out my understanding of the matter concluding with various questions for the parties. At that stage I directed my questions primarily at Mrs Browne for the respondent, but since that time Mr Manarangi has become involved, and the process that I envisaged in that Minute did not carry forth in quite the way anticipated.

[4] The matter was then set before me in the March sitting of the Court and allocated half a day's hearing. During the course of this sitting Mr Manarangi was instructed by Mrs Carr on behalf of the applicant and an amended application dated 26 March 2012 was filed together with submissions and a further Bundle of Documents. That further bundle contains some new materials as well as some of the old. As a result of the various documents before the Court I prepared a chronology which then formed the basis of discussion during the hearing. For convenience I attach that chronology to this decision. The references to "BD" is a reference to the Bundle of Documents filed by Mr Manarangi during the course of this sitting.

[5] Importantly, the application made by Mr Manarangi altered the approach then being taken. In particular the focus came onto the Vesting Order made on 4 January 1904 in relation to Application 71. There was no challenge made to the other application dealt with on the same day, that is, Application 56.

[6] Mr Manarangi also confirmed in oral argument that the applicants challenged a subsequent act of the Chief Judge in 1908 when he purported to cancel an Order made in 1905. I will explain the detail of that shortly.

Jurisdiction of the Court

[7] My jurisdiction today arises from s 390A and I now set out subsections 1, 2, 4, 6 and 10.

> (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 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, or where the Land Court or the Land Appellate Court has decided any point of law erroneously, the Chief Judge 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 Court or the Land Appellate Court, or revoke any decision or intended decision of either of those Courts.
>
> (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.
>
> (4) The Chief Judge may require any applicant to deposit such sum of money, within such time as he thinks fit as security for costs, and, unless that deposit is so made, may summarily dismiss the application. The Chief Judge shall have power to allow costs to any person opposing the application.
>
> (6) Where an application has been lodged under this section, the Land Court may, for the purpose of protecting the property in dispute, grant an order prohibiting dealing with the share or interest affected by the

application pending the result of the application, and any dealings in contravention of the order shall be deemed to be void:

Provided that nothing in this subsection shall prevent the confirmation or registration of an alienation effected by an instrument executed before the granting of the order.

(10) This section shall not apply to any order made upon investigation of title or partition save with regard to the relative interests defined thereunder, but the provisions of this subsection shall not prevent the making of any necessary consequential amendments with regard to partition orders.

[8] Various other sections in the Cook Islands Act have been referred to me but I need to ensure that what I do today is firmly within the parameters of s 390A. I do not intend straying from that jurisdiction.

The Cook Islands Christian Church Incorporation Act 1968

[9] Mrs Browne in her initial reply submissions had drawn the Court's attention to s 7 of this Act which is in the following form:

7. Vesting of Property – All the estate right title and interest both legal and equitable in and to the land as set out and described in the Second Schedule to this Act now vested in any person upon trust for or on behalf of the Church or the Society or vested in the Society, is by virtue of this Act without the necessity for any formal deed of assurance, divested from such person and from the Society respectively and vested in the body corporate subject to any conditions contained in the original grant or any lease in relation to the said land and shall be held upon trust and dealt with for the purpose of carrying on, benefiting, advancing, extending or making more effectual the working and objects of the Church. (emphasis added)

[10] There were then various references to the Act in the submissions but it was not immediately apparent to the Court that it might have any greater significance than that contended for by Mrs Browne. In the course of preparing for this hearing, I

read s 7 and then the second schedule to that Act. I discovered that the parcel of land that is currently before the Court, that is Section 106C, is described in the second schedule under the general heading 'Rarotonga', the subheading 'Nikao', and it is the first parcel of land then described. This had not been mentioned by the lawyers.

[11] s 7 of the Act makes it clear that this land has vested in the Church. This is an Act of Parliament binding on the Court and I am satisfied that ownership of the block of land is properly vested in the Church as a result of s 7.

[12] Mr Manarangi nonetheless argued that the s 390A jurisdiction should still be exercised. He argued that his clients were entitled to be recorded on the Title. As I understand it, this is for the purposes of standing and in the course of argument he referred amongst other sections to s 451 of the Cook Islands Act.

[13] I have considerable reservations as to whether I should be attempting to exercise my s 390A jurisdiction in the face of the 1968 legislation. Nevertheless, out of deference to the strongly put and well-considered arguments of Mr Manarangi, I believe I should address the matters raised by him.

The Chronology

[14] The starting point for the Court's enquiry is a Deed that was apparently entered into in 1869 recording a gift of the subject land in 1864. I have been referred to a biography of Mr Chalmers who, it seems, was the missionary who gave effect to the Deed in 1869. At pages 28 and 30 of that text, there is a reference to the subject land. It is said there that the late Makea Ariki had presented the land to Mr Krause, the missionary, but he was reluctant to accept it. The text goes on to say, however, that it was then transferred as a gift to the Society and the work of clearance of that land then began. It seems that for a number of years that that remained the position.

[15] In the late 1890s (and into the early 1900s) various Acts of Parliament dealt with the question of land in the Cook Islands. I have been referred to a number of these but, in particular, to an Order in Council made in 1902, and Regulations made later the same year, dealing with the processes and procedures of the Land Titles

Court. There has been much attention today given to these provisions. I return to them shortly.

[16] Then we come forward to December 1903 when Mr Hutchins (on behalf of the London Missionary Society) made two relevant applications numbered 56 and 71. Application 56 dealt with the alienation of the subject land. Application 71 was a more generic application seeking vesting.

[17] On 4 January 1904 Chief Judge Gudgeon dealt with both applications. The minutes of that hearing are before the Court. At Minute Book 1, page 92, there is a reference to Application 56 which confirmed the alienation of the subject land from Makea Ariki to the London Missionary Society (LMS). Then, in the same Minute Book at page 95, there is a reference to Application 71, vesting not only that land but other lands in the LMS. Mr Manarangi has made the point that Application 71 did not specifically refer to the subject land but I find on the basis of the materials before me that it was intended to deal with this land and indeed a multitude of other parcels of land.

[18] There was, then, in 1905, an investigation into the subject land and a hearing on 14 and 15 June 1905. Following that, the Court made an Order that the subject land was held by Makea Ariki by way of a life interest. If we pause at that point, it can be observed that the conclusion in 1905 was directly inconsistent with that reached in 1904. This seems to have been appreciated subsequently because, in January 1908, the 1905 Order was cancelled. It seems this was done by Chief Judge Gudgeon. That is recorded as having occurred on 31 August 1908.

[19] Coming forward further, I have been referred to an opinion given by Judge Fraser on 3 March 1969 in which he stated his opinion that the Church had proper Title to the subject land and could lease it to the Crown for house-sites. The status of that opinion remains unclear and neither counsel has been able to give a complete and satisfactory answer as to its status. I intend no criticism in that observation. It seems that Judge Fraser was the judge who approved the leases created in 1969 and it may be that his opinion was undertaken as part of that exercise. Be that as it may,

I do not think that his opinion is a statement that I should regard as being in the nature of a formal judicial pronouncement.

The Challenge by the Applicants

[20] The challenge by the applicant focuses on the Order on Application 71 which was made by Chief Judge Gudgeon on 4 January 1904. It is said that although he purported to make that Order the Court lacked jurisdiction and therefore the jurisdiction under s 390A(1) is invoked.

[21] It is further said that the cancellation in 1908 was invalid with the result that the Investigation of Title that was undertaken in 1905 should prevail.

[22] There is no direct challenge to the Order on Application 56 by which the alienation to the LMS was confirmed.

[23] In short, it seems to be argued that the Chief Judge made a very basic error of jurisdiction in 1904, and then another error in 1908. Furthermore, it seems to be alleged he made the first error in the face of full and detailed knowledge of the jurisdiction that he should have been exercising. I say that because other files before the Court at the time (January 1904 and thereabouts) showed that he was fully aware of the nature of his jurisdiction, including the jurisdiction to investigate Title.

[24] During the course of argument, I put it to Mr Manarangi that if he were to challenge Application 71, he would also need to challenge Application 56. That is, if one fell but the other stood, there was still a fundamental inconsistency between what was done in 1904 and what was done in 1905. Therefore, if the Court were to uphold what was done in 1905 that would simply create further unhappy consequences. Mr Manarangi did not accept that. He argued that Application 56 was only declaratory and not substantive. He said it did not create an interest.

[25] In my view both of Applications 56 and 71 need to be considered together and it seems that was the approach taken by the Court at the time. Both were dealt with on the same day. It seems there were a multitude of other alienation files

considered on that day and that, ultimately, Application 71 was designed to vest the relevant (alienated) land in the LMS.

[26] Detailed reference has been made to s 10 of the Order in Council of 1902 which clothed the Court with jurisdiction. I set out subsections 1, 13 and 16 at this point:-

> (1) To investigate the title to and to ascertain and determine the owners of any land within the said Islands, distinguishing titles acquired by Native custom and usage from titles otherwise lawfully acquired.
>
> (13) To issue instruments of title to lands the title to which shall have become ascertained, subject to any trusts, restrictions, or encumbrances (if any) affecting the same.
>
> (16) By order to vest land in any person whom, in the exercise of the powers aforesaid, by the Court determines to be entitled thereto, and generally to do all acts and things necessary to the effectual exercise of the jurisdiction conferred upon the Court by this Order in Council.
>
> (emphasis added)

[27] It will be observed that s 10 (16) specifically addresses the power to vest. I accept, as Mr Manarangi says, that the subsequent Regulations contained no express procedure to deal with vesting. I am quite clear, though, that, by the combination of the subsections set out above, there was jurisdiction in the Court to make the Orders that Application 71 sought.

[28] During the course of argument there was a lot of discussion between bar and bench as to the status of the exercise undertaken by the Court in relation to Application 56.

[29] The language of Regulations 43 to 51 is that of "ascertainment". It is not the language of investigation. Mr Manarangi strongly urged that there was a distinction to be maintained between an investigation into Title and an ascertainment. To the contrary, it seems to me that the two concepts are very closely allied. That is, if

there is to be an alienation of land it would be necessary to ascertain ownership of Native Title and it seems that the process to be followed would be similar to that to be followed on an investigation. Moreover, I observe that the form of the Order made on Application 56 spoke in terms of "investigation".

[30] The main reason that this issue became material is that s 390A(10) excludes any jurisdiction on this Court to challenge an investigation of Title. Mrs Browne argued that I could not investigate the 1904 Orders of the Court because that was consequent upon an investigation. Mr Manarangi said that was not the case because what was undertaken by way of Application 71 was of a different character.

[31] I do not believe I need to resolve this particular issue.

[32] It seems to me that there was jurisdiction in the Court to make the Order in Application 71. It also seems to me that the Court had jurisdiction under s 25 of the Order in Council to cancel the 1905 order when it did that in 1908. I therefore find that the Court did act within jurisdiction and there is no error that would attract my jurisdiction under s 390A.

An Encumbrance?

[33] During the course of argument Mr Manarangi argued that there was an encumbrance upon the Title relating to the wording of the Deed. That is, and putting it in my words, that there was a reversion back to the landowners. That is not a matter I can resolve today. It seems to me that if the original Titles are to stand then that is a matter the landowners will have to consider and, if so advised, to pursue on some other occasion. I am conscious that Mr Manarangi has submitted that s 451 might be an impediment. While I have not received full argument on that it does strike me as odd that standing should be so limited. That, however, is a matter for the Land Division to consider.

Decision

[34] The fact that the Legislature in 1968 specifically recorded the vesting of the land in the Cook Islands Christian Church seems to me highly important but not entirely determinative of my jurisdiction. I think Mr Manarangi is right that it does not completely rule out the exercise of my jurisdiction. Nevertheless, the fact that the land was transferred to the Church by statute in 1968 is highly material to how I might exercise any jurisdiction.

[35] The question of delay in bringing an application of this sort is also a relevant factor. The longer the delay, the more people organise their lives in reliance upon a certain state of affairs. Here I am, a hundred years on, being asked to set aside decisions made by a highly experienced Chief Judge supposedly on the basis he lacked jurisdiction. Whatever else might be said about judges, generally they are astute to ensure that they act within jurisdiction. I have found he acted within jurisdiction.

[36] Moreover, the effect of the challenge is that a very substantial vesting of lands pursuant to Application 71 would apparently be set aside.

[37] The Court views consequences such as those set out above as being extremely serious. When those consequences are viewed against the actions of the Legislature in vesting the land in the Church I believe all of that points to me as having only one decision to make which is to refuse the application that the applicant has brought for me to exercise my discretion under s 390A and I do refuse it.

[38] *Prima facie* the Church is entitled to costs. I invite the parties to confer and if possible reach agreement. In the absence of agreement, Mrs Browne is to file a memorandum of costs within 2 weeks from today's date and Mr Manarangi a further 2 weeks thereafter.

Tom Weston
Chief Justice

CHRONOLOGY

• July 1864	Makea Daniela gift to Mr Krause of LMS	BD 5
• 17 March 1869	Chalmers documents gift	BD 4 BD 5 Applicant's submission 3, 14 & 36
• 20 July 1895	Act: Secret Dealings	BD 6
• 1899	The Land Act	BD 16
• 11 June 1901	Cook & Other Islands Government Act - S. 6	BD 8
• 1902	Order in Council and Rules - S. 10 - R. 44	BD 7 & 9
• 11 December 1903	Hutchins files Application No. 56 - Confirmation Hutchins files Application No. 71 -Vesting	BD 10 BD 10, 11
• 4 January 1904	Hearing of Application No. 56 Hearing of Application No. 71	BD 12, 13 BD 12, 13
• 23 May 1904	Application No. 71 Order	BD 2
• 6 July 1904	Application No. 56 Order	BD 1
• 14-15 June 1905	Tepuka 106C investigated	BD 14
• 15 (21?) June 1905	Hearing : Investigation of Title (No. 219)	BD 3 & 15
• 10 November 1905	Order sealed	BD 3
• 30 January 1908	Freehold Order for Tepuka 106C prepared	Applicant's submission 37
• 31 August 1908	Cancellation of 1905 Order	BD 3
• 3 March 1969	Judge Fraser opinion	Applicant's submission 35, 36