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

APPLICATION NO. 5/11

IN THE MATTER	of Section 390A of the Cook Islands Act 1915
AND IN THE MATTER	of the land known as **TEPUKA 106C, NIKAO, AVARUA**
AND IN THE MATTER	of an application to Cancel a Vesting Order made to the LMS Corporation on 4th January 1904
BETWEEN	**ELLENA TAVIONI** on behalf of **THE SUCCESSORS OF MAKEA TAKAU** Applicants
AND	**THE COOK ISLANDS CHRISTIAN CHURCH INCORPORATED** of Avarua Respondents

Hearing: 17 September 2013

Appearances: Mr T Manarangi for the Applicants
Mrs T Browne for the Respondents

Judgment: 17 September 2013

JUDGMENT OF WESTON CJ

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[1] There is an application before the Court to recall an oral judgment that I issued on 28 March 2012 following argument that day. In that judgment I dismissed an application made under s 390A of the Cook Islands Act ("the Act") which had been brought by Mrs Carr then acting for the applicant, on 5 October 2011.

[2] The jurisdiction under s 390A of the Act is a jurisdiction vested exclusively in the Chief Justice which allows the Chief Justice to reopen earlier decisions in certain circumstances including in cases of mistake or error.

[3] The application for recall was made on 3 July 2012. The specific grounds set out in that were that my attention was not drawn to a decision of a Court of Appeal in the *Tumu* case (CA 3/8; 10 July 2009). Mr Manarangi referred to relevant authority justifying an application for recall including the case of *Horowhenua County & Nash* [1968] NZLR 632.

[4] The application to recall was called before me in the August 2012 sitting and on 29 August 2012 I issued a minute setting out where things had got to. By that time, I learned that the *Tumu* decision had been argued in the Privy Council in April (which I observe was only one month after my oral judgment) and that the parties were still awaiting decision in that case. As a result of that I adjourned the recall application directing the parties to report to the Court within 4 weeks after the issue of the decision by the Privy Council.

[5] In that Minute of 29 August I set out in paragraph [9] Mr Manarangi's then grounds to advance the recall application and in paragraphs [14] and [15] I foreshadowed some of the topics on which I would require assistance if the recall application were to be advanced. These included assistance in relation to s 7 of the Cook Islands Christian Church Incorporation Act 1968.

[6] The Privy Council issued its decisions in both the *Tumu* and *Baudinet* cases on 22 October 2012 ([2012] UKPC 34 and 35). The applicant failed to notify me of her intentions which was breach of the earlier directions that such intentions be notified within 4 weeks.

[7] Mrs Browne, perhaps assuming as I had that the applicant no longer wished to advance the recall application, then applied for costs in relation to the March 2012 hearing. Rather than award costs, and for the avoidance of doubt, I issued a further minute on 23 April 2013 seeking clarification of the applicant's intentions with the recall application. I was then advised that the applicant wished to proceed with the recall application. There was an exchange of submissions, and the matter was listed in this part of the September sitting of the Court.

Brief Overview of the Facts

[8] The facts are complex and this short summary is not intended to be comprehensive. I set out a more detailed explanation in my oral judgment in March 2012 and I have largely drawn on that for the purposes of this quick summary.

[9] The application before me involves a large block of land. It was apparently gifted by the Makea to the then missionaries for missionary purposes in or about 1864. Subsequently the London Missionary Society ("LMS") filed two applications in December 1903 seeking to clarify the status of this block of land. Application 56 sought to confirm alienation of the land to the LMS. Application 71 was more broadly based and sought to vest a number of blocks of land in the LMS. As I said in my March 2012 decision, the materials clearly suggest that these applications are intended to be read together. Both were made on the same day and both were then addressed by the Court on the same day early in 1904. As I read the effect of these two decisions it was to vest the relevant land in the LMS.

[10] The next year, that is in 1905, there was an investigation of title in relation to the same block of land. An Order was made vesting that land in the Makea and at face value there is a difficult issue of inconsistency between the Orders made in 1904 and that on the investigation in 1905. Mr Manarangi now says that there is no such inconsistency and that the Orders can be explained. I am not able to resolve that argument which has not previously been made to me in the course of this matter.

[11] In any event, in 1908 someone – which appears to have been Chief Judge Gudgeon, but that is not certain – purported to cancel the Order made in 1905. On the face of it, then, that left the Orders made in 1904 as being the ones still standing.

Arguments made by the Applicant

[12] The arguments in the original application as filed in December 2011 changed over time. By the time the matter was argued in front of me in March 2012 there were two key arguments. First, that the second of the two applications decided in 1904, that is Application 71, was made in excess of jurisdiction. There was no challenge to that made in Application 56. And, secondly, it was argued that the 1908 cancellation was in excess of jurisdiction. Today the argument has moved on. As I

understand it, the applicant no longer challenges the Order made on Application 71 and argues instead that there is no inconsistency between the Orders made in 1904 and in 1905. And then, secondly, there is still a challenge to the jurisdiction of the Court apparently to cancel the 1905 Order which, as it seems, was done in 1908.

[13] There have been variations of these arguments along the way and it is possible that as Mr Manarangi moves forward the argument will change again.

[14] In the period leading up to the matter being called before me today I have liaised with counsel to discuss the current status of the file, and I thank counsel for their assistance in trying to throw light on matters. I have also spent quite a lot of time reading the two Privy Council decisions in *Tumu* and *Baudinet*. Plainly those are binding upon me although, with respect, it is not entirely easy to discern a consistent set of conclusions arising from the two decisions and there do appear to be some aspects which are inconsistent, one with the other.

[15] Having said that, though, for present purposes I note paragraph [59] in the *Tumu* decision which appears to make it clear that s 390A does not extend to deal with jurisdictional challenges. I have also noted that in the *Baudinet* decision at paragraphs [19] and [21] there is an acknowledgement that s 390A certainly contains a slip rule but is said to go further than that. It is not clear, however, how much further one can go if there is no scope to address jurisdiction.

[16] This background that has led Mr Manarangi to foreshadow an application under s 416 of the Cook Islands Act which section was also addressed by the Privy Council.

[17] Turning back to the Applicant's argument, I note that I have no general declaratory jurisdiction under s 390A. Therefore there is nothing that I can say about the 1905 Order as to whether it is, or it is not, inconsistent with what was done in 1904. It seems to me that a s 416 application is a better vehicle to raise those sort of arguments but the short point is there is nothing much that I can do about that. In terms of the 1908 cancellation, which is said to have occurred without jurisdiction, it appears clear from the *Tumu* decision of the Privy Council that I do not have jurisdiction under s 390A to address that.

[18] On the basis of this reasoning it seems that the s 390A application is doomed to fail (as it has done previously subject to the recall application). So the issue now is what we need to do about all of that.

The Recall Application

[19] Prima facie, it seems to me that the recall application must succeed. The *Tumu* case should have been referred to me by counsel and was not. If I had known, in particular, that that decision of the Court of Appeal was about to be argued in front of the Privy Council in only a month's time there is no way that I would have proceeded with the hearing in March of last year. That then provides reasonably orthodox grounds to recall my March 2012 judgment and I do so.

[20] However, granting the recall application leads directly to the more fundamental jurisdictional issues which I have discussed above and which I now understand the applicant acknowledges are real and need to be addressed.

[21] In the face of those problems Mr Manarangi has applied to adjourn the case and said that his client will issue proceedings under s 416. It is of course, possible there may be other proceedings as well once he's had a chance to investigate that.

[22] Mr Manarangi seeks to adjourn the s 390A application in case anything emerges from these future proceedings and, in that sense, the adjournment is made out of an abundance of caution. Mrs Browne does not have instructions to consent to the adjournment. She makes the point that the Church is entitled to some degree of certainty but the fact that s 416 proceedings are likely to be issued means that the Church will not be able to achieve such certainty at least in the short term.

[23] I can see the good sense in adjourning the s 390A application. It is possible that, in the course of addressing future proceedings, there may be something that can still be done in the context of the s 390A application. There is no point artificially limiting the ability of the Land Division of the Court to resolve all issues that might properly be before it and if s 390A can fill any gap then I would certainly entertain any amended application necessary to address that.

[24] I think the best way to protect the Church's position is to direct that the s 390A application be called before me when I am next in Rarotonga. At that point the applicant can give me an update as to where the s 416 application has got to and decisions can be made as to what then might happen in the s 390A application.

[25] Mrs Browne has asked for me to fix security for costs which I can do under s 390A. I am reluctant to do that at the moment because we are now at what is likely to be the tail-end of the s 390A application. If, in the future, there is any need to reactivate that jurisdiction then I suggest that the question of security for costs should properly be raised at that time. Therefore, I decline to order security for costs as a condition of the adjournment.

General Observations

[26] Now I just want to make some general observations.

[27] The applicant has made some highly critical comments about how this case has been conducted. These have been reported to parties outside the litigation. The comments have been referred to me and I have discussed them with counsel. I simply record, at the moment, that those comments were made on a misconceived and erroneous basis which I understand counsel to accept.

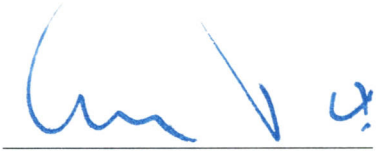
The Orders

[28] First, I formally recall my March 2012 judgment.

[29] Secondly, I adjourn the s 390A application which is to be called before me when I am next in Rarotonga in 2014.

[30] Thirdly, I reserve the question of costs although record that prima facie Mrs Browne's client is entitled to costs.

[31] And, fourthly, I observe but without making a formal direction that there may be good sense in the s 416 case being listed in front of Justice Isaac who now has had some dealings with Makea claims and may have some useful familiarity with the case. I do not, however, make any further directions as to the conduct of the s 416 application. It has not yet been filed and it should be managed in accordance with the usual practices of the Court.



Tom Weston
Chief Justice