IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(Land Division)

NO: 03/2003

IN THE MATTER OF Section 390A Cook Islands Act 1915

AND

IN THE MATTER OF the decision of Chief Judge McCarthy in the VAERUARANGI ARIKI title case (App No 1157/48) on 22 February 1949

AND

IN THE MATTER of an Application by AREMATIE AKAPEREPERE PUNOUA RAKITU of Aitutaki

Decision of Greig CJ
Dated the 6th day of October 2003.

The applicant Arematie Akaperepere Punua Rakitu applies for an order, as it is stated, to cancel the dictum of Chief Judge McCarthy in the Vaeruarangu Ariki title case in his judgment dated 33 February 1949 in which it is alleged, in the words of the application, "he held that primogeniture in the western law is ancient Maori custom".

The application specifies seven grounds and is supported by an affidavit of the applicant and an affidavit of Joseph Ka which refer to and assert the deponents' belief as to the true customs applying to the succession to this Ariki title. There is in addition a lengthy submission in writing by Mr Ka which is expressed to be "for the Applicant". I note the conflict and difficulty but do not at this stage decide on the status of Mr Ka as deponent and "advocate". He does not and cannot appear as Counsel because he is not qualified as a barrister.

The dicta which are relevant are as follows:
Decision of Chief Judge McCarthy February 1949 in re Vaeruarangi title (Aitutaki MB 13/155) at page 3:

> " The Court , however, is forced to follow what it believes to be the true and ancient Maori custom, namely- Where there is a dispute over succession to an Arikiship, succession will go to the senior line if there is a member of that line available and suitable for appointment"

At page 2 the Chief Judge notes the usual custom of consideration and appointment by the families concerned; that is the Ariki families. The Court makes a declaration as to the rightful person when the people cannot agree. There is no mention in the judgment of the ritual of Akataka Patoa.

Decision of Hingston J. 23 August 2002 at page7 where His Honour saw no reason to deviate from what was said by Chief Judge McCarthy in 1949.

There are a number of comments that need to be made in respect of this application. The first being as to the time lapse involved. It is 54 years since the pronouncement complained of which formed part of the decision at the time settling the rightful person to hold the title. Since then there has been another decision of the Court on 23 August 2002 by Hingston J. which declares the right of the current title holder. Just what effect the order sought would have on the title since 1949 is not clear. There is no application in terms to appeal either of these judgments or to affect the existing rights declared by them. The order would however alter if not demolish the underlying rights so declared.

There is no reference to the requirement of sub-section (8) of S. 390A.

Section 390A does not provide a general right of appeal or recall of orders of the Court. It deals with three distinct circumstances. One of these is error of law but recognition or declaration of custom is a matter of fact. The other circumstances for consideration under the section are unintended results by doing or leaving undone something which but for the mistake would not have been done or left undone. In this case the Judge has done precisely what he intended to do, namely the declaration of the custom and the right to the title.

It is said that the applicant is affected by the mistake alleged by being aggrieved, as he deposes, because the dictum "effectively overrode my Ancient Maori custom" setting a precedent which has been followed. I doubt if that is the affect which the section contemplates. The applicant does not suggest that he is affected as a claimant to the title now or in the past. He disagrees with the dictum of the Court but that cannot give him standing under the section. If it did then any body at all might apply for rectification of orders without any greater interest than being a Cook Islander.

There is some confusion as between the principle or custom of primogeniture and the custom, as declared here, of preferring the senior line. That does not necessarily mean the first-born. As seems clear any suitable member of the senior line may be chosen.

In any event whatever is the correct custom it has been the subject of pronouncements in a number of cases concerning Ariki titles. I note the following.
Judgment of Dillon J in Vakatini Ariki title case. Decision dated 14 April 1980 page 10:

> " As a result of those findings I believe that native custom in respect of this Ariki title has been clearly proved and that the eldest child does have the right to succeed if suitable"

Decision of Native Appeal Court Makeanui Title Application 147 16 October 1945. Judgment of Morison, Morgan and HarveyJJ at page 4:

> "After considering the various authorities to which the Court has been referred, it is of the opinion that the custom generally adopted has been to elect the Ariki from the senior line of the Ariki family unless there is no senior member of that line who is considered suitable to hold the office"

Decision of the Supreme Court of New Zealand per Ostler J 1941 in re the Ariki of Makea Nui at page 16:

> " The native custom has been clearly proved that the eldest child has the right to succeed if suitable, and it is only if unsuitable that the Kopu Ariki have any right to pass him or her over and confer the tile to another member of the family"

Admittedly these do not deal with the Vaeruarangi title but these earlier decisions indicate that the senior line or the first born have been recognised in other cases over a long period of time: and at the

level of the Appeal Court. It would be a bold decision in an application under s.390A to make an order which in effect over ruled a line of precedent at that higher level. The question ought to be dealt with if at all by the Court of Appeal in a suitable case.

There is the further question as to who should be the party or parties to be joined in this application if it were to proceed to hearing. At least the present incumbent of the Ariki title and those who opposed his application would have sufficient interest. Those who were involved in the other Ariki title cases might well be interested and have sufficient interest to give standing. But if the applicant has sufficient interest because he is aggrieved by the decision there would be no end to the numbers who would have an interest.

In the result after consideration of the foregoing I have decided that this application is not one that can be dealt with under the section. The application is refused