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

[LAND 347/1998]

APPLICATION NO. 1/2011

IN THE MATTER	of Sections 390A of the Cook Islands Act 1915
AND	
IN THE MATTER	of the land known as **RAUPA Section 87E3B Arorangi**
AND	
IN THE MATTER	of an application by **JULIA TEREAPII TUAKE** Applicant
AND	of an application for partition by **TUAKANA TOETA** (for the Moari branch) Respondent

JUDGMENT OF THE COURT

Background

[1] This is an application for rehearing under section 390A, Cook Islands Act 1915. While the application is dated 23 February 2011, and was filed on that day, it could not be said to have been complete until the supporting affidavit and submissions were received by the Court on 22 July 2011.

[2] The application concerns the land known as Raupa Section 87E3B Arorangi which was subject to a Partition Order made by Smith J on 15 March 2000. The land in the above described title was then partitioned into three new titles which for convenience I describe as sections 1, 2 and 3:

[a] Section 1 comprises two parcels of land being a valuable beachside parcel and a second hillside parcel. This land was registered in the name of the respondent;

[b] Section 2 is a hillside parcel registered in the name of Tuvaine Toeta;

[c] Section 3 comprises various parcels of land registered in the name of the 79 remaining landowners.

[3] The respondent (Tuakana) and his late sister, Tuvaine, comprise the Moari branch of the family. Each had equal shares in relevant land. The Moari branch had a relative interest in a one and five-sixths share in the total land comprising section 87E3B which would have entitled them to land in excess of three hectares. Sections 1 and 2 as described above total slightly in excess of two hectares and the respondent advised the Court in March 2000 that the Moari branch accepted that in full and final settlement of their entitlement. It is now said that Tuvaine knew nothing about all of this at the time. She died shortly thereafter.

[4] The applicant is one of Tuvaine's children and she holds powers of attorney from her siblings to bring this application on their behalf. For convenience, I will (sometimes) refer to the applicant as if that were Tuvaine herself.

[5] There is evidence before the Court that the value of the parcels comprising section 1 is considerably in excess of the value of the land in section 2. That is, it is said that the respondent's land is worth considerably more than the applicant's land.

Procedural History

[6] I first considered the application in October 2011 which followed the applicant completing the papers before the Court and the file being sent to me in October 2011 for consideration. At that point there had been no response from the respondent and I directed (by way of a minute) that the application be filed upon Mrs Browne.

[7] That then occurred and over the following months further papers were filed.

[8] I then issued a further minute which set out a full discussion of the application, the submissions filed and my conclusion that the matter should be referred to the Land Division. I think it useful to set out paragraphs [15]-[17]:

> *"[15] I think Mrs Browne is right that the application, as worded, is too wide. I do not think there is jurisdiction under section 390A to revisit, for example, the family meeting. The only way that a partition order can be re-examined under this*

jurisdiction is if the relative interests of the parties fall to be considered. It is not entirely clear to me whether this exception is open here. As I understand "relative interests", this term reflects a percentage interest held by a particular landowner in a whole section. Here, the effect of the Order made by Smith J was to create three new sections, two of which were wholly held by the applicant and respondent respectively. Mrs Browne submits (see paragraph 14 of her submission) that the amendment sought by the applicant here is not one with regard to the relative interests defined by the Order of Smith J. There seems to be some force to that submission.

[16] On the other hand, though, the relative interests of the applicant and respondents in Raupa Section 87E3B were not appropriately recognised in the subsequent partition. I must say that that troubles me. It seems to be implicit within the Order made by Smith J that he assumed that the partition adequately recognised the relative interests of both Tuvaine and the respondent.

[17] This is a highly specialised area and I believe I would be much assisted by a report from the Land Division of the Court and for that purpose intending referring the application to the Land Division."

[9] I particularly noted, in a postscript to the Minute, that I had set out my provisional thinking in more detail than I would usually do so as to ensure that the Land Division of the Court was in a position fully to report to me.

Report by the Land Division

[10] The matter was heard by Isaac J on 27 February 2012. It was some time before the transcript of the hearing and the submissions were sent to him (September 2012).

[11] His report is dated 13 March 2013. While I will now refer to key excerpts from that report, I annex the report and formally adopt it as an appendix to this Judgment.

[12] The key advice received from Isaac J is that my concerns about the Court's jurisdiction appeared to him to be correct. His key findings can be found in paragraphs [47] and [48] as follows:

"[47] In this case the applicant's mother received a sole interest in one title created by the partition order and the respondent a sole interest in the other. No relative interests were created in either order.

[48] As a result and in terms of s 390A(1) the Chief Justice in my view does not possess the jurisdiction to interfere with the partition of Justice Smith. Accordingly, I would recommend that the application can be dismissed at this point without considering the submissions of the applicant relating to the alleged errors of the Justice Smith order."

[13] Isaac J, who also holds the position of Chief Judge of the Maori Land Court in New Zealand, then went on helpfully to set out his appreciation of the similar jurisdiction which exists in New Zealand in the Te Ture Whenua Maori Act 1993. I repeat paragraph [51] as follows:

"[51] Clearly the jurisdictions between the Chief Judge of the Māori Land Court New Zealand and the Chief Justice of the Cook Islands are very similar in my view the principles applied by the Chief Judge of the Māori Land Court in exercising this jurisdiction are applicable to the Chief Justice of the Cook Islands in terms of s 390A(1). These principles include:

(i) When considering s 45 applications, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence produced by the applicant (and any evidence in opposition);

(ii) Section 45 applications are not to be treated as a rehearing of the original application;

(iii) The principle of Omnia Praseumutur Rite Esse Acta (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies to s 45 applications. Therefore in the absence of a patent defect in the order, there is a presumption that the order made was correct;

(iv) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct;

(v) The burden of proof is on the applicant to rebut the two presumptions above; and

(vi) As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decision. These principles are reflected in s 77 of the Act, which states that Court orders cannot be declared invalid, quashed or annulled more than 10 years after the date of the order. Parties affected by orders made under the Act must be able to rely on them. For this reason, the Chief Judge's special powers are used only in exceptional circumstances."

Disposition

[14] I dismiss the application. Prima facie, the respondent is entitled to costs. If the parties are not able to resolve this between them then I invite memoranda.

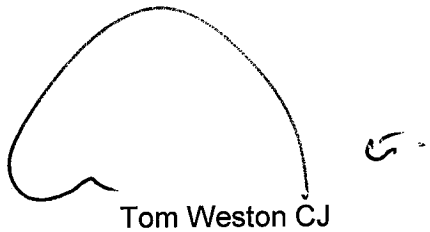
[15] One matter should be addressed by Counsel if costs orders are sought. It appears to me that there were delays by Mrs Browne in responding to the application. There may have been good reason for that but I would seek some explanation in any relevant memoranda.

Distribution of this Judgment

[16] As is usual, this Judgment will be distributed by the Court to Mr Moore and to Mrs Browne. For the avoidance of doubt, that Judgment will include the report of Isaac J which is an appendix to it.

[17] I also direct the Registrar to send an electronic copy of the Judgment to Ms Catherine Evans, President of the Law Society so that she can distribute it to members of the Society. The Registrar should also send an electronic copy to Land Agents who regularly appear in the Court.

Dated 5 April 2013 (NZT)



Tom Weston CJ

APPENDIX

REPORT OF ISAAC J

IN THE HIGH COURT OF
THE COOK ISLANDS
(LAND DIVISION)

App No. 01/2011

IN THE MATTER	of Section 390A Cook Islands Act 1915
AND **IN THE MATTER**	of the land known as RAUPA SECTION 87E3B ARORANGI
AND **IN THE MATTER**	of an application by **JULIA TEREAPII TUAKE**

Applicant

AND **IN THE MATTER**	of an application for partition by **TUAKANA TOETA** (for the Moari branch)

Respondent

Hearing: 27 February 2012

Judgment: 13 March 2013

REPORT TO THE CHIEF JUSTICE

Introduction

[1] On 23 February 2011 the applicant filed an application under s 390A Cook Islands Act 1915 ('the Act') for a rehearing of an order made by the Court on 15 March 2000 in relation to Raupa Section 87E3B block. The application was filed on the basis that the Court made an error by granting a partition order which allowed an unequal distribution of the parties relative interests.

[2] On 17 January 2012 Weston CJ referred the application to the Land Division of the Court for a report on the meaning and effect of s 390A(10) in the circumstances of the present case as well as related matters believed to be relevant in the exercise of the Chief Justice's jurisdiction.

[3] On 27 February 2012, I inquired into the application as directed by the Chief Justice. The minutes of the hearing and submissions of counsel were sent to me for consideration on 7 September 2012.

Background

[4] Prior to the order of Justice Smith of 15 August 2000, the applicant's mother Tuvaine Toeta and the respondent Tuakana Toeta held equal shares in Raupa Section 87E3B.

[5] On 15 March 2000, Smith J granted a partition order in respect of the land known as Raupa Section 87E3B Arorangi. It was partitioned into three sections as follows:

(i) Raupa Section 87E3B1 Arorangi – 2,500m² and 8000m² to vest in Tuakana Toeta;

(ii) Raupa Section 87E3B2 Arorangi – comprising 1.4790 hectares to vest in Tuvaine Toeta;

(iii) Raupa Section 87E3B3 Arorangi – balance area in the residue owners in their respective shares.

[6] Tuvaine Toeta, now deceased, was the applicant's mother and the respondent's sister. As stated they held equal shares in the parent block 87E3B. On partition the applicant maintains the land should have been equally divided between her mother and the respondent and the Court made an error which lead to an unequal distinction of shares.

[7] With this brief background in mind I want to consider the submissions of the parties.

Applicant's Submissions

[8] The applicant seeks a rehearing under s 390A(10) of the Cook Islands Act 1915. The applicant submits that the relative interests contained in the partition order granted in 2000 deprive the applicant of her full entitlement to the land, as prior to the Order being granted, the respondent and the

applicant's mother held equal relative interests in the Moari share. Following the Order the share was altered to 75% and 25% respectively. Such a distribution, it is submitted, is inequitable.

[9] The applicant submits that the phrase 'respective shares of the owners' in s 435(1) of the Act, can also be read as 'relative shares' and therefore in any situation where it is impractical for the Court to partition any land by the exact relative shares, then the Court may allocate land 'unequally, but must do so in accordance with s 435(2) of the Act'. This necessitates that the parcel allotted to any owner is no less than two thirds of the full value of which they are otherwise entitled.

[10] It is contended that should the Court choose to exercise this power, then in accordance with s 435(3) of the Act, the Court must make a determination in respect of any deficiency in the value of the parcel, which must also be stated in the partition orders. Furthermore, those orders must expressly constitute a charge upon the parcel which possesses the corresponding excess of value.

[11] It is submitted that, when making a partition order, the Court is creating a title in land under s 430(2), and therefore a thorough investigation must be carried out before such an order is made. The applicant respectfully submits that Smith J, when making the partition order, relied on counsel to apprise the Court of any difference in value of the land sought by his client, when really Smith J should have satisfied himself that the proposed partition was equitable. The applicant contends that it is unlikely His Honour would have made the same order if he had realised the actual lay of the land.

[12] For similar reasons to those set out above, it is submitted that Smith J's reliance on counsel's submissions resulted in the erroneous allocation of only 25% of the relative interests being made to the applicant's mother. This was significantly less than she was entitled to. It is submitted that this error was beyond the Court's s 435(2) jurisdiction.

[13] A further error, it is submitted, was the Court's failure to obtain a valuation of the land before making the determination. The applicant maintains that if the Court chose to make an order that was not in exact accordance with the relative shares of the owners, as per s 435(2), then the Court was also required to make an order compensating the landowner receiving the lesser share, but did not do so in this case.

[14] The applicant contends when the Court is considering any application for partition, that 'value' in the context of s 390A(2) and s 390A(3), requires any mathematical share in relation to square metres, to be read down.

[15] The applicant also questions how Smith J was able to fully consider the second ground of the application, namely the 'wish of the majority of landowners', when at no point did he refer to the family meeting held on 13 December 1999, which the applicant submits is the only evidence before the Court of the wishes or consent of the majority of landowners.

[16] It is submitted that the Court, when considering the evidence provided by Mrs Matamua in cross-examination and in her affidavit, should also consider whether the respondent availed her of the full implications of the proposed partitions. The applicant suggests that Mrs Matamua could not have been fully informed of the proposal when she consented, as she would have been aware of the difference in value between the beachfront land and the steep, inaccessible hillside block.

[17] In the event Mrs Matamua was fully informed of the situation when she gave consent, then the applicant submits that she failed in her duty to act in the best interests of her principal by making significant decisions, but with no direction or instruction.

[18] It is respectfully submitted that Mrs Matamua's memory of the family meeting was unreliable, and at the hearing, problems with her memory and lucidity meant that the agent for the applicant was unable to carry out a full cross examination, with the Court cautioning him to be 'very short' and proceed 'very gently'. The applicant submits that Mrs Matamua's failing health also calls into question the dealings she purportedly had with the respondent, and the consent that she supposedly gave him for the two partitions. Consequently, it is submitted that the Court should exercise caution before placing any reliance on her evidence.

[19] While it is acknowledged that Mrs Matamua was present at a family meeting held on 13 December 1999, the applicant states that she did not make representation on behalf of the applicant's mother, and therefore she was not present in her capacity as an attorney. Furthermore, the applicant contends that in 1996 Mrs Matamua was replaced as Tuvaine's power of attorney, when Ester Katu was appointed as her attorney and therefore Mrs Matamua could not have represented the family at the meeting.

[20] When determining a person's interest in land, other than by value, the applicant submits that the factors the Court should take into consideration are monetary, traditional values and custom.

[21] In order to amend any inequity without upsetting third parties, it is submitted that the Court should consider the following two approaches, these being modification of the partition order, as to allocated areas, and modification of the Order in accordance with s 435(3).

[22] If the partition order is amended under s 390A(1), the applicant submits that the Court would simply need to 'reverse' the allocation of the available Moari share. The result of this would be that the applicant's mother would be allocated the Native interest in the 'beach section' and in the respondent's 'hillside section' and the respondent would then be allocated the 'Tuavaine Toeta's hillside section'. The third party issues would be resolved by allowing the Cook Island Vacation Limited' lease on the beachside section to run its term. The lease to Tuakana Toeta over Tuavaine Toeta's hillside section, however, and the subsequent mortgage to Tatau Limited would be more complicated, because the security would need to be moved from the Respondent's hillside section to Tuvaine Toeta's section.

[23] The applicant submits that should the Court choose to leave the allocation of land as it is, the order would need to be modified to include a charge in favour of the applicant's mother over the respondent's hillside section, in the amount of $213,500. It is submitted that this is the corresponding difference in value.

[24] The applicant notes that Weston CJ was satisfied with the explanation regarding the delay in filing the application, namely that the applicant, who succeeded to her mother's interests in 2002, did not realise the full extent of her uncle's actions in relation to her mother's wide-spread land titles, and it was not until 2009 when she obtained a solicitor that this came to light. Furthermore, it was submitted that her mother was not given any notice of the hearing, which is a fundamental breach of natural justice and renders the question of the time it took to bring this application moot.

[25] The applicant notes that any resolution of the present matter will still impact the other two claims which are awaiting trial, and the logical solution would be to settle all three at the same time. It is further submitted that the applicant made a without prejudice offer, except as to costs, for settlement of all three claims, but the respondent, for the most part, rejected it.

Respondents Submissions

[26] The respondent submits that the issues for determination are whether s 390A(10) of the Act prevents the hearing of this application, and if s 390A(10) does not preclude this hearing, whether the alleged error exists.

[27] Reference is made to s 429 of the Act, which the respondent submits provides the Court with a wide discretion when granting partition orders. The respondent contends that the Court was advised that the area to be partitioned was in full satisfaction of Moari's interest, and furthermore that partition was necessary or else there may be no land left for Moari.

[28] The respondent submits that the partition order vested all of 87E3B1 in the respondent, and all of 87E3B2 in the applicant, with each the sole owner in their respective blocks. For this reason there can be no question of any relative interests existing between the parties. Section 390A(10) therefore negates an application of s 390A.

[29] In the event that the Court finds there is jurisdiction to rehear the partition order, the respondent maintains that any amendment should only affect the applicant's mother's land. The respondent is content with the amount of land he has received, despite this being less than the share he was in fact entitled to.

[30] The respondent contends that the order would mean the land must be reallocated between the respondent and applicant, necessitating an amendment of the boundaries of the sections, and obtaining additional land to satisfy the full amount entitled by the applicant's mother.

[31] It is further submitted that Mareta a Ani, who had power of attorney for the applicant's mother, attended the family meeting in relation to the partition order, and gave consent on behalf of Tuvaine.

[32] In regards to the evidence pertaining to valuations, the respondent asserts that this amounts to hearsay and should be disregarded, as it is not relevant to the present application and the issue of values was not before Smith J at the hearing held in 2000. For this reason, the applicant submits that the s 435 does not assist the applicant in their claim as it has no relevance to the present situation. It relates to situations where a partition in accordance with exact shares would result in such minute parcels of land for one shareholder that the land would be unusable, therefore a larger partition is made and monetary compensation is awarded to the landowner whose share is being diminished to achieve this purpose.

[33] Finally, the respondent considers the application should be dismissed and would like to be heard on costs.

Law

[34] Section 390A of the Cook Islands Act 1915 states:

> **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 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.

(3) The Chief Judge may refer any such application to [[the Land Court]] for inquiry and report, and he may act upon that report or otherwise deal with the application without holding formal sittings or hearing the parties in open Court.

...

(5) Any order of amendment, variation, or cancellation shall take effect (subject to appeal) as from the making thereof; but no such amendment, variation, or cancellation of any order made by the Chief Judge hereunder shall take away or affect any right or interest acquired for value and in good faith under any instrument of alienation executed before the making of the order of amendment, variation, or cancellation, but the instrument may be perfected and confirmed as if no such order had been made by the Chief Judge. Any such alienation shall thereafter enure for the benefit of the person eventually found by the Chief Judge's order to be entitled to the share or interest affected, and all unpaid or accruing purchase money, rent, royalties, or other proceeds of the alienation, as well as any compensation payable, shall be recoverable accordingly. Any bona fide payment made in faith of the order amended, varied, or cancelled shall not be deemed to be invalid because the order was so amended, varied, or cancelled.

...

(8) This section shall extend and apply (with the exception hereinafter mentioned) to orders, whether made before or after the commencement of this section, save that in all cases where an order is dated more than 5 years previously to the receipt of the application under this section

the Chief Judge shall first obtain the consent of [[the High Commissioner]] before making any order hereunder. The Chief Judge shall nevertheless have full power without that consent to dismiss any such application or to refer it to [[the Land Court]] for inquiry and report.

(9) The Chief Judge shall dismiss all applications (if any) which have already formed the subject of proceedings under section 32 of the Cook Islands Amendment Act 1946, unless [[the High Commissioners]] expressly consents to the Chief Judge exercising jurisdiction under this section in any such matter.

(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.

[35] Section 429 provides that:

429. Jurisdiction to partition Native land –

(1) [The Land Court] shall have exclusive jurisdiction to partition Native freehold land.

(2) Such jurisdiction shall be discretionary, and the Court may refuse to exercise the same in any case in which it is of opinion that partition would be inexpedient in the public interest or in the interests of the owners or other persons interested in the land.

[36] Section 435 states:

435. Payments by way of equality of partition - (1) When by reason of the smallness of the undivided shares or for any other reason the Court is of opinion that it is inexpedient or impracticable to partition any area in exact accordance with the respective shares of the owners, the Court may, in partitioning that area, allot to any owner a parcel greater in value than that to which he is otherwise entitled, and may allot to any other owner a parcel proportionately less than that to which he is otherwise entitled.

(2) The value of the parcel so allotted to any owner shall in no case be less than two-thirds of the full value to which he is otherwise entitled.

(3) The deficiency in the value of any such parcel shall be determined by the Court,

and shall be stated in the partition orders, and shall be expressly constituted by those orders a charge upon the parcel which possesses the corresponding excess of value

Discussion

[37] Section 390A of the Act provides the Chief Justice with a wide discretion to amend, vary or cancel any order of the Court where, through any mistake, error or omission of fact or of law, a person has been affected by the mistake, error or omission.

[38] This wide discretion is restricted however, by s 390A(10), which states that s 390A does not apply in relation to the investigation of title or partition 'save with regard to the relative interests defined there under'.

[39] This means that if there has been an error or omission in the making of an order and the Chief Justice deems it necessary or expedient to amend or vary or cancel, he can do so, but the Chief Justice cannot interfere with orders creating title, such as orders made upon an investigation of title or upon partition.

[40] The only amendment or cancellation the Chief Justice can make is in relation to such orders is in relation to the relative interests defined in the orders of title.

[41] The question therefore arises as to whether in the case of a partition the Chief Justice can disrupt the titles created or simply consider the relative interests determined within the titles created.

[42] In this case the applicant is stating that because of errors made by Justice Smith in his 2000 decision, the Chief Justice should amend the titles created by simply reversing the allocation of the available Moari share.

[43] The respondent submits that the Chief Justice has no jurisdiction to make this amendment as the partition order complained of vested all of 87E3B1 in the respondent and all of 87E3B2 in the applicant. Therefore the respondent and the applicant's mother were the sole owners of their respective blocks and there are no relative interests defined in the partition order. If this is incorrect then the respondent considers that the order complained of was not in error.

[44] Therefore the first question to consider is whether the Chief Justice has jurisdiction to amend, vary or cancel the partition orders of Judge Smith of 15 March 2000.

[45] The applicant makes no submissions on this point. The respondent is of the view that s 390A(10) removes the Chief Justice's jurisdiction to intervene in this case.

[46] The powers of the Chief Justice as set out in s 390A(1) "shall not apply to any order (of) partition save with regard to the relative interests defined there under...".[1]

[47] In this case the applicant's mother received a sole interest in one title created by the partition order and the respondent a sole interest in the other. No relative interests were created in either order.

[48] As a result and in terms of s 390A(10) the Chief Justice in my view does not possess the jurisdiction to interfere with the partition of Justice Smith. Accordingly, I would recommend that the application can be dismissed at this point without considering the submissions of the applicant relating to the alleged errors of the Justice Smith order.

[49] In making this recommendation, which effectively ends my involvement in the matter, I am conscious of the request of the Chief Justice to inform him of related matters believed to be relevant in the exercise of the Chief Justice's jurisdiction.

[50] To consider matters which may be relevant to the exercise of the Chief Justice's jurisdiction I have relied on the principles relied on by the Chief Judge of the Māori Land Court New Zealand, when exercising a similar jurisdiction. The jurisdiction for the Chief Judge of Māori Land Court New Zealand is contained in s 44 of Te Ture Whenua Māori Act 1993, which provides that:

> ***44 Chief Judge may correct mistakes and omissions***
>
> *(1) On any application made under section 45 of this Act, the Chief Judge may, if satisfied that an order made by the Court or a Registrar (including an order made by a Registrar before the commencement of this Act), or a certificate of confirmation issued by a Registrar under section 160 of this Act, was erroneous in fact or in law because of any mistake or omission on the part of the Court or the Registrar or in the presentation of the facts of the case to the Court or the Registrar, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.*

[51] Clearly the jurisdictions between the Chief Judge of the Māori Land Court New Zealand and the Chief Justice of the Cook Islands are very similar in my view the principles applied by the Chief

[1] Section 390A(10) Cook Island Act 1914.

Judge of the Māori Land Court in exercising this jurisdiction are applicable to the Chief Justice of the Cook Islands in terms of s 390A(1). These principles include:

(i) When considering s 45 applications, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence produced by the applicant (and any evidence in opposition);

(ii) Section 45 applications are not to be treated as a rehearing of the original application;

(iii) The principle of *Omnia Praseumutur Rite Esse Acta* (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies to s 45 applications. Therefore in the absence of a patent defect in the order, there is a presumption that the order made was correct;

(iv) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct;

(v) The burden of proof is on the applicant to rebut the two presumptions above; and

(vi) As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decision. These principles are reflected in s 77 of the Act, which states that Court orders cannot be declared invalid, quashed or annulled more than 10 years after the date of the order. Parties affected by orders made under the Act must be able to rely on them. For this reason, the Chief Judge's special powers are used only in exceptional circumstances.

[52] Also, in *Bennett – Te Puna Parish Lot 154G Block* (2011) 2011 Chief Judge's MB 68 (2011 CJ 68) it was stated that a Chief Judge application is not to be treated as a rehearing or appeal of the original application just because the applicant disagrees with the decision of the Court. It is necessary for the Chief Judge to uphold the principles of certainty and finality.

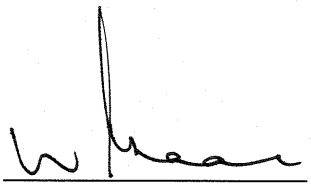
[53] These principles in my view make it clear that the general intent of the legislation is that orders of the Court should be binding and conclusive on all parties and that the applications to the Chief Justice are only made in exceptional circumstances where the applicant can show a clear mistake or error in the original order which the Chief Judge deems necessary or expedient to remedy.

[54] Also, the Cook Islands' jurisdiction s 390A(8) requires the consent of the High Commissioner before making an order when the application has been filed over five years after the order complained of. This reinforces the need for certainty and the conclusive nature of orders, especially those affecting title.

[55] Whilst these principles are relevant to the Chief Justice's general jurisdiction under s 390A(1), having regard to my finding in para [49] above, they are not relevant to the present case, where I found that the Chief Justice has no jurisdiction to interfere with the orders of Justice Smith.

[56] I therefore recommend that this application be dismissed for want of jurisdiction.

Dated at Wellington this 13th day of March 2013.



W W Isaac
JUSTICE