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

390A 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, 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
AND	**CAROLINE BROWNE** Objector

Date: 24 September 2015

Counsel: Mrs T Carr for the Applicants
Mrs T Browne for the Respondents
Mr R Holmes for Caroline Browne the Objector

JUDGMENT OF THE CHIEF JUSTICE

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[1] The parties were represented before me this morning. Shortly prior to the hearing a number of documents were filed, some of which I had a brief opportunity to consider, and others not.

[2] Mr Holmes filed a Notice from his client as objector. At the same time he filed a fresh application numbered 441/2015 under Sections 416, 421 of the Cook Islands Act. I had a brief opportunity to consider the application in that fresh matter. It seems properly to capture all of the issues that I understood to be in play in the current application and which I set out in my previous minute.

[3] In that previous minute I raised the question of jurisdiction indicating I had real concerns about the scope of the Chief Justice's jurisdiction under s.390A Cook Islands Act to deal with want of jurisdiction at an earlier point.

[4] I had reached the conclusion that there was no such jurisdiction and this was supported by paragraph [59] of the Privy Council decision in *Tumu.*

[5] During the course of argument this morning Mrs Carr continued to advocate that I had jurisdiction under s.390A to deal with want of jurisdiction at an earlier period.

[6] However, both Mrs Browne and Mr Holmes supported the view that I had provisionally reached. Indeed Mrs Browne said that was the view that I had held at the time of the recall argument and had been the view advocated by her at that time. Mr Holmes confirmed that he was now clear that the questions of jurisdiction should properly be ventilated by the means he had now set out in his fresh application.

[7] I then discussed with Mrs Carr the possibility that we could dismiss the s.390A application on a without prejudice basis. By that I meant that the applicants would have the rights to bring such an application again if Mr Holme's fresh application in some way did not provide an appropriate opportunity to resolve the issues. Mrs Carr took instructions and I'm grateful to her and the persons she represents for agreeing to such course.

[8] As part of that discussion, we also canvassed the question of costs. Mrs Browne, on behalf of the Respondent Church, has quite properly previously raised the question of costs and sought them. I indicated to the parties that I was reluctant to make costs even if the s.390A application were to be dismissed. That is because the issues are alive in another proceeding. The Court is always assisted in determining costs by having a proper

understanding of the merits. The merits at this stage are unresolved and the intention is that they will be resolved in Mr Holme's fresh application.

[9] Mrs Carr was concerned to ensure that the Church would properly and actively defend the fresh proceeding. Mrs Browne said, in the course of addressing the Court, that that would be the Church's intention. Mrs Carr subsequently referred to this as an undertaking and Mrs Browne wanted to make it clear that it was not. I accept that it is not an undertaking and cannot be regarded as such. Nevertheless, it seems clear to me that the Church will be actively defending the fresh proceeding. As I understand that proceeding, it is obliged to do so in order to protect its own interests. I explained this to Mrs Carr. I also said to her that I would record this exchange in the minute so that her clients' position on this is fully recorded.

[10] If it turns out, for example, that the Church does not take such a position, then that may be material for any future decisions in relation to s.390A.

[11] In dismissing the 390A application without prejudice, I make it clear that I do hold the view that I do not have jurisdiction to deal with want of jurisdiction in earlier matters. Nevertheless, Mrs Carr still affirms that she would wish to argue that point, if ultimately the fresh proceeding brought by Mr Holmes is not the appropriate vehicle to ventilate her client's concerns.

[12] Mrs Carr also raised with me whether I would make any Interim Orders preventing further dealings with the land. I said to her that I did not believe I had jurisdiction. Moreover, I do not believe I am the appropriate judge to do that. It seems to me that that is an issue more properly considered by a Judge of the Land Division and more properly considered within the terms of Mr Holmes' fresh proceeding.

[13] I now dismiss the s.390A application without prejudice as I have set out above. The question of costs is reserved. If, despite my indication, the Church wishes to press a claim for costs, then Mrs Browne should proceed by way of memorandum with Mrs Carr filing a Memorandum in reply. I do not set out time limits for this. I assume that Mrs Browne and Mrs Carr can arrange those between themselves.

[14] Mr Holmes, although he has now filed a Notice on behalf of the Objector, has confirmed that he does not seek any costs and there is no possible basis to seek costs against his client.

Tom Weston, CJ