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

APPLICATION NO. 390A 7/09
(also 510/11 & 65/11)

IN THE MATTER	of the lands known as **TIKIOKI 43C2,** and **VAIMAANGA 7, TAKITUMU**
AND	
IN THE MATTER	of an application under s 390A of the Cook Islands Act 1915
BETWEEN	**PURETU HEATHER** Applicant
AND	**KOEKOE MOKOTUPU** Respondent

Date of Report to Chief Justice by Land Court Judge: 14 March 2014

Date of Judgment: 27 July 2018

JUDGMENT OF HUGH WILLIAMS, CJ

[WILL0417.dss]

Introduction

[1] This judgment reviews and adopts a report furnished by Isaac J on 14 March 2014 to the then Chief Justice concerning an application under s 390A of the Cook Islands Act 1915. The application filed by Ms Puretu Heather sought a rehearing of the decision of Judge Dillon delivered on 21 December 1990 revoking and cancelling two succession orders to Okura (alias Ukura) made on 15 October 1947. The effect of Judge Dillon's order was to revoke and cancel the two succession orders made to Okura (alias Ukura)[1].

Procedural issues

[2] Unfortunately, since property rights are involved, this matter has been the subject of significant delay in reaching the present point. The procedural history of the application up to 14 March 2014 is recorded in Isaac J's report. The procedural delays which have occurred

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[1] MB 18/112 – referred to in memo to Court of Mrs Carr, 7.12.2009

since that date will be recorded later. To the extent that the Court may be thought responsible for those delays, its regret is expressed to the parties and to all the others whose interests have been affected by the delays.

[3] The delays prior to 14 March 2014 can be summarised as follows:

a) On 30 September 1996 a rehearing was heard on a matter relating to Tikioki Section 43C2 and Vaimaanga Section 4, Takitumu, but was adjourned as the papers had not been served on all parties;

b) An application for rehearing was filed on 7 December 2009 and on 31 August 2010 Weston CJ referred it to a Judge of the Land Division for a report, the Chief Justice being satisfied the applicant had provided an adequate explanation for the delay in bringing the application;

c) The application was adjourned by Savage J on 21 October 2010 to allow the family to hold a meeting and for supporting submissions to be filed.

d) On 3 March 2011 Hingston J adjourned the matter to await the outcome of a Court of Appeal case regarding *res judicata.* *Res judicata* is not an issue in relation to this application;

e) The application was heard by Isaac J on 24 and 29 February 2012 following which the applicant was to file submissions within 14 days and respondent and interested parties were to file reply submissions by 11 May 2012. The latter were filed a week late but, more relevantly, as Isaac J put it, "as a result of an administrative oversight the file and submissions were not received by [the Judge] until 13 November 2013".

f) Following receipt of Isaac J's 14 March 2014 report, Weston CJ indicated his intention to accept the Judge's recommendations but the then Chief Justice expressed concern as to the necessity, under s 390A(8), for the Queen's Representative's consent to be obtained where, as in this case, the matters under reconsideration were made more than five years before the date of the Court application. He sought advice on that topic from the Cook Islands Law Society and local practitioners experienced in land matters.

g) The Cook Islands Law Society filed a helpful memorandum on 30 April 2014 canvassing the issue and providing guidance as to matters the Queen's Representative might take into account should advice be sought.

h) In the meantime, by memorandum dated 9 April 2014 Tepaki Nooapii Tepaki (aka Tim Tepaki) filed a memorandum which effectively contended that he had standing in this matter for the reasons advanced in the memorandum and seeking an opportunity to be heard since he was not a party to the proceeding. He said that:

> "I believe if the Court proceeds to revoke our Ukura Rangatira title and make liars out of our forefathers it will be a travesty of justice of immense proportion, the implication of which will be widespread and distressful."

i) Mr Tepaki's contentions were addressed – along with other matters – by Mrs Tere Carr, the land agent for the applicant, in a comprehensive memorandum dated 11 September 2014. She noted that Mr Tepaki was not a registered landowner of the land and thus did not have standing. She noted that the application depended heavily on genealogies which had been thoroughly analysed by both parties over the years and there was nothing Mr Tepaki could add on the topic, he having failed to adduce any evidence in that regard. In his Minute (No.2) of 8 October 2015, Weston CJ regarded the matters raised by Mrs Carr's memorandum as conclusively answering his concerns and decided Mr Tepaki had no standing and could not add anything to the evidence.

j) A Mr Anthony Brown apparently filed a memorandum on 8 April 2014[2] also seeking to be heard.

k) Mrs Carr dealt with Mr Brown's position in her memorandum saying the latter was an owner of Tikioki Section 43C2 but observing that because the matters before Isaac J were Succession Orders and not Orders to Investigate Title and Mr Brown's family remained owners of the land, his interests had been adequately dealt with in the application itself. In Minute (No.2) Weston CJ

[2] not seen by present Chief Justice, but the memo may be Mr Tepaki's since that was filed by Mr Brown.

accepted Mrs Carr's submissions as conclusively answering his concerns in relation to Mr Brown's family.

l) The opportunity given by Weston CJ for input from others involved in this matter and in s 390A applications generally did not materialise so Weston CJ recounted the procedural history of the matter in his 8 October 2015 minute and went on to say[3]:

> "I am satisfied that Isaac J's recommendation should be upheld and will refer that to the Queen's Representative for his approval. Assuming that approval is received I will then issue a judgment upholding the recommendation of Isaac J".

m) Unfortunately, progress on this application then seems to have faltered until 31 October 2017 when the necessary papers were prepared and the matter referred to the Queen's Representative for consideration as to whether or not consent should be given to orders pursuant to Isaac J's report.

n) His Excellency the Queen's Representative consented to the Chief Justice making such orders by certificate dated 23 February 2018[4].

Report of Isaac J

[4] After recounting the procedural history of this application up to 14 March 2014 Isaac J recited the whakapapa disclosed by the Orders of Investigation for Tikioki 43[5] and Vaimaanga 7 dated March 1905 and 9 July 1903 respectively and the succession and genealogies which followed those orders, genealogies which were adopted in subsequent applications in 1950 and 1990.

[5] The Judge then recited[6] the relevant provisions of Justice Dillon's judgment of 21 December 1990 which led that Judge to the conclusion that there would be "orders revoking the succession orders in respect to both blocks made on the 15th day of October 1947" and that there would also be "succession orders in respect to both blocks in favour of the successors set

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[3] at [13]

[4] received by Chief Justice on 4 May 2018 (NZT)

[5] Shorthand for Tikioki 43C2 and defined as "Tikioki 43" for the balance of the judgment at [5]

[6] at [17]

out in schedule A attached to the application and in their respective shares". Isaac J then cited[7] the genealogy on which Justice Dillon had relied, subsequent genealogies over the years and then carefully recounted the submissions of the respective parties.

[6] He noted[8] "the applicant maintains that the ancestor Urukura is not the same person as the Ukura/Okura listed in the Orders of Investigation of Title." After considering the applicant's submissions on that topic in significant detail, and the use of various names in earlier applications as recounted in the submissions, the Judge summarised the applicant's submissions[9] and passed to the respondent's submissions. He detailed the genealogy evidence relied on together with the custom on which reliance was placed, then passed to submissions of Mrs Tutai Parker and the objection of the Kaitamaki family and Mr Moore's submissions on behalf of the descendants of Mata and Okura[10].

[7] The Judge then recounted the provisions of s 390A and followed that by listing the principles to be invoked in exercising the jurisdiction under that section before concluding:

> "[80] 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[11] where the applicant can show a clear mistake or error in the original order which the Chief Justice deems necessary or expedient to remedy."

[8] Isaac J then discussed an issue of jurisdiction and passed to the major issue, the identity of Ukura and Okura. He concluded that "after shifting (sic: sifting?) through all the whakapapa evidence "I consider Ukura and Okura are one and the same person. I do not hold the same view in relation to Urukura" for the reasons he gave. The Judge's conclusion was[12]:

> As this case succeeds or fails on genealogy, I am of the view that the applicant has met the burden of proof.
>
> I therefore recommend that the orders of 21 December 1990 are cancelled and the orders of 1947 are reinstated.

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[7] at [18]-[24]
[8] at [25]
[9] at [53]
[10] at [55] - [76]
[11] There is an argument that this sets the bar too high
[12] at [93] and [94]

[9] As noted, Weston CJ in his minute of 8 October 2015, discussed Isaac J's report and reached the conclusion earlier cited.

Conclusion

[10] For all the reasons set out in this judgment, the present Chief Justice reaches the same conclusion as Weston CJ, adopts the conclusions of Isaac J in his report of 14 March 2014 and accordingly orders that the orders of Justice Dillon made on 21 December 1990 in relation to Tikioki 43C2 and Vaimaanga 7 Takitimu be cancelled with effect of revoking and cancelling the two succession orders made to Okura (alias Ukura) on 15 October 1947.

[11] Should any of those involved in this matter seek an order for costs, memoranda may be filed within one month from the date of delivery of this decision.

[12] Copies of this decision and of the accompanying genealogy should be circulated to the parties and to those mentioned in para 14 of Weston CJ's minute of 8 October 2015 provided the pre-conditions set out in that paragraph have been met.

Hugh Williams, CJ