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

APPLICATION NO. 1/17

UNDER	of Section 390A of the Cook Islands Act 1915
IN THE MATTER	of the land known as **ARERENGA SECTION 1, ARORANGI**
BETWEEN	**TERE TAIO** ofRarotonga, Landowner (Atu Enua) **Applicant**
AND	**THE SUCCESSORS TO ETETERA** **Respondent**

Hearing: 1 May 2019

Appearances: Mr T Moore for the Applicant
Mrs T Browne for the Respondent

Decision: 1 August 2019

REPORT TO CHIEF JUSTICE WILLIAMS

Introduction

[l] This repmt relates to an application made under s 390A of the Cook Islands Act 1915 (the Act) by Tere Taio (the applicant) in respect to a succession order dated 18 October 1943 to the interests ofTalrna (the 1943 order).

[2] The application is brought on the grounds that:

(a) The Court in making the 1943 Order, vested Takaa's interest in the land in his niece Etetera, not his direct descendant, contrary to the language of an Order on Investigation of Title (OIT) dated 13 July 1903.

(b) The searching officer in dealing with Etetera's application for succession to the interest of Takaa erroneously identified Takaa as a deceased owner of the land.

(c) That the Comi failed to recognise the clear and unambiguous language in the OIT that barred the Comi from making a succession order to Etetera.

Issue

[3] Therefore, the issue to be determined is whether or not the succession order from Takaa to Etetera was made in error having regard to the OIT.

The Proceedings

[4] Prior to commencing their cases, representatives for the paiiies confirmed the relevant documents on the Comi file as follows.

[5] For the applicant:

(a) the application;

(b) the affidavit of the applicant;

(c) submissions for the applicant dated 30 September 2016; and

(d) supplementary submissions for the applicant dated 26 September 2018.

[6] For the respondent:

(a) submissions for the respondent dated 28 September 2017;

(b) a bundle of documents dated 18 April 2018; and

(c) a memorandum dated 3 April 2018.

Case for the Applicant

[7] At the inquiry, Mr Moore called the applicant, the vaatuatua of the Tinomana Ariki, and the chair of a committee established to examine taura oire or residential titles.

[8] The applicant gave evidence that since Tinomana Tokerau has been in place, she has set up a committee of 6 people to investigate and oversee the taura oire titles and discuss issues that arise with the kopu involved.

[9] He explained how the OIT informed the discussion with occupiers and decisions of the committee.

[10] The applicant further explained that a family with no direct descendants had lived on the land for more than 100 years so it was time for a change, but the case would be considered by the committee and the Tinomana on its merits. There was no intention to push people off the land and if a past Tinomana had not objected to occupation, then the present Tinomana would not upset the decision of a past Tinomana.

[11] The applicant referred to an example of an application to have Stephene Kautai vacate the land as he was a feeding child and nor a direct descendent. After discussion with Mr Kautai the committee decided to withdraw the application.

[12] The committee had completed research on previous taura oire titles and the applicant agreed with Ms Boggs, who gave evidence for the respondents that they fall into the following categories:

(a) succession by direct descendants;

(b) succession by near relatives;

(c) succession by adopted children or Tamariki Angai;

(d) succession by adoption not of the blood; and

(e) succession by other.

[13] The applicant also stated that the Tinomana can give land for occupation to anyone, and that he, as the applicant, has seen it with his own eyes.

[14] In relation to the present application the applicant agreed that Tinomana Pirangi was the Tinomana at the time, and that perhaps Tinomana Pirangi did not understand the situation but the committee may need to relook at that matter.

[15] Agent for the applicant, Mr Moore, submitted that Tinomana Pirangi may not have known about the OIT. She was not in court and the order may have been made without her knowledge or consent.

[16] Mr Moore also submitted that the Cami of Appeal case in *Roi v Roi* dealt with the question of "near relatives" in stating that general provisions (including minutes) do not trump an OIT and that only direct descendants could succeed to a residential right on taura oire land.[1] The same was reiterated by the Court of Appeal in *Tavioni v Baudinet* where the Cami stated that a sealed order takes precedence over any informal notes or minutes of a judge.[2]

[17] Mr Moore cites four additional cases which maintain that succession to taura oire land is limited to direct descendants.[3]

[18] In reference to Chief Justice Gudgeon's general principles relating to tauira oire title, Mr Moore submitted that is the first time we see near relatives mentioned. He also submits that he does not consider these principles can apply to taura oire titles as they do not speak about direct descendants.

[19] He submits however that by adding near relatives to the persons entitled to succeed varies the OIT from direct descendants. The OIT cannot be varied and nothing can be read into it.

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[1] *Roiauri v Heather (nee R01)* [1985] CKCA; CA (8 October 1985).
[2] *Tavoni v Baudinet* [2009] CKCA; CA 1 (10 July 2009).
[3] "Re Wilson", "re Snow", and "re Taripo", cited in Submissions in Supp01i of Application to Cancel the Takaa Order, Travis Moore, 30 September 2016 at 6-7; *Samatua v Tanner* [2013] CKHC, App 3/2013, 30 May 2014.

[20] Mr Moore also refers to the relevance of *Hunt v Numa* by distinguishing the OIT in the present case.[4] The main difference being that the *Numa* OIT did not include a reversion provision however, the OIT in the present case does, stating that "upon the death of Takaa and failure of his direct descendants the said land shall revert to the said Tinomana or her successors."

[21] Finally, Mr Moore accepted the manner in which the Tinomana can determine whether to grant occupation to persons who are not direct descendants constitutes Tinomana creating a custom, as they carry the authority to make the final decision.

Case for the Respondents

[22] Mrs Browne called Doreen Boggs to give evidence and also made oral submissions.

[23] At the hearing, Mrs Boggs confirmed the contents of her affidavit.

[24] She stated was not sure as to why the applicant withdrew the Stephen Kautai application.

[25] It was the service of notices to certain occupiers of Tauira Oire land by Tinomana concerning their rights that lead her to begin research into the taura oire titles. She considered everyone with occupation rights was affected including their great grandparents. Meetings were called with taura oire occupiers and also with Tinomana, or the committee on Tinomana's behalf. Tinomana's committee agreed to the meeting but did not attend.

[26] Mrs Boggs' investigation considered the custom of the taura oire titles.

[27] She accepted the custom for direct descendants or near relatives to succeed and accepted the Tinomana had granted taura oire titles to adopted children of the blood, adoptions not of the blood, and feeding children. She stated that as these were accepted by Tinomana, they should remain. Her research showed the categories are:

(a) succession by direct descendants;

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[4] *Hunt v Numa,* per Williams CJ, 13 September 2017, cited in Submissions of Counsel for the Successors to Etetera, Tina Browne, 28 September 2017.

(b) succession by near relatives;

(c) succession by adopted children or Tamariki Angai;

(d) succession by adoption not of the blood; and

(e) succession by other.

[28] She considered the remarks of Chief Justice Gudgeon at the time referring to the rights of near relatives in part of his judgment.

[29] Mrs Boggs confirmed that Arerenga 1 was leased out and she was not aware that Etetera's descendants are occupying the land.

[30] She also confirmed that when the Court investigated title in 1908, the taura oire custom was probably already in place.

[31] Mrs Browne, counsel for the respondents, submitted that there is not one standard rule as to how taura oire titles are succeeded to.

[32] The research has shown that there are four different categories as to how succession takes place and the Court's decisions of *Roi v Roi* and *Samatua v Tanner* demonstrate what has happened over time regarding the taura oire titles. Counsel submitted that if the present situation has previously been consented to by Tinomana, it should not be disturbed.

[33] It was submitted that if the Tinomana had concerns as to the ownership of the house in 1943 or in 1957, he would have said so. Tinomana's concerns in the present case are related only to receiving rental income.

[34] Mrs Browne also submitted that Chief Justice Gudgeon's pronouncements in respect

\ **to laura oire titles would be applicable to this case.**

Discussion

[35] The issue for determination is whether the succession order from Takaa to Etetera on 18 October 1943 was made in error having regard to the OIT for Arerenga 1 dated 13 July 1903.

[36] In essence the applicant says the OIT which states that Takaa together with his direct descendants was ordered as an owner of an occupation or residential right on Arerenga 1, does not allow succession to anyone but a direct descendant.

[37] The respondent says that taura 01re titles have been succeeded to by direct descendants, near relatives, adoptees of the blood, adoptees of non-blood, and feeding children and this is in accordance with the custom relating to these titles.

[38] I think it is important in any consideration of the taura oire titles to look at the background to them.

[39] In my decision *Puia v Puia* [5] I considered the background to taura oire titles and the legal rights that flowed from them.

[40] When Chief Justice Gudgeon made the order on investigation of house sites he made the following commentary:[6]

> [8] Chief Justice Gudgeon in the Order on Investigation of Title for the house sites makes a number of pronouncements to clarify the effect of these titles and the rights of the owners of the house sites and the Ariki. I now set out the relevant pronouncements to this issue:
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> > 1) MB 1/67-69, dated 13 July 1903. This minute dealt with the Order on Investigation of Title for occupation sites to Tinomana and TeUri. The Chief Justice said this:
> >
> > "... all the other sections there are Occupation Rights which in many instances give a title superior to that of the real owner of the land. It will therefore be our duty to define those rights, and in doing so we will follow the arrangement made with the mission where the people were brought together and induced to build in the vicinity of the church in order to be near religious instruction.

[5] *Puia v Puia* [2017] CKLC 4; App 58821 & 228/16, (27 August 2017).
[6] Above n 5, at 8-9.

The arrangement as we read it is this. That all those who built houses should have an inalienable right to live on the piece of land chosen by them so long as the family lived or continued to occupy the land. Therefore in awarding this land to Tinomana and Te Uri the award will be subject to the following rights:

1) That each householder shall pay to Tinomana one shilling in the month of January of each year as atinga for the land.

2) That so long as the descendants or near relatives of the present owner are alive they shall be deemed to be the absolute owner of house and land. But in the event of the family dying out Tinomana or any future representative of the Arikiship may apply to this Court to replace him or her in possession.

3) The occupier may sell or lease his or her right acquired in the section that is his for her own life interest but nothing further and any rent received shall be the property of the occupier.

4) Any owner of a house may purchase from Tinomana or other Atu Enua the soil on which his or her house is built and become the absolute owner provided such arrangement be made before the Comt and with its consent.

5) The one shilling per annum shall represent the total of Tinomana's interest in such section during the occupation of such house and land."

2) MB 4/21A, dated 17 February 1908. This minute dealt with Section 150, Avarua. The Chief Justice said this:

" ... legal laying out of this township of Avarua took place in 1827, when the Revd. Mr Buzzacott and the land Chiefs of Avarua came to an understanding somewhat to the following effect. That within ce1tain defined limits extending from the Avatiu creek towards Tupapa, all persons desirous of living near the Church might take up a section on either side of the Main road in order to build a house thereon and by so doing acquire a residential right for themselves and descendants. I am however of opinion that in all cases where a Resident shall die childless and without near relatives, the consent of the Atu Enua is necessary to validate the transfer of the house to a stranger. There may be circumstances which would justify the Comt in departing from this rule, but speaking generally the land should return into the hands of the Atu Enua where a man dies without Heirs of his own blood."

3) In the same minute the Chief Justice explained the respective rights of the Ariki and holders of the occupation titles in this manner:

"I desire specially to make you all understand, that in this village the lands are not under the Mana of any Ariki or Chief but are under the mana of the Akonoanga Oire, and therefore I object to any arrangement by which the land of many families is included in one piece under the mana of one man who will probably in the future contest the independent rights of those joined with him in the grant. The sole purpose and intention of the Land Titles Court has been to break down this Mana nonsense which has been carried to a ridiculous point in Avarua. The aim of the Court has been to give, as far as

> was possible, each man his own land and make him independent of everything but the law and those appointed to carry out the law. In this work the Court has received valuable assistance from Pa, Makea, and Tinomana."
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> 4) MB 4/47A, dated 10 March 1908. In this minute Chief Justice Gudgeon further explained the effect of the titles created for occupation. He said the Cami became involved because of trouble at Arorangi when a ce1iain man leased his house and the Atu Enua thought she had a right to a large share of the rent. He stated:
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> "The position now is that each house owner is under the protection of the law, and - subject to a proper recognition of the rights of the Atu Enua - is the absolute owner of the House, and can either sell or lease that right to a stranger, whether Maori or Foreigner. In such a case he merely sells the buildings he has erected and the right to live in them.
>
> The obligations to the Atu Enua continues no matter who lives on the land. Such is the position of the occupier and I will now define that of the Ariki or Atu Enua.

[41] As stated in *Puia*, these pronouncements clarify a number of important issues regarding taura oire titles. The titles were for occupation or residential sites. The persons who held these titles had the authority to lease or sell them. These rights can be asce1tained without interference from the Ariki and the titles have given each man his own land and make him independent of everything but the law.

[42] The restrictions arose when the occupier had no further use of the land and had no descendants.

[43] The research done by Mrs Boggs and accepted by the applicant confirms that succession has taken place by direct descendants, near relatives, adoptees by the blood and adoptees not of the blood. There is no hard or fast rule and succession orders are made in terms of the Act.

[44] Moreover, if a succession order has been approved by one Tinomana, a subsequent Tinomana would not attempt to ove1turn or interfere with that order.

[45] Therefore, the sh01t point is that there is no consistent custom in relation to eligible beneficiaries of taura oire land. Of the 28 taura oire titles to which Arerenga 1 belongs, the results show:

(a) direct descendants 11;

(b) near relatives 4;

(c) adoptee of the blood O;

(d) adoptee not of the blood 3; and

(e) other 0.

[46] These results were not disputed by the applicant.

[47] This application is before the Comi on the basis that the succession order of 18 October 1943 from Takaa to Etetera did not comply with the wording of the OIT of 18 July 1903 relating to this land and taura oire titles.

[48] In relation to the OIT, the evidence is clear. That is that there are no hard or fast rules as to how Tinomana determines entitlement to occupation. What is clear is that the occupier does not have to be a direct descendant if the Tinomana allows it. Once an occupation title has been established by a Tinomana, a subsequent Tinomana would not disturb this occupation.

[49] When turning to the succession order of 1943 from Takaa to Etetera, which is the actual order subject to this 390A application, the legal position is more straightforward.

[50] Sections 445 to 455 of the Act provide the jurisdiction for making succession orders. No error of the Comi or in the facts presented to the Court have been demonstrated or even refeffed to by the applicant in relation to these provisions.

[51] Fmihermore, in terms of s 446, the Comi is required to consider success10n m accordance with Native custom. The Native custom relevant to the 1943 succession was the succession in relation to taura oire occupation. The research and evidence demonstrated that succession to taura oire land can go to direct descendants, near relatives, adopted children and feeding children and that where one Tinomana agrees to a succession, a subsequent Tinomana will not normally interfere.

Recommendation

[52] Based on the above discussion and in patiicular the pronouncements of Chief Justice Gudgeon relating to taura oire titles, the history of taura oire successions, I consider it would be difficult to conclude that the order complained of is contrary to the custom of taura oire succession.

[53] Further in relation to the law of succession contained in ss 445 to 455 of the Cook Islands Act 1915, no evidence or submissions were presented to challenge compliance with these provisions.

[54] Accordingly, I recommend this application be dismissed.

Pronounced in Wellington at 3.00pm on this 1st day of August 2019 (NZST).

WW Isaac
JUSTICE