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

APPLICATION NO. 5/2016

IN THE MATTER	of Section 390A of the Cook Islands Act 1915
AND	
IN THE MATTER	of the lands known as **AREMANGO 7D NO.2; NUKUPURE 3A NO.1; MAROTONGAITI 3B; and TE ARAUNGA 7C NO.2, NGATANGIIA** and **TOTOKOITU 26B, TAKITUMU**
BETWEEN	**DAVID EDWIN PITTMAN** on behalf of the descendants of Tamarua Orometua Applicant
AND	The issue of **TE RITO TAI TEARIKI** Respondent

Dates of Original and Amended Applications:	1 April & 31 May 2016
Date of Referral by Chief Justice to Land Division:	21 September 2016
Date of Hearings:	17 & 22 August 2017
Date of Land Division Report:	13 August 2018 (NZT)
Date of Judgment:	24 May 2019
Counsel:	Mrs T Carr for the applicant Mrs T Browne for the respondent (Mr T Moore assisting)

JUDGMENT OF HUGH WILLIAMS, CJ

[0540 & 574.dss]

Application

[1] This judgment deals with an application by the abovenamed applicant, Mr Pittman, on behalf of the descendants of Tamarua Orometua for an order under s 390A of the Cook Islands Act 1915 cancelling succession orders made on 6 January 1968 and 26 March 2005 to Meameaau Tamarua on the ground they were made in error. An amended application filed on 31 May 2016 named the Respondent as successor to Meameaau Tamarua.

[2] The application was supported by affidavits from the applicant and from Pupu Lambert May Vaea plus supporting submissions from Mrs Carr, agent for the applicant. It was opposed and, at the hearings on 17 and 22 August 2017, the representation was as set out in the intituling.

Procedural

[3] As noted, the application was filed on 1April 2016 and was referred by Weston CJ to the Land Division for a report on 21 September 2016 pursuant to s 390A(3) of the Cook Islands Act 1915.

[4] In his minute referring the application to the Land Division, Weston CJ noted that there was a related application (2/2016) which was filed at the same time as the present application and is between the same parties. It, too, relates to succession orders made on the same dates as are challenged in this application and covers the same parcels of land but with the addition of Oneroa Island Section 4A, Aroko Section 4C, Koromiri Island Section 3K, Taruru Takuvaine and Taiti Section 18, all in Ngatangiia. That application has also been referred to the Land Division for a report and has been heard by Isaac J, but in Coxhead J's report in this matter[1] the Judge described application 2/16 as a "separate and distinct matter" so that application can be left to take its own course without further reference.

[5] This application was heard by Coxhead J on 17 and 22 August 2017 and, after the usual delay in producing a written transcript of the hearing, Coxhead J's report was filed in the Court on 13 August 2018 (NZT)[2]. The report is a careful and considered evaluation of the evidence adduced and the matters at issue in the application. The present Chief Justice is minded to accept Coxhead J's recommendation that the application be dismissed and thanks the Judge for his report.

Jurisdiction

[6] The Court's jurisdiction in applications such as this is derived from s 390A of the Cook Islands Act 1915 which relevantly reads:

> (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

[1] Paras 9 and 10.

[2] It is regretted that other litigation has precluded the report being considered at an earlier date.

> 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 [sic] 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.
>
> (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.
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> (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 [sic] 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.

[7] The approach to adjudicating on s 390A applications is, as Coxhead J correctly set out in the report being considered, as follows:

> [41] The burden of proof rests on the applicant to prove that there was a mistake, error or omission in relation to the order in question. It is well-established from previous cases that this burden is not easily satisfied.[23]
>
> [42] The approach to be taken to applications pursuant to s 390A was set out by Chief Justice Isaac in *Tuake v Toeta – Raupa Section 87E3B Arorangi* as follows:[24]

(i) The Chief Justice 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) The principle of *Ommia Praseumutur [sic] Rite Esse Acta* (everything is presumed to have been done lawfully unless there is evidence to the contrary). Therefore, in the absence of a patent defect in the order, there is a presumption that the order made was correct;

(iii) 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;

(iv) The burden of proof is on the applicant to rebut the two presumptions above.

[43] It is also worth noting that s 390A stands in direct contrast to the well-established principle of finality and certainty of decisions. As such, the power to amend orders should only be exercised in exceptional circumstances. Justice Isaac discussed this in *Tuake v Toeta* as follows:[25]

> 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 made only 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.[3]

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23 For example, see Report to the Chief Justice in *Paiti – Arerenga Section 6* [2013] App 14/2012, 26 April 2013 (upheld by Chief Justice Weston on 30 April 2013); *Jones v Tini – Akaoa Section 7 Arorangi* [2014] App 154/2012, 4 March 2014 at [20].

24 Principles set out in the Report to the Chief Justice in *Tuake v Toeta* dated 13 March 2013, as summarised in *Heather v Mokotupu – Tikioki Section 43C2* [2014] Applications 07/2009, 510/2011 and 65/2011, 14 March 2014 at [79].

25 *Tuake v Toeta* [2013] CKLC 9; Application 1/2011, 5 April 2013 at [53].

Report

[8] Coxhead J commenced the report by noting the appellant's submission that the succession order of 6 January 1968 was made in error as the Court did not have the full facts available at the time, would have reached a different decision had that not been the case and that, should the challenge to the 1968 order succeed, a subsequent succession order made on 26 March 2005 should also be overturned as it was based on the same evidence.

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3 The test of "exceptional circumstances" in *Tuake v Toeta* may state the position too highly but the question requires no further consideration in this case.

[9] The report noted that the earlier succession application was brought by Tuatakiri Pittman, the present applicant's grandfather, in relation to the interests of the late Meameaau Tamarua, and concluded that succession orders would be made in favour of "the issue of Te Uatakiri who married Te Putiki". The Judge at the time adjourned the application for discussions on the allocation of lands between branches of the family and on 16[4] January 1968 agreed that Te Rito Tai Teariki would take "Sections 7D2, 3A1A, 3B and 7C2 in full and final settlement of Aumea's interest".

The present respondent is the daughter of Te Rito who succeeded to Meameaau.

[10] Turning to the applicant's case, the Judge noted that in the 1967 hearings Tuatakiri Pittman did not give evidence but called a Charlie Cowan in support of his application. The applicant now contends Mr Cowan had a conflict of interest and, further, that his evidence should be disregarded as he was found to have provided false evidence in another case.

[11] The errors were said to include that the respondent's family had never been present in genealogies of the Tamarua family before 1940, the year prior to which Aumea never appeared in any genealogy. That lead to the submission that either she never existed or had lost her rights to succeed by leaving the tribe.

[12] Had all of that not occurred, the applicant submitted, the succession rights in 1968 would have been granted to the issue of Tamarua Orometua, whose descendants Mr Pittman represents.

[13] The report noted that s 446 of the Cook Islands Act 1915 requires the Court to apply Native custom when dealing with succession orders including inquiring into allegations that someone otherwise entitled to succeed has left the tribe and, if so, whether they had been accepted back[5].

[14] Turning to the question of delay, a factor which must necessarily be covered in an application such as this, Coxhead J correctly recounted the legal position that delay is not of itself a reason not to grant an application and a submission that the original order was unchallengeable as it was a consent order[6].

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[4] Sic.

[5] At 22 citing *Succession to Goodman* [1955] CKHC MB22/385, 4 July 1955 at [3].

[6] At 25-27.

[15] Turning to the respondent's case, the report correctly summarised the applicable law[7], reviewed the statutory principles and turned to the evidence.

[16] After reviewing the allegations concerning Mr Cowan, the Judge concluded "there has been no compelling evidence put forward to this Court as to why the Court should not have relied on Mr Cowan's evidence at the 1967 hearing"[8] especially in light of the making of the consent order after the then parties' consultation. The fact Mr Cowan was disbelieved in one case was no basis to conclude his evidence was unreliable in this matter.

[17] Turning to the genealogies, the Judge reviewed the evidence and said that he had "not been presented with genealogy evidence which clearly shows that the genealogies presented at the 1967 hearing are incorrect or that there is a mistake in the genealogy"[9].

[18] The third problem faced by the applicant was his uncertainty giving evidence as to just what it was he was propounding as the basis for overturning the 1968 order. That led the Judge to conclude:

> [59] The Court has not been presented with any conclusive evidence to show that the persons more closely related to the subject matter at the time were incorrect.
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> [60] In this case, persons who were of the family and were knowledgeable of those matters presented in Court in 1967. When the Court was adjourned to convene a meeting of the family, that family were in my view best placed and knowledgeable of the situation. To find otherwise without any conclusive evidence is to suggest that the persons present in Court in 1967 and present at the family meeting following the Court hearing did not know their own genealogy.
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> [61] Nothing has been provided to the Court to confirm such a proposition. Further, the agreement reached at the family meeting appears on the evidence to have been made freely and with no dispute. The orders made were, in essence, consent orders.
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> [62] The Court is being asked to overturn a decision of the Court where there has been family agreement. In essence, the Court has been asked to overturn an order based on genealogy agreed to by family at the time.
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> [63] There is no compelling evidence that persuades me that an error has occurred.

[19] After commenting on a possible *res judicata* point he recommended the application be dismissed.

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[7] At 28-39.
[8] At 46.
[9] At 56.

Decision

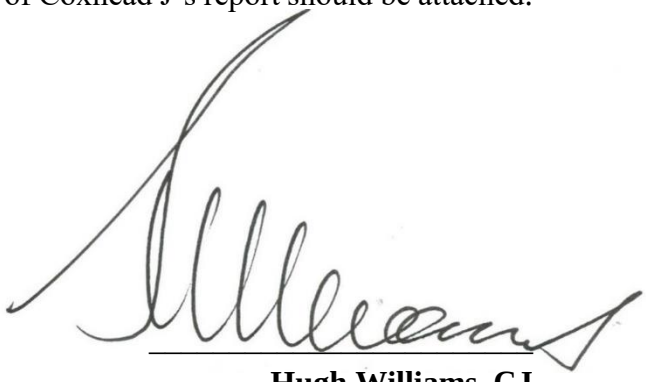
[20] Coxhead J's report is a careful and persuasive account of the issues arising in relation to this application. The present Chief Justice accepts the recommendation.

[21] S 390A(8) requires the prior consent of the Queen's Representative to the Chief Justice making any order under the section if the order under consideration is made more than five years before the receipt of the relevant application, as is the case here.

[22] S 390A(1) gives the Chief Justice power to "make such order in the matter for the purpose of remedying [any mistake error or omission of fact or law] as the case may require" and empowers the Chief Justice to "amend vary or cancel any order ... or revoke any decision" of the Land Division.

[23] As has elsewhere been remarked, it is distinctly arguable that a decision by the Chief Justice to dismiss an application, that is to say a decision not to amend, vary, cancel or revoke a decision of the Land Division, therefore does not require the consent of the Queen's Representative. However, in matters relating to land, it is preferable to adopt a cautionary approach and accordingly the matter was referred to the Queen's Representative on or about 8 February 2019 who, on 27 March 2019, gave his consent to the course proposed by the Chief Justice.

[24] The application is accordingly dismissed and the Registry is forthwith to provide the parties with a copy of this judgment to which a copy of Coxhead J's report should be attached.



Hugh Williams, CJ