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

APPLICATION NO. 390A 7/16

IN THE MATTER	of Section 390A of the Cook Islands Act 1915
AND	
IN THE MATTER	of the lands known as **VAIMAANGA SECTIONS 3 & 3A, TAKITUMU** and **AKAPUAO 42E, TAKITUMU**
AND	
IN THE MATTER	of an application by **GEORGE HOSKING,** Raina Mataiapo
	Applicant
AND	**MIIMETUA JOSEPH MAREARAI and TEOKOTAI JOSEPH MAREARAI**
	Respondents

Date of referral of Application to Land Division:	22 July 2016
Date of Hearing:	28 July 2016
Report to the Chief Justice:	12 April 2018
Appearances:	Mr G Hosking / Mr R Holmes for Applicant (328/16) Mr T Moore / Mrs T Carr for Applicants (191/14, 194/14 & 558/14) and for Respondents (328/16)
Minute (No.1):	5 July 2019
Minute (No.2):	25 July 2019
Judgment (No.1):	20 June 2018
Judgment (No.2)	17 December 2019

JUDGMENT (NO.2) OF HUGH WILLIAMS, CJ

[0710.dss]

Application

[1] This judgment deals with an application filed by Mr Holmes, counsel for the applicant, filed on 29 April 2019 for recall of the judgment delivered in the substantive application under s390A of the Cook Islands Act 1915(NZ) on 20 June 2018. As noted in

Minute (No.1) issued on 5 July 2019[1] the application, by extension, would appear to include an application to recall the report to the Chief Justice of Isaac J dated 12 April 2018 though Mr Holmes, in his reply submissions[2] disputed that characterisation of the application on the ground that Isaac J's report is not a judgment of the Court. That issue will require consideration later.

[2] The recall application was opposed by Mr Moore, agent for the respondents, on the basis that the judgment is a perfected order having been signed by the Chief Justice and delivered to the parties; that it has never been the practice pursuant to s 390A for Chief Justices to refer the report of a Land Division Judge to counsel for the parties; that the recall application is a device to circumvent s 390A(2); that Mr Hosking is "quite clearly unhappy with the s 390A judgment and wants a different decision and yet another bite at the cherry"; and that, by reference to other applications brought by Mr Hosking, the recall application is an abuse of process.

[3] The interval between the filing of the recall application on 29 April 2019 and the date of delivery of this judgment was partly utilised in the filing and service of submissions by Messrs Holmes and Moore, mainly Mr Moore's memorandum of 8 August 2019. Following that, consideration of the judgment was put to one side until after a discussion group meeting took place in Rarotonga on 15 November 2019 concerning the procedure which should apply to s 390A applications. On that date, a discussion was held between the Chief Justice and practitioners and members of the public frequently engaged in such applications. It was thought matters might emerge which would impact on recall applications such as the present. It did, but only to a limited degree.

Judgment of 20 June 2018

[4] The judgment of 20 June 2018 was relatively brief. It reads:

> [1] By applications dated 16 May 2016 and 15 June 2016 the abovenamed applicant George Hosking as Raina Mataiapo sought a rehearing by way of rescinding Succession Orders to two land blocks known as Vaimaanga Section 3 and Akapuao Section 42E, both in Takitumu. More particularly, these were:

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1 At [1].

2 7 July 2019, para 21.

a) A Succession Order made on 10 February 1964 vesting Te Rima Raina's 1/8th interest in Vaimaanga Section 3 in Metua a Maitoe as from 27 December 1983; (MB 26/49)

b) a Succession Order also made on 10 February 1964 vesting Maitoe Raina's sole interest in Akapuao Section 42 in Metua a Maitoe as from 27 December 1983 (MB 26/49);

c) a Succession Order made on 14 November 1994 vesting Metua a Maitoe's interest in both Vaimaanga Section 3 and Akapuao 42 in Miimetua Joseph Marearai and Teokotai Joseph Marearai as from 20 May 1984 (MB 10/46).

[2] By Minute dated 22 July 2016 Weston CJ, after referring to a number of unsatisfactory aspects of the application, referred the file to the Land Division for preparation of the report.

[3] A hearing of this and related applications took place on 28 July 2016 and by report dated 12 April 2018 Isaac J, after carefully reviewing the evidence of both parties observed[3]:

> "[29] Much of the evidence presented before me, and in fact much of the applicant's case, is based on a challenge to the evidence presented to the Court during the 1964 hearing. This includes Tutae Ateina's admission that she gave false evidence to the Court during that hearing. The evidence that was presented during that hearing has stood for multiple generations and being relied on by the Court for over fifty years. It should not be amended lightly.
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> [30] As previously noted, s 390A places a high burden of proof on the applicant and there are presumptions that the orders were made lawfully and that the evidence given at the time that the orders were made was correct.
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> [31] In my view there was a lack of verifiable evidence presented before me in this case to dispute the longstanding history of the Raina family and the evidence that was presented was insufficient to rebut the two presumptions discussed above. I consider, therefore, that the burden of proof required under s 390A to amend the Succession Orders has not been met.
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> [32] I recommend that the Chief Justice dismiss the application."

[4] It is clear from Isaac J's report that the success or otherwise of these applications depended on credibility findings concerning the evidence and that the judge, after careful consideration of the competing submissions and testimony, reached the conclusion set out above.

[5] There is no basis on which the present Chief Justice could justifiably overturn the recommendations of Isaac J reached on the Judge's assessment of the credibility of the witnesses. The applications are accordingly dismissed.

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3 At [29]-[32].

> [6] It is for the parties to decide on the effect that decision might have on applications 328/16, 191/14, 194/14 and 558/14 and, if costs are in issue, memoranda may be filed.

[5] What has occurred since 20 June 2018 was related in Minute (No.2) delivered on 25 July 2019 which said:

> [3] A review of the judgment of the file in preparation for deciding how best to process the recall application showed, as paragraph 1 of the judgment of 20 June 2018 said, that at issue in this matter are applications dated 16 May and 15 June 2016 relating to succession orders made on 10 February 1964 and 14 November 1994 and, since the order was "dated more than five years previously to the receipt of the application" s 390A(8) required that "the [Chief Justice] shall first obtain the consent of [the Queen's Representative] before making any order".
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> [4] Although dismissal of an application under s 390A may arguably not be an order correcting a "mistake, error, omission, or erroneous decision in point of law" under s 390A(1) because property rights are involved in s 390A applications, it has been considered prudent to obtain the Queen's Representative's consent in all cases which qualify under s 390A(8) even where dismissal of the application is contemplated.
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> [5] The necessity or desirability of obtaining the Queen's Representative's consent to the orders in this case was realised shortly after the judgment of 20 June 2018 was issued and the necessary papers requesting consent were forwarded to the Official Secretary for submission to the Queen's Representative. However, despite the passage of time, no consent has been as yet received.
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> [6] Since s 390A(8) makes the obtaining of the Queen's Representative's consent in cases which qualify under the subsection a necessity before the Chief Justice may make any order under s 390A, it would appear possible that the orders contained in the judgment of 20 June 2018 may be a nullity.
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> [7] Mr Holmes and Mr Moore are to comment on that possibility by memoranda filed within 10 working days of delivery of this minute.
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> [8] While, if the judgment of 20 June 2018 is held a nullity, it will clearly supersede the application to recall, the submissions filed for and against recall deal with the procedure which should be followed by Chief Justices under s 390A after receiving a report from the Land Division following an inquiry on a referral.
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> [9] That may remain a live issue in this case and Messrs Holmes and Moore are to make submissions on that point in the memoranda directed in paragraph [7].

Section 390A(8)

[6] Section 390A(8) reads:

> (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 [Queen's Representative] 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] Several points arise out of the wording of subs (8).

[8] The first is the effect on orders which require the Queen's Representative's consent under the first sentence of the subsection of lack of consent, either because consent has not been sought or because consent has been sought but has not been given, including when a judgment has been delivered.

[9] As to the former, it is understood that the Queen's Representative's consent may have been sought for orders made in qualifying applications only in the last few years. If so, the validity of Chief Justices' orders in those applications – other than dismissals – may be open to doubt, but as nothing is known of individual cases and the situation does not apply to the present application, that matter can be put to one side.

[10] Secondly, although the subsection is silent as to whether the Queen's Representative's consent may be general or must be specific, the better view is that the consent must be sought as a prerequisite to the making of the orders for which consent is applied for, despite the second sentence of the subsection.

[11] The third point is that the two sentences of the subsection in combination make clear that, first, Chief Justices may dismiss applications without the Queen's Representative's consent and without referring the application to the Land Division of the High Court for enquiry and report and, secondly, that the power to dismiss applications without consent also applies to dismissals by Chief Justices following receipt of Land Divisions' reports since s 390A(8) applies to the Chief Justice "making any order hereunder", that is to say orders made both before and after reference of applications to the Land Division for enquiry and

report. The subsection therefore applies to two, quite distinct, aspects of the process of determining applications under s 390A.

[12] Following on from that, although applications under s 390A can be validly dismissed by Chief Justices without the Queen's Representative's consent, it is to be noted that, because persons' property rights are affected by orders made under s 390A, even when the Chief Justice intends to dismiss the application, the Queen's Representative's consent has been sought to all disposals of s 390A applications as a matter of prudence.

[13] As far as this application is concerned, the upshot of that discussion is to hold that the orders made in the judgment of 20 June 2018, qualifying under s 390A(8) but never having received the consent of the Queen's Representative, are nullities and the applications listed in the judgment remain undetermined.

[14] That finding disposes of Mr Hosking's recall application since, now, in law, the applications listed in paragraph [1] of the judgment of 20 June 2018 remain undetermined, but subject to the recommendation in Isaac J's report of 12 April 2018 that they be dismissed and there is now no judgment to be recalled.[3]

[15] In formal terms, that means Mr Hosking's recall application must be dismissed as having no foundation but the submissions of Messrs Holmes and Moore on what should occur following receipt of Isaac J's report remain relevant.

Jurisdiction to Recall

[16] There is no doubt that the Court has power to recall its judgments on the grounds set out in *Baudinet v. Tavioni and Macquarie*[4] where the following appears:

> 3. We accept that this Court[5] has jurisdiction to recall its own judgment prior to sealing. Although there is no express rule to that effect it is part of the Court's inherent jurisdiction as a superior court of record.

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3 The application for the Queen's Representative's consent was administratively recalled on 25 July 2019 but is subject to the Chief Justice's indication in the now inchoate judgment as to the Chief Justice's intentions.

4 *Baudinet v. Tavioni and Macquarie* CACI 1-3/09, 18 June 2010

5 The decision is one of the Court of Appeal, but there is no reason why its precepts do not also apply to all Divisions of the High Court.

> 4. Although the principles upon which the jurisdiction will be exercised will never be exhaustively defined, considerable assistance can be derived from *Horowhenua County v. Nash* (No.2) [1968] NZLR 632 (SC), *Unison Networks Ltd v. Commerce Commission* CA 284/05 [2007] NZCA 49 (CA) and *Faloon v. Commissioner of Inland Revenue* Asher J High Court Tauranga CIV 2005-470-508, Asher J 30 March 2006. Cases which potentially qualify for recall include those in which (i) there has been a major legislative change or decision of high authority since the hearing (ii) counsel formerly failed to direct the Court to a plainly relevant legislative provision or decision of high authority or (iii) there is some other very special reason for recall. The jurisdiction is to be exercised only sparingly. A recall application is not a rehearing in disguise. Nor is it an opportunity for reframing the arguments previously presented, presenting fresh arguments which ought to have been advanced but in the event were not, or traversing fresh legislative provisions, authorities or arguments which could not have affected the overall result.

[17] Applications under s 390A are made not to the Court but to the Chief Justice who alone can exercise the jurisdiction[6] so it may be questionable whether the Court's powers to recall its judgments extend to that personal jurisdiction, but given the recall power is rooted in the Court's inherent jurisdiction as a superior Court of record and the fact that Chief Justice's orders on s 390A applications often include Court orders or orders affecting previous Court orders, it is no great extension of the Chief Justice's jurisdiction under s 390A to hold the jurisdiction includes the power of recall on the grounds set out in *Baudinet*.

[18] However, for the reasons discussed elsewhere, it is unnecessary at this point to consider whether any of the recognised grounds for recall apply in this instance.

Section 390A(3)

[19] Section 390A(3) reads:

> (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.

[20] It is by no means clear from the wording of the section how s 390A applications should proceed and be determined following a Land Division enquiry and the making of the

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6 *Baudinet v. Tavioni and Macquarie* [2012] UKPC 35, at 19, p8.

report to the Chief Justice and, in particular, whether the parties are entitled to participate further and, if so, to what extent.

[21] Practice to date concerning distribution of the Land Division reports has varied: some Land Division Judges direct they be sent to the parties, some do not, some do on occasions but not invariably. The practice of Chief Justices has similarly varied according to the circumstances of individual cases.

[22] What is clear is that, upon receiving Land Division reports on s 390A applications, Chief Justices may, "act upon that report or otherwise deal with the application" as appears appropriate in the individual case and they may do so "without holding formal sittings or hearing the parties in open Court".

[23] That, on its face, gives Chief Justices the power to finalise s 390A applications following receipt of a Land Division report without involving the parties[7] but, as the discussion group paper said:

> [26] It is considered that, being reports, (usually following evidence and submissions), from the Land Division to the Chief Justice to assist in the exercise of a jurisdiction exclusively vested in the Chief Justice, such reports should be sent initially to the Chief Justice alone, but that the default position thereafter should be that they be circulated to the parties by the Chief Justice for comment within a specified period. Such referrals may be accompanied by a tentative judgment indicating the possible result of the application. There will be exceptions to that position, such as when the Land Division's report is based on credibility issues reached after seeing and hearing witnesses, but circulation to the parties by the Chief Justice should be the norm.
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> [27] It should be emphasised that the prime purpose of seeking comment from the parties on the report is not to enable a re-run of arguments which failed to find favour in the Land Division hearing but to point to errors which might vitiate the Land Division recommendations, and to provide input concerning orders which need to be made to implement them.
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> [28] Following consideration of the further submissions, the Chief Justice will then decide the application, with the options including delivery of a judgment (with or without the seeking the Queen's Representative's consent depending on the age of the order being amended), the making of the

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7 But subject, in qualifying cases, to the consent of the Queen's Representative.

> consequential orders required (see s 390A(7)), or, possibly, referral of the matter back to the Land Division.
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> [29] That mode of proceeding would seem to best reconcile the dictates of natural justice and the terms of s 390A(3). In addition, in that it should reduce applications for recall following circulation of the Chief Justice's final judgment, it should abbreviate proceedings.

[24] It is also well settled that s 390A applications are not to be regarded as applications for rehearing, the equivalent of an appeal or justified because the losing party disagrees with the recommendation in the Land Division report but are dealt with in accordance with the following principles:

> [8] …
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> 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 which satisfies the grounds in s 390A. It is well-established from previous cases that this burden is not easily satisfied. Discharging that burden must also satisfy the following criteria.
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> The approach to be taken to applications pursuant to s 390A is:
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> (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) at any s 390A hearing;
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> (ii) The principle of Ommia Praesumuntur 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;
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> (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;
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> (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;
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> (v) The burden of proof is on the applicant to rebut the two presumptions above.
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> 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 such as:

> 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.
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> …

[25] To those principles needs to be added consideration as to what Parliament intended to achieve by enacting the referral and report provisions to s 390A(3).

[26] The answer appears to be twofold.

[27] The first purpose must have been to free Chief Justices[8] from the necessity to hold the frequently lengthy and complex hearings the numerous s 390A applications require, delegate that power to Land Division judges steeped in the intricacies of Cook Islands and Maori land law, and thus gain the double advantages of one person not having to hear every s 390A application and obtain access to the expertise of the Land Division Judges.

[28] The second purpose, and consequent on the first, is that, although the ultimate decision on any s 390A application is for the Chief Justice alone,[9] appropriate weight should be accorded the reports of such experienced Judges – particularly where they have reached views on credibility after hearing witnesses – so their conclusions and recommendations are likely to be adopted by Chief Justices unless parties can point to errors in their reports which vitiate their findings.

[29] In this case, Mr Holmes submitted that in every s 390A case the Chief Justice should refer the report to counsel for the parties for submission, consider all the documents filed at every earlier stage of the application and, where appropriate, hold a further hearing.

[30] For the reasons outlined, it is considered that, while possibly appropriate in certain cases, the procedure for which Mr Holmes argued goes beyond the requirements of s 390A, particularly in subs (3), is not to be adopted as the general rule and need not be followed at this point of Mr Hosking's application.

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8 All, to date, non-resident in the Cook Islands.

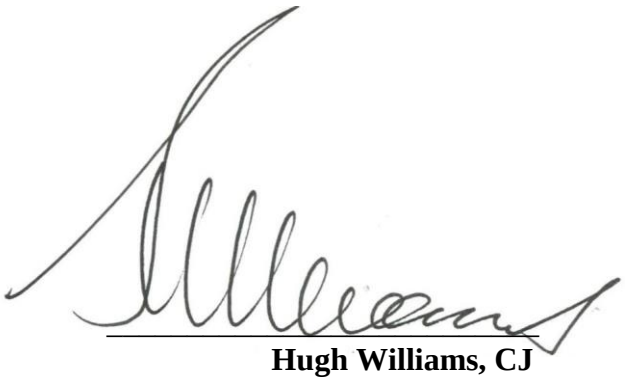
9 Subject to any input in qualifying applications from the Queen's Representative. None is known to have eventuated.

[31] That said, for the reasons set out in his detailed submissions, Mr Holmes submitted that Isaac J overlooked a number of passages of evidence and dealt with the issue of adoption relevant to the case in a way which might have been affected by the judgment of the Privy Council in *Browne v. Munokoa*[10] which was delivered on 16 July 2018, some months after Isaac J's report.

[32] In those circumstances, it is appropriate to refer file 7/2019 back to Isaac J for him to consider, on the documents now filed and the Privy Council judgment whether there is now material which disturbs the findings in his report and, if so, in what manner.

[33] It is to be emphasised that the referral back to Isaac J is solely because of the matters discussed in the last paragraph of this judgment and on the papers now comprising part of the file and that there is no suggestion the Judge should feel it necessary to convene a further hearing of the matter unless he chooses so to do.

[34] On the receipt of Isaac J's further report the application will be determined in what then seems to be the appropriate fashion.



Hugh Williams, CJ

[10] *Browne v. Munokoa* [2018] UKPC 18.