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

APPLICATION NO. 6/2017

IN THE MATTER	of Section 390A of the Cook Islands Act 1915
AND IN THE MATTER	of the land known as **TEREORA 106B, AVARUA**
AND IN THE MATTER	of an application to amend an order after title ascertained
BETWEEN	**NORMA NAPA MOROS and ETHEL NAPA SOOCHOON** on behalf of the successors of **AKAITI A TARA** Applicants
AND	**THE TUORO FAMILY** as descendants of **RANGI TUORO** deceased, the late **TINOMANA RUTA ATA TUORO ARIKI** and the late **JOHN ATA** Respondents

Date of Application:	19 June 2017
Date of referral to Land Division:	27 March 2018 (confirmed on 23 April 2019)
Counsel:	Nil
Appearances:	N N Moros & E N Soochoon as representatives of the successors of Akaiti A Tara, Applicants per Mrs Noeline Browne as agent. Maria Tuoro, Ngapoko Akaiti Rangi Tuoro and the Tuoro family for Respondents.
Minute (No's 1 to 7):	27 March 2018, 15 June 2018, 11 September 2018, 23 April 2019, 18 October 2019, 17 December 2019, and 12 March 2020.
Date of Judgment:	17 April 2020

JUDGMENT OF HUGH WILLIAMS, CJ

[0777.dss]

[A]: For the reasons appearing in the judgment, the application is dismissed.

[B]: Incidental matters, including costs, are dealt with as appearing in the judgment.

Application

[1] On 19 June 2017 Norma Napa Moros and Ethel Napa Soochoon (also described as Ethel Napa Moros) as representatives of the successors of Akaiti A Tara applied pursuant to s 390A of the Cook Islands Act 1915 (NZ) to amend a freehold order made on 10 January 1955 to the Ngati Putua clan in respect of Tereora 106B Avarua on the ground that Akaiti A Tara was omitted by mistake or error from the persons listed in the order. The freehold order followed a rehearing of an Investigation of Title in respect of the land, and appeals held on 10 March 1957.

[2] The respondents, the Tuoro family, opposed the application by notice of objection filed on 16 November 2017.

[3] The application was supported, not by affidavits but by comprehensive submissions filed on 21 June 2017 and opposed by the detail given in the respondents' notice of objection.

[4] The progress of the application has, as will be seen, being hampered by procedural issues but on 27 March 2018 (confirmed on 23 April 2019) the Chief Justice referred the application to the Land Division of the Court for inquiry and a report.

[5] Following a hearing on 9 July 2019, Coxhead J reported on 10 October 2019 giving it as his view that, for the reasons discussed in the report, the Chief Justice had no jurisdiction to make the orders sought because of the restrictive provisions of s 390A(10) but, going on to consider the facts in light of the pleadings and the evidence given at the hearing, the Judge concluded that Tara and Akaiti, her adopted daughter, were not omitted from a list endorsed by the Court in 1955 by mistake or error. Accordingly the applicants had failed to make out their case on the facts, a view he repeated in his second report dated 9 March 2020.

[6] For the reasons set out in this judgment and in Coxhead J's report, the Chief Justice accepts Coxhead J's recommendations, the application is therefore to be dismissed but, for the reasons which will appear, it is necessary to traverse the history of the matter in somewhat greater detail to underpin that conclusion.

Procedural

[7] As noted in Minute (No.1)[1] although the application had been served on seven members of the Parau line of Ngati Putua, another family in the Parau clan, the successors of Helen Taylor from the Tonaau line, had not been served because they lived in Tahiti. Those persons were directed to be served by way of an advertisement in French published in Tahiti, but that requirement proved difficult for the applicants to comply with, as Minutes No's 1 to 4 show, and were not completed until 29 August 2018 following which the referral was directed to be effected by the Registry.

[8] Even at that stage, Minute (No.4) commented that consideration might ultimately need to be given to whether the orders sought by the applicant were barred by s 390A(10).

[9] As noted, Coxhead J first reported to the Chief Justice on 10 October 2019. That report was summarised in Minute (No.5)[2] at the conclusion of which the parties were advised that the Chief Justice was minded to accept Coxhead J's recommendations but gave them an opportunity to file memoranda both on the s 390A(10) recommendation and, more generally, on Coxhead J's report.

[10] That led to Mrs Browne, as agent for the applicants, filing an 11 page memorandum[3], attaching 14 pages of additional documents and filing an 8 page supplementary list of documents the following day and to the respondents filing a memorandum dated 4 November 2019[4] continuing their opposition to the application, agreeing with the recommendations in Coxhead J's approach and asking for the 18 March 1955 order, a freehold order made on re-investigation of title, to remain as it was.

[11] The filing of that material led to the Chief Justice referring those memoranda and documents back to Coxhead J by Minute (No.6)[5] principally to ascertain the Judge's view as to whether the additional material could with the exercise of reasonable diligence on the part of the applicants have been put before the Judge at the hearing and whether it met the settled criteria for the reception of further evidence once a substantive hearing has

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1 At [4].
2 Delivered on 18 October 2019
3 Filed on 13 November 2019, received by Chief Justice 20 November 2019 (NZT). It does not deal only with Tereora 106B.
4 Received by Chief Justice on 8 November 2019 (NZT).
5 Delivered on 17 December 2019.

been concluded and before judgment has been delivered. The Judge was also asked to advise whether the additional material put before the Court by the applicants since the hearing altered the views on the facts expressed in the report of 10 October 2019.

[12] That led to Coxhead J's report of 9 March 2020 in which the Judge noted the lack of explanation from the parties as to why the material filed with the November 2019 memoranda was not filed before the hearing on 9 July 2019.

[13] Accordingly, by Minute (No.7)[6] Mrs Browne, as agent for the applicants, was given an opportunity to comment on the Judge's queries. That led to her filing a comprehensive nine page memorandum dated 3 April 2020[7].

Discussion and decision

General

[14] The relevant portions of s 390A read:

> [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 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 [Justice] 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.
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> [2] Any order made by the Chief [Justice] upon any such proceedings amending, varying, or cancelling any prior order shall be subject to appeal in the same manner as any final order of the Land Court but there shall be no appeal against the refusal to make any such order.

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6 Delivered on 12 March 2020.

7 Referred to Chief Justice on 7 April 2020 (NZT).

> [3] The Chief [Justice] 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.
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> …
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> [10] This section shall not apply to any order made upon investigation of title or partition save with regard to the relative interests defined thereunder, but the provisions of this subsection shall not prevent the making of any necessary consequential amendments with regard to partition orders.

[15] It is settled law that applicants under s 390A face the following hurdles[8]:

a) 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.[23] Discharging that burden must also satisfy the following criteria.

b) 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:

   (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;

   (ii) The principle of *Ommia Praesumuntur Rite Esse Acta* (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies. 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 regarded as having been correct, unless persuasive contrary evidence can be adduced.

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

c) 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]

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8 Slightly upgraded from the formulation appearing in many judgments.

> These principles … 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 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.[5]

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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].

5 The test of "exceptional circumstances" in *Tuake v Toeta* may state the position too highly but an error or mistake must be proved: *Teaia Mataiapo v Uirangi Mataiapo* 9/12 Weston CJ, 6.5.16 at [11].

[16] Also relevant for Chief Justices considering recommendations from the Land Division following a hearing is that it is a well-settled approach that, although they are not determinative, significant weight should be given to the views expressed by Judges experienced in the area of law involved who have had the advantage of seeing and hearing witnesses and making findings on that evidence.

[17] Factually, the background to this application was given by Coxhead J in his 10 October 2019 report as follows[9]:

> [4] On 21 June 1905, the Court made an order on investigation of title of Tereora Section 106B, Avarua. Willie Parau Browne then applied for and was granted a rehearing of that 1905 order. The decision regarding the reinvestigation of title was subsequently issued on 18 March 1955, which granted Makeanui Teremoana Ariki an interest in the land for the term of her office as Ariki and vested the remainder in the following 19 persons of Ngati Putua:[1]
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> 1. Rangi Tuoro
> 2. Ruta Ata
> 3. John Ata
> 4. Parau Taylor
> 5. Helen Taylor
> 6. Tamaiti Tupangai
> 7. Areariki a Te Kura
> 8. Mere Iotua

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9 At [4], [5], [8]-[10], [13]-[15].

9. Tupangai Iti
10. Tureiti Tupangai
11. Te Kura Tupangai
12. Putua Unu
13. Willie Parau Browne
14. Mereana Taripo
15. Ernest Taripo
16. Robert Taripo
17. Harry Taripo
18. John Taripo
19. Kairau Parakoti

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1 22 Minute Book 342-346 (MB 2/342-346).

[5] Both Willie Parau Browne and Makeanui Teremoana Ariki appealed against the orders made. According to the Court records, the appeal of Makeanui Teremoana Ariki was dismissed on 10 April 1957. However, the appeal of Willie Parau Browne was granted and Makeanui Teremoana Ariki was removed from the title.[2] This left the title in the names of the 19 owners listed in the 1955 decision.

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[8] The applicants … noted that the children and grandchildren of Tara's sisters, Mere and Tonaau, were included in the owners list in 1955. Mere's son Rangi Tuoro and her grandchildren Ruta Ata and John Ata were included with relative shares. Parau Taylor and Helen Taylor who are the daughters of Tonaau were also included in the title with their relative shares noted against their names. The applicants were bewildered therefore as to why Akaiti was not included when her cousins were.

[9] By way of explanation, the applicants advised that between the hearing in 1955 and the appeal in 1957, Willie Parau Browne had health issues and became unable to conduct the appeal himself. He enlisted the help of his cousin-in-law Tom Crummer. The applicants suggest that, given Tara Tuoro was deceased, Mr Crummer may have thought it inappropriate to add her name to the list. Further, Mr Crummer may not have been known or may have forgotten that Akaiti had been formally adopted by Tara. In his haste to prepare the names to be placed in the order, a mistake was made in not including Akaiti in lieu of her adopted mother Tara.

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2 3 Appellate Court Minute Book 15 (AMB 3/18).

[10] The applicants further submitted that the proposition that Akaiti was not included in the owners list because she was an adopted child and not a natural child does not hold weight. They argued that there is a long history, in terms of custom, of treating adopted children as if they were natural children, given there was generally a blood connection. They noted such custom has been recognised by the House of Ariki and pointed to the famous example of Pa Ariki being adopted by Tangiia. Such a situation however was quite different from a situation where there was no blood connection. Relevantly, Akaiti was a natural daughter of Willie Parau Browne who was a first cousin to her adoptive mother Tara. Willie Parau Browne and Tara were also brought up like brother and sister. Therefore, there was a blood connection between Akaiti and her adoptive mother Tara.

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[13] The respondents submitted that the orders are correct and that the share of Tara Tuoro was not omitted by mistake or error, therefore the order should not be amended. They submitted that the 19 persons named on the 1955 order are all biologically connected to the genealogical table of Ngati Putua, meaning they have been assigned their share through their blood right. This reflects the agreement reached by the family members of Ngati Putua.

[14] The respondents did not dispute that Tara, eldest sister of their ancestor Mere Parau Putua, was excluded from the title issued in 1955. They say that when examining the order and understanding the genealogical affiliations, it is clear that Tara and others from their own family were excluded given that they were deceased prior to the order in 1955 and they all passed away with no biological children.

[15] Similarly, the respondents did not dispute that Akaiti was legally adopted by Tara. However, on examination of the order there are no adopted persons included in the 1955 order. To the respondents it is clear that when the order was made it was determined solely upon biological affiliation and not adoption. To support this, they note that Akaiti did succeed to her biological father, Willie Parau Browne, with regards to the Tereora Section 106B Avarua interest. As a further example, they noted that Arthur Harry Browne was also adopted but was included in the land because of his biological connection to Mere rather than through his adoptive parents.

[18] Coxhead J then noted[10]:

[27] The applicants seek to amend the freehold order for Tereora Section 106B on the basis that it either mistakenly or by error excluded the share of Tara Tuoro and left her adopted daughter Akaiti off the title. The respondents argue however that the order is correct, and the land was vested only in those persons

10 At [27]-[28].

> entitled through their biological lines, excluding those who died without biological children and excluding adopted children.
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> [28] It is of note that Akaiti was an owner in these lands. She succeeded to her biological father Willie Parau Browne. There is no doubt that Willie Parau Browne was a man of influence and the minutes of the Court hearing in 1955 clearly show that he was a man of authority. However, the question is why was Akaiti not included in the 1955 list, particularly given Willie Parau Browne's presence at the Court hearing.

[19] Then, after noting a range of possible explanations for Tara or Akaiti's omission from the 1955 order, the Judge commented[11]:

> [30] However, these are all assumptions. The Court must assess the situation not on assumptions but on clear evidence. From the evidence, I am not satisfied that Akaiti was excluded from the list by mistake or in error. She may have been excluded from the list deliberately. The evidence is not conclusive either way. There is no clear evidence that a mistake or error was made.
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> [31] The list of 19 names is quite specific. However, the basis on which the Court vested the land in those particular owners is not clear. The Court minutes do not tell us who proposed the list, although the respondents have suggested that the list is a reflection of the decision reached by the Ngati Putua family. The applicants on the other hand have said it is a mystery to them as to why Akaiti was not included on the list. it is inconclusive whether Akaiti should or should not have been included on the list, but the fact is that she was not included. I cannot say with certainty that a mistake has occurred and the applicant has not convinced me that there has been an error made.
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> [32] While the Court records certainly show that Akaiti has succeeded to her adopted mother in other lands, that does not suggest to me that her mother Tara and Akaiti have for some reason been left out of this 1955 list by mistake or error. It seems more probable that Akaiti was not included on this list as she was to, and did in fact, succeed to her biological father, in the same way as her cousins succeeded to their biological parents. But once again that is a presumption which the evidence does not clearly conclude either way.

[20] On that basis Coxhead J recommended that, irrespective of what he viewed as a lack of jurisdiction to make the orders sought having regard to the provisions of s 390A(10), the application warranted dismissal on the facts.

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11 At [30]-[32].

[21] Circulation of that report to the parties led to the filing of the memoranda mentioned and referral of that material to Coxhead J.

[22] Dealing with whether the additional material could, with the exercise of reasonable diligence on the applicants' part, have been put before him at the hearing, Coxhead J noted that all the material was readily accessible as it was sourced from the Land Court record and could therefore have been put before the Court at the 9 July 2019 hearing. The only reason for its later submission was to rebut or amend Coxhead J's views in the first report. It was the applicants' attempts to redress the gaps in the evidence shown in the report and their subsequent searches of all Ngati Putua land files[12].

[23] The criteria for the reception of further evidence after hearing were reviewed by the New Zealand High Court in *Anton's Trawling Limited v. Dawson & Associates Limited*[13] where the Court said regard should be given to whether the party seeking to adduce the further evidence had shown on a reasonable basis a lack of earlier appreciation of its significance; the evidence is either conclusive of the case or likely to have a substantive bearing on a central issue; and how credible and reliable the evidence is likely to be. Those issues are to be set against a discretion to accept further evidence which should be exercised sparingly and against whether there is an adequate explanation for the failure to call it at the proper time. Those criteria are accepted.

[24] Coxhead J noted that the applicants' further evidence was not provided on the basis it had been recently discovered but because of a "review and reassessment of my report to essentially fill in gaps and findings I have made in that report"[14]. So the evidence could with reasonable diligence have been adduced at the hearing being derived from the Land Court record. He also considered that the "further material is not conclusive and does not have a substantive bearing on the central issue"[15].

[25] Mrs Browne's 3 April 2020 submissions relied on what she submitted are the complexities of s 390A matters combined with the time-consuming research they require, often using poor documentation, but conceded that the applicants thought they had presented their best case by the time of the 9 July 2019 hearing. She detailed the research

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12 At [5], [6] and [9].
13 [2016], NZHC 980, at [11].
14 At [12].
15 At [13].

undertaken by the applicants; what they mistakenly thought was not in contention between the parties before the respondents' 2 July 2019 notice of objection; and said the applicants were surprised at the "novel and unusual basis" of the objection, despite being alerted to the basis of the objection by an email some months before the hearing.

[26] After noting that the "matter has been approached by the applicants and agent in the nature of a 'crusade' for the Family to restore TARA and her daughter AKAITI to their rightful place in the freehold order of 1955"[16], she conceded that[17]:

> "With the benefit of hindsight, the applicants accept the objections ought to have been addressed more thoroughly, by means of case law on Adoption and the rights of Adopted children of blood connection to their adoptive parent/s".

[27] Mrs Browne also commented on the factual complexities in the matter as aired at the 9 July 2019 hearing, a submission borne out by perusal of the transcript.

[28] In light of all of that, irrespective of whether there is jurisdiction for the Chief Justice to make the orders sought by the applicants, their application would have failed on the facts. It has been found, after full examination of the issues, that they failed on the evidence adduced at the 9 July 2019 hearing, against the presumptions and onuses earlier set out, to demonstrate that a "mistake, error, or omission" was made when the challenged 10 January 1955 freehold order was made. The material later put before the Court failed the test for its admission in evidence but, even had that not been the case, it would have made no difference to the recommendation and result.

Section 390A

[29] Mrs Browne submitted that s 390A is a complex measure, time-consuming and arduous to research prior to filing, lengthy and procedurally difficult to manage and present in Court, particularly when the right of audience is expanded beyond qualified lawyers to registered land agents and, not uncommonly, to litigants in person, the last not usually being persons whose prior experience in the area is predominantly in filing and conducting Court cases.

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16 At 66.
17 At 26.

[30] The section has a lengthy history. It was enacted 70 years ago[18]. It might be thought that applications under the section would be diminishing given the decades it has been in force, but the present number of outstanding applications suggests that not to be the case.

[31] Not only is the section so broadly worded that it can appear seemingly contradictory and not differentiating clearly between the various phases through which a s 390A application can pass, but its provisions have seldom been the subject of judicial consideration at an appellate level and, as far as is known, it is only in recent years that attempts have been made to analyse and codify the procedures which should attach to s 390A applications[19].

[32] In addition, the section is now surrounded by the questions of onus and legal presumptions set out earlier which do not appear in the terms of the section itself.

[33] Another hurdle facing applicants is that s 390A is intended as a "once for all" regime with successive applications being discouraged[20]. It is also important for applicants to realise that the Rule in *Henderson v. Henderson* applies to s 390A applications[21]. The Rule requires parties and their "privies" to bring forward their entire case at the outset, and they will only in special circumstances be permitted to raise an issue which might have been brought forward previously as part of the matter in dispute but which was omitted. The Rule applies not just to issues actually raised by the parties but "every point which properly belonged to the subject of litigation in which the parties, exercising reasonable diligence, might have brought forward at the time". Without very good reason, the Rule precludes parties litigating on one footing and then, when that proves unsuccessful, trying a different approach with amended pleadings and altered evidence.

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18 By s 16 of the Cook Islands Amendment Act 1950 (NZ).

19 One such was a 5 November 2019 discussion paper.

20 *Teariki v. Sanderson*, CA 1/11, 19 October 2011, at [18] speaking of the 13 November 2007 CA decision in *Teariki v. Strickland* concerning s 450.

21 *Henderson v. Henderson* (1843) 3 Hare 100; *Teariki v. Sanderson*, at [23]-[26]; *Baudinet v. Tavioni* [2012], UKPC 35, at [25]-[29]; *Tavioni v. Baudinet*, CA 1/309, 10 July 2009, at [34].

[34] The possible application of the Rule in *Henderson v. Henderson* led to the second reference to Coxhead J following the November 2019 exchange of memoranda, but the second report from the Judge makes clear that the additional material could have been made available at the hearing and accordingly the evidence could have been part of the case had reasonable diligence been exercised by the applicants before 9 July 2019. On that basis, the additional material must be disregarded to the extent it endeavours to alter or enlarge the issues raised by the application as at 9 July 2019.

[35] To that must be added Coxhead J's finding that, even had the additional material been before him at the 9 July 2019 hearing, it was not conclusive and would have had no substantive bearing on the central issue in the case.

[36] That observation, being accepted, supports the Chief Justice's finding that, irrespective of jurisdiction, the applicants have failed to make out their case factually. The application would have been dismissed on that ground.

Section 390A(10)

[37] Section 390A(10) precludes the Chief Justice making orders under the section which relate to orders on investigation of title or partition except "with regard to the relative interests defined thereunder".

[38] The correct interpretation to be accorded to that phrase has now been considered in several decisions: in particular Re. Tuoro 27A Takitumu, *Beren v. Teava Iro* (known as "*Turoa*")[22] and Re. Raupa 87E3B Arorangi, *Tuake v. Toeta* (known as "*Raupa*")[23], *Wichman v. Teamaru*[24], and his decision mentioned in Coxhead J's initial report in this matter, *Tauei v. Rangatira* – Ngakuiao 88B[25].

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22 Land 533/2002, s 390A 3/2009.
23 Land 347/1998, s 390A 1/2011.
24 390A 11/2012, 20 August 2019, Hugh Williams CJ.
25 HCCI (Land Division) App 334/2016, 3 May 2019.

[39] The first two of those decisions – which were said to be in conflict – were considered in *Wichman* and the conclusion was[26]:

> [28] The observation that s 390A(10) debars intervention "with orders creating title such as orders made upon an investigation of title or upon partition" and confers power only to amend or cancel "orders in relation to the relative interests defined in the orders of title" is persuasive, as is the consideration as to whether, in partition cases, s 390A(10) gives power to "disrupt the titles created or simply consider the relative interests determined within the titles created". In *Raupa*, because the two parties received sole interests in the titles created by the partition order, no relative interests were created and there was therefore no jurisdiction to intervene under s 390A(10). In *Turoa*, though only a part-file was available, it may be that the principle is correct, but its application may not be, and its application was diverted by the matter being by consent.
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> [29] At all events, the principle is that, if a partition order or one on investigation of title, creates a solely owned title, s 390A(10) operates as a bar to the Chief Justice making any order under s 390A, even if the error is manifest or the matter is one of consent. If, however, the order on investigation of title or the partition order creates relative interests within the titles created, challenges which fit within the balance of s 390A can be brought and are not debarred by s 390A(10).

[40] Mrs Browne endeavoured to distinguish those decisions from the present case but Coxhead J, after reciting the straightforward factual background cited earlier observed:

> [20] The first issue that arises in this case, is whether the Chief Justice has jurisdiction to amend the relevant order pursuant to s 390A of the Cook Islands Act 1915, as sought by the applicants.
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> [21] The order made in 1955 was not simply a vesting order but was a freehold order made on the reinvestigation of title to Tereora Section 106B. The original investigation of title order made in 1905 was annulled by the Court and a replacement issued which vested the land in Makea Teremoana Ariki for the term of her office with the remainder to those 19 persons listed. On appeal in 1957, the order was amended to remove the interest of Makea Teremoana Ariki, leaving the title in the named 19 persons as owners. Therefore, the order which the applicants allege was made in error and seek to amend, is an order on investigation of title.
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> …

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26 At [28]-[29].

> [25] In the present case, while the grant of the amendment sought by the applicants would affect the relative interests in the land, what they essentially seek is to challenge the basis of the orders made on investigation of title. That is, they do not seek to simply adjust shares between the owners but to alter the basis on which ownership was awarded to the named persons, by the inclusion of either Tara or Akaiti as an additional owner. I consider therefore that the application is not in relation to relative shares defined in the order and that the Chief Justice does not have jurisdiction to make the orders as sought.

[41] The Chief Justice agrees with Coxhead J. On the facts in this matter, as he said, the "order which the applicants allege was made in error, and seek to amend, is an order on investigation of title" but the applicants "do not seek to simply adjust shares between the owners but to alter the basis on which ownership was awarded". Accordingly, the Chief Justice does not have jurisdiction to make the orders sought.

[42] On that basis, not only would the applicants have failed on the facts – both those put in evidence up to and during the hearing on 9 July 2019 and, to a limited extent, by way of the November 2019 memoranda – by failing to satisfy the onus seen against the presumptions earlier mentioned, the application would, in addition, must be dismissed for lack of jurisdiction under s 390A(10) to make the orders sought.

Result

[43] This application, filed in 2017, challenges a freehold order made on 10 January 1955, being an order "dated more than five years previously to the receipt of the application" thus, under s 390A(8), potentially requiring the consent of the Queen's Representative before any order can be made under s 390A.

[44] In some recent cases where dismissal of a s 390A application is envisaged, it has been considered prudent to refer those applications for the Queen's Representative's consent, even though dismissal is contemplated, given that people's property rights are involved.

[45] However, further consideration has been given to the terms of s 390A – especially subs (8) – and it has been decided to discontinue that practice.

[46] The reasons include the following.

[47] First, the practice, in the terms of the subsection, runs counter to the second sentence of s 390A(8) which gives the Chief Justice "full power without [the Queen's Representative's] consent to dismiss any such application or to refer it to the Land Court for inquiry and report". The second premise of that second sentence conflates the Chief Justice's power to dismiss an application under s 390A at an early stage and without referring it to the Land Division for inquiry and report and the power of the Chief Justice to deal appropriately with an application, including by dismissal, following receipt of such reports but, even so, the second sentence of subs (8) clearly gives Chief Justices "full power … to dismiss any such application" and such an outcome requires no consent from the Queen's Representative.

[48] In a broader sense, the power to make orders under s 390A is dependent on applicants demonstrating a generic "mistake, error, or omission" or an order leaving or effectively leaving something undone or unintended, but the power is limited by the restrictive bar on making orders affecting orders on investigation of title or partition in s 390A(10) and is influenced by the heading to s 390A: "Amendment of orders after title ascertained".

[49] All those provisions are consistent with the principles set out earlier by which s 390A applications are decided, particularly the principle that earlier orders of the Court should be regarded as binding and conclusive on all parties, the general principle of finality and certainty of decisions and the heading to the section which plainly implies that once title has been ascertained it should, without good reason, be regarded as conclusive. It is only in clear cases where a mistake, error, or omission which vitiates the challenged earlier order can be established that the *status quo ante* should be disturbed and the property rights of existing landowners – often of many years standing – disrupted.

[50] Those observations as to principle – especially that of finality – are also consistent with s 390A(2)[27] saying orders dismissing applications under the section are un-appealable.

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[27] Assuming the power to "dismiss" is synonymous with the power of "refusal".

[51] For all the reasons appearing throughout this judgment, there will be a formal order that the application in this case is dismissed.

[52] In the circumstances, it seems unlikely that costs will be sought but if that assumption is incorrect, memoranda may be filed with that from the respondents being due 25 working days after delivery of this decision, and those from the applicant within a further 10 working days.

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Hugh Williams, CJ