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

APPLICATION NO. 390A 6/2015

IN THE MATTER	of Section 390A of the Cook Islands Act 1915(NZ)
AND	
IN THE MATTER	of the land known as **RAUTAI 127A NO.1, AVARUA**
AND	
IN THE MATTER	of an application for Revocation of a Succession Order dated 27 August 1953 to the interests of ROPU

BETWEEN **JIMMY TEOKOTAI**

Applicant

AND **IAN KARIKA** on behalf of the Kamoe family

Respondent

Date of Application:	21 April 2015
Date of Referral to Land Division:	31 May 2016
Date of Hearing in Land Division:	12 October 2020
Date of Land Division Report:	24 August 2021 (NZT)
Appearances:	Mr T Nicholas for Applicant Mrs T Browne for Respondent
Date of Judgment:	3 June 2022

JUDGMENT OF HUGH WILLIAMS, CJ

Application and procedural

[1] This Judgment deals with an application under Section 390A of the Cook Islands Act 1915 (NZ) which the Applicant, Mr Teokotai, filed on 21 April 2015 seeking revocation of a Succession Order made on 27 August 1953 to the interests of ROPU in the land known as Rautai 127A No. 1, Avarua.

[2] The application was referred by Weston CJ to the Land Division of the Court on 31 May 2016 for inquiry and report. It was heard by Savage J on 12 October 2020, and, in the report by the Judge dated 24 August 2021, he recommended, for the reasons appearing in the report, that the application be dismissed.

[3] In what has now become standard practice, by Minute (No. 1)[1] the report was referred to counsel who appeared at the inquiry for the filing of submissions as to why they contended that the Judge's recommendation should, or should not, be accepted, making the point that the opportunity was "not to permit counsel an opportunity to rerun submissions made before Savage J, which did not commend themselves to him", but merely to give counsel the opportunity to "point out any errors or other issues which, in their submission, might vitiate the report and lead to the recommendation not being accepted."

[4] Mr Nicholas, counsel for Mr Teokotai, filed his submissions on 19 January 2022, and Mrs Browne, counsel for the respondent, followed with submissions dated 4 March 2022. The content of those submissions is considered later in this Judgment.

Legal principles

[5] This being an application under s 390A, it is pertinent first to recount the provisions of s 390A(1). They read:

> **390A. Amendment of orders after title ascertained** – (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 Judge may,

[1] Issued 27 August 2021.

> 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.

and, secondly, to recount the well-established principles as to the proper approach to Section 390A applications, which are[2]:

> [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: …
>
> > 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.
> >
> > (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 Omnia 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 deemed to have been correct;
> >
> > (iv) 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 … 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 Justice deems necessary or expedient to remedy.

…

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

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[2] Adapted from *Hosking v Marearai: Judgment No 4 (Costs)* 390A 7/16, 11 November 2020 and similar cases.

[26] The answer appears to be twofold.

[27] The first purpose must have been to free Chief Justices 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,[3] 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.

Savage J's Report

[6] Savage J's Report commenced:

Introduction

[1] The applicant, Jimmy Teokotai, has applied to revoke a succession order over land known as Rautai 127A No. 1, Avarua, which was made in favour of Moemaunga (also known as Ikunga) for succession to Ropu (also known as Te Rotopu) in 1953. The applicant claims that erroneous evidence was put before the Court that led to Moemaunga succeeding to Ropu, instead of the descendants of Ropu's natural siblings, including the applicant and his family.

Background

[2] Manu Kamoe had an interest in Rautai 127A1 and passed away in 1914. He was succeeded to by his natural daughter, Moemaunga, and unregistered adopted children, Korea (also known as Kouria) and Manu (also known as Rua).[4]

[3] It appears that Ropu had been at some stage an additional unregistered adopted child of Manu, or a feeding child, but was not mentioned at Manu Kamoe's succession hearing. When Ropu passed away without issue, his interests were succeeded to by Moemaunga, his adoptive sister.[5] Moemaunga has since passed away without issue.[6]

[4] After Moemaunga's succession to Ropu's interest in Rautai 127A1, Justice of the Peace, John Kenning, granted a succession order to this land interest to the

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

4 MB 8/150 8 January 1917.

5 MB 22/135 27 August 1953.

6 MB 26/213 25 January 1965.

> applicant, Jimmy Teokotai, and his family.[7] This order was then revoked in 2007 by Justice Hingston.[8]
>
> [6] The issue is whether there has been a mistake, error or omission in the evidence presented to the Court in respect of the 1953 succession, and, if so, whether the Court should use its discretion to remedy the mistake error or omission"

[7] After noting Hingston J's revocation decision of 20 February 2007, the Judge then recounted[9] the Minute Book entry for the succession to Ropu and concluded[10] by saying there was no evidence to show a mistake, error, or omission in 1953 for Moemaunga's succession to Ropu's interest in Rautai 27A1:

> [17] It is unclear whether Ropu's blood siblings or their descendants were represented at the succession hearing for his interest in Rautai 127A1. If the interest had come to Ropu through his natural father, then presumably Ropu's natural siblings would also have been named as owners then the partition was granted; however, it does not appear that the names of Ropu's natural siblings are among the owners listed."
>
> [18] Accordingly, it does not appear that there is sufficient evidence to show that there was a mistake, error or omission in the order made in 1953 for Moemaunga's succession to Ropu's land interest in Rautai 127A1.

[8] The Judge noted the evidence given before him was "equivocal and does not meet the standard of proof required for such an application".

Submissions

[9] Mr Nicholas' submissions in effect reargued the approach for which he had contended in the inquiry as to the source of the land, and whether Ropu was an adopted, but unregistered, child of Manu Kamoe, and reproduced various extracts from Minute Books to support his submissions.

[10] Mrs Browne's submissions contended that Mr Nicholas had misunderstood the issue before Savage J, his submissions repeated those made to the Judge – plus including

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7 9 December 2002.
8 Application 74/2007 (20 February 2007).
9 At [16]
10 At [17], [18].

matters not referred to at the inquiry – and misinterpreted the evidence given in Court, particularly in 1953 and 1963.

Discussion and decision

[11] This matter requires no extensive consideration to conclude that Savage J's recommendation was appropriate and should be accepted. The matters raised by Mr Nicholas in his submissions either were, or could have been, raised at the inquiry, as Mrs Browne asserts.

[12] The evidence before him was carefully assessed by Savage J, who correctly identified the issue for his inquiry. There is nothing in the material either before the Judge or produced since to deflect the tentative conclusion that the recommendation for dismissal should be accepted.

[13] The application is dismissed accordingly.

[14] If there is an application for costs, submissions are to be filed by:

(a) the respondent **within 30 working days** of delivery of this Judgment, and

(b) the applicant, **within a further 15 working days**

Hugh Williams, CJ