IN THE COOK ISLANDS COURT OF APPEAL
HELD AT AUCKLAND, NEW ZEALAND

APPLICATION NO 337/98
CA 1/01

IN THE MATTER of the land known as **MATAOTEARE & AREPORIA SECTION 6E, NGATANGIIA**

BETWEEN **PHILLIP NICHOLAS** for and on behalf of the Objectors being the Nicholas family

Appellants

AND **TUKURANGI HOSKING** for and on behalf of the issues of **PIAKURA**

Respondents

Hearing: 11 December 2002

Coram: Casey JA (Presiding)
Barker JA
Smellie JA

Counsel: A M Manurangi and C Petero for Appellants
T P Browne for Respondents

Ruling: 11 December 2002

INTERIM JUDGMENT OF THE COURT

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[1] When this appeal was called before us we put it to Mr Manurangi that he faced two hurdles. First, he had to obtain leave to enlarge the time for filing the appeal and, secondly, the submissions that he had filed indicated that he proposed to

argue a jurisdictional point which had not been heralded in his original Notice of Appeal. Mr Manurangi frankly acknowledged that he had stumbled upon his additional Point of Appeal within the last week or so. The point in a nutshell is this. In March 1907, as is recorded in the judgment under appeal, ancestors of his clients were declared the owners of the land in dispute. In July 1907, the March order was re-visited and ancestors of Mrs Browne's clients were awarded a $1/13^{th}$ share in the land. The Judge in the Court below regarded the July order as having been made under the provisions of the Cook Islands Act 1915 which would have had the effect of securing to the ancestors of Mrs Browne's client, native freehold land which is close to, if not the equivalent of, fee simple under the Crown.

[2] What Mr Manurangi has unearthed is that the 1915 Act was not in force at the time of the making of the second order in 1907 and he wishes to challenge that order's validity. We pointed out to Mr Manurangi that an adjournment was all but inevitable if he was going to be allowed to argue that point, but that he still had to get leave to enlarge his appeal. Pursuant to s 416 of the Cook Islands Act 1915, there is jurisdiction in the High Court (Land Division) to validate invalidly made orders on grounds of equity and good conscience. Thus, even if Mr Manurangi's contention is ultimately upheld, Mrs Browne's clients may still achieve validation. Mr Manurangi acknowledged that, if he was granted special leave pursuant to Article 60(3) of the Constitution, it would be on terms.

[3] Having heard Mr Manurangi on all these issues, we then invited Mrs Browne to indicate her view. We made it clear that, come what may, she would get an adjournment today. Thus the issue was simply whether she wanted the matter adjourned so that she could prepare to meet the new ground which Mr Manurangi would be allowed to advance, pursuant to special leave. Or whether she saw it as more advantageous to her clients to have the existing grounds of appeal adjourned and the balance of the case sent back by this Court to the High Court pursuant to s 56 of the Judicature Act for a new trial on the additional July 1907 jurisdictional point. In the High Court, in that eventuality, Mrs Browne would have the opportunity to seek validation if the new point went against her. Both parties would then be free to pursue further recourse to this Court if dissatisfied, in conjunction with the adjourned grounds of appeal.

[4] We took a short adjournment and then, having heard further from both counsel, ordered as follows:

[1] The application to amend the Notice of Appeal to one seeking special leave to appeal under Article 60(3) of the Constitution will be granted. The Notice of Appeal is to be amended to include the added ground relating to the validity of the July 1907 order.

[2] The question of the validity of that order is remitted to the Land Division of the High Court for determination as part of the case in respect of which this special leave application is made.

[3] The Respondent will have leave to apply to the High Court, if necessary, for validation of that order under s 416 of the Cook Islands Act 1915.

[4] The Respondent will have costs in any event of $1000 for preparation and attendance at the hearing today together with any expenses to be settled by the Registrar if the parties cannot agree.

[5] This appeal will be adjourned, with leave to either party to bring it on after the hearing in the High Court, on 21 days' notice.

[6] If the High Court application in paragraph [2] above does not proceed in a timely manner, then the appeal can be brought on by application in the ordinary way, but we do not expect that will be necessary.

Casey JA | Barker JA | Smellie JA

Solicitors:
T M Manurangi, Avarua for Appellant
Browne Gisbson Harvey, Rarotonga PC for Respondent