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

APPLICATION NO. 3/2011

IN THE MATTER	of Section 390A of the Cook Islands Act 1915
AND IN THE MATTER	of the land known as **AREAU 35, ARUTANGA, AITUTAKI**
AND IN THE MATTER	of an application by **MATA URI PUATI** for a rehearing of an order given by Mr Justice Dillon given on 8 January 1998 Applicant
AND IN THE MATTER	of **MAINA TRADERS LIMITED** Respondent

APPLICATION NO. 2/2012

IN THE MATTER	of an application by the descendants of **PATI ARIKI** for a rehearing of an Order on Investigation of Title made on 22 August 1903 and for a rehearing of an Order for Amendment of Title made on 22 September 1939 Applicant
AND IN THE MATTER	of the descendants of **NGARIKI & TEKURA URU MAKEA** Respondent

APPLICATION NO. 3/2012

IN THE MATTER	of an application by the descendants of **PATI ARIKI** for a rehearing of an Order made on 8 January 1998 confirming a lease dated 20 January 1998 Applicant

Date of Application: 13 October 2016

Appearances: Mr T Moore as agent for the Applicants (2/2012 & 3/2012) and for the Respondent (3/2011)
Mrs T Browne for Respondent (2/2012 & 3/2012) and for Applicant (3/2011)

Minute (No.1): 12 July 2012
Minute (No.2): 17 March 2016
Minute (No.3): 11 September 2018
Judgment: 10 December 2018

JUDGMENT OF HUGH WILLIAMS, CJ

[WILL0519.dss]

Procedural

[1] It is unnecessary to recount the history of these three longstanding applications under s 390A of the Cook Islands Act 1915 as they fully appear in the minutes of Weston CJ and the present Chief Justice dated 12 July 2012, 17 March 2016 and 11 September 2018.

[2] The matters remaining outstanding are questions of costs in one of the applications and the closure of the files but in that regard it is noted that although these three s 390A applications are being completed by this judgment, partition and confirmation applications in relation to the land remain outstanding and are to be heard at some stage at a sitting of the Land Division of the Court on Aitutaki.

Application No. 3/2011

[3] The present Chief Justice does not have anything like the full file in this matter but that is immaterial as it – then intituled as Application 104/2011 – was dealt with on an urgent basis by Weston CJ on 9 September 2011 and, in an oral judgment delivered that day, the former Chief Justice refused the application to refer the matter to the Land Division of the Court, noted that the applicant had withdrawn an interim injunction application and recorded that the respondent had "succeeded on all fronts and is entitled to costs".

[4] After receiving submissions on behalf of the parties, on 26 February 2013 Weston CJ delivered a judgment as to costs ordering the applicant to pay the respondent $1,600 in that regard.

[5] Application 3/2011 is accordingly at an end.

Application No. 2/2012

[6] This application, filed on 20 February 2012, sought a rehearing of the orders made on 22 August 1903 and 22 September 1939 as listed in the intituling.

[7] The then position was detailed in Weston CJ's minute of 12 July 2012 including that the applicant wished to withdraw the application "without prejudice" which, it later appeared, meant that it was to be on the basis that the application could be renewed should circumstances indicate that to be the appropriate course.

[8] As Weston CJ noted (para 11) of his 17 March 2016 minute, litigants can withdraw their application at any time subject to the possibility of costs and, in that minute (para 12) he granted leave to withdraw the application subject to any possible costs issues, and sought memoranda on that topic.

[9] Counsel having failed to agree on questions of costs, in Minute (No.3) of 11 September 2018 a timetable order was made in relation to memoranda on costs but the Minute noted (para 8) that there were already costs submissions on 3/2011 and 3/2012 on which counsel could rely.

[10] Pursuant to that minute, Mrs Browne, counsel for the objectors, filed submissions dated 13 September 2018 drawing attention to her submissions of 16 May 2012 in 3/2012 setting out the relevant law, attaching her firm's note of costs in respect of 2/2012, briefly outlined the hearing of the application and submitted the application should never have been filed because s 390A(10) is a jurisdictional bar to s 390A applications which may not be made in respect of "any order made upon investigation of title or partition save with regard to the relative interests defined thereafter". She sought indemnity costs.

[11] In a memorandum dated 27 November 2018 Mr Moore, agent for the applicants, said that application 2012 also challenged an order amending title and drew attention to his submissions dated 22 April 2015 containing submissions that Mrs Browne wished to "piggyback" this matter on the outstanding applications. He submitted it was her desire to

have "agent's clients removed totally from ownership of the land that kept 2/2012 alive after it had become redundant". He suggested any claim for costs was more than offset by the applicant's costs "to keep the redundant matter from being used to remove them as landowners from ownership of the land".

[12] While the matters raised by Mr Moore have a certain cogency, it remains the fact that there are still outstanding issues concerning this land which will require determination by the Land Division and that, whatever Mrs Browne's clients may have wished at an earlier stage of the matter, all parties now agree that 2/2012 is at an end by having been withdrawn and that the applicants faced a significant procedural bar to it in any case given the terms of s 390A(10).

[13] Further, there being no suggestion that costs in one of these applications should be set off against costs in the others, that, too, is no bar to the making of an order for costs.

[14] In those circumstances, as against an account for $2,669.50 including VAT and disbursements, there will be an order that the applicants pay costs to the objectors in the sum of $1,250.

Application No. 3/2012

[15] Mr Moore and Mrs Browne indicated in their most recent memoranda that they do not wish to file any further submissions beyond those filed in this matter on 16 May 2012.

[16] Application 3/2012 is likewise an application brought pursuant to s 390A for a rehearing of the orders listed in the intituling to this judgment. It was supported by a bundle of documents filed by the respondents on 30 April 2012.

[17] Mrs Browne's costs submissions[1] drew attention to that her client filed a Notice of Opposition on 30 April 2012 following which the agent for the applicants notified the Court on 15 May 2012 that he would seek leave to withdraw the application. After dealing with the standard cases relating to awards of costs and exhibiting her firm's fee note of $996.38 including VAT, she detailed the history of 3/2011, Maina Traders

[1] Filed on behalf of Maina Traders Limited, the lessee of the land under a lease dated 20 January 1998

Limited's application to determine capital value which, with a counter application, was heard on 20 February 2012. That led to 3/2012 being filed the same day. She referred to the interrelationship between the applications shown by the transcript in application 225/2011 heard on 20 February 2012 to suggest that the reserve judgment in that case was still outstanding on 16 May 2012 and, because 3/2012 appeared to be the second attempt to rehear the 1998 order in the intituling, it was an abuse of process and should never have been filed. Indemnity costs were sought.

[18] Mr Moore's submissions dated 28 May 2012, after commenting on what has become a Practice Note issued by David Williams CJ on 12 February 2008 submitted that Maina Traders' lease was under no immediate threat in 3/2012 because of the time normally taken for s 390A applications to be determined and, in response to Mrs Browne's submission that the application was an abuse of process, Mr Moore submitted that 3/2011 was a "narrow challenge to the validity not of the deed itself but to the validity of the Meeting of Assembled Owners that led to the application for confirmation of the deed" and drew attention to Weston CJ's comment that there was an arguable error in the calling of that meeting. He therefore submitted that the question before the Court in 3/11 was whether the quorum of the MOAO was satisfied, a submission which seeks to contradict Weston CJ's dismissal of the application. He submitted that Maina Traders did not incur costs of any significant amount because it acted before a complete application including submissions and affidavits had been filed. The submissions for indemnity costs, he submitted, were nothing more than a chronology of the documents filed by the parties, a submission he supported with detail of the various matters dealt with by the Court.

[19] Acknowledging that withdrawal is normally treated, for costs purposes, as a discontinuance, he submitted that Maina Traders, not having been impleaded initially, incurred no significant costs by filing a Notice of Opposition, and that was premature. Costs of obtaining initial advice were all that was justified and counsel's fee for a 30 minute consultation was all that was reasonable.

[20] As noted above, any litigant is entitled to withdraw from their participation in any litigation but doing so jeopardises them for costs in the same way as litigants who discontinue their proceedings.

[21] While Mrs Browne's firm's fee note may, if viewed just in the context of 3/2012, contain items which go beyond the strict confines of that application, as is obvious from the terms of the various minutes and judgments in these three matters, they are interrelated and it is not unreasonable that the cost to be allowed in 3/2012 should go beyond those occurred in filing the Notice of Opposition in that application.

[22] There will be accordingly an order that the applicants in 3/2012 pay the costs of the objectors in the sum of $650 plus disbursements of $12.

Hugh Williams, CJ