

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

**APPLICATION NO. 104/18**

**IN THE MATTER** of the Declaratory Judgments Act 1994

**AND**

**IN THE MATTER** of the land known as **ARERENGA  
SECTION 7, ARORANGI**

**AND**

**IN THE MATTER** of an Order on Investigation of Title  
made by the Court on 6 August 1907

**BY**

**TINOMANA ARIKI** of Rarotonga,  
Landowner (Atu Enuā)

**Applicant**

Hearing: 19 April 2018

Appearances: Mr T Moore for the Applicant  
Mrs T Browne for the Objector

Decision: 20 May 2019

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**DECISION OF JUSTICE W W ISAAC**

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**Introduction**

[1] This decision relates to an application by Tinomana Ariki for declaratory orders. The applicant seeks to interpret an order of investigation of title made on 6 August 1907 in respect to Allotment 7, Arerenga.

[2] That order stated:

It is hereby ordered that the Native, whose name is set out in the first column of the schedule endorsed hereon, is, and is hereby declared to be together with his direct descendants the owner of an occupation or residential right in the parcel of land to be called or known as Allotment 7 Arerenga, Arorangi containing 61 Ars more or less and delineated in the plan numbered 525 subject to payment to Tinomana owner of the said land and her successors of the sum of one shilling on the first day of January in each year. And it is further declared that upon the death Rangi Ati or failure of his direct descendant the said land shall revert to the said Tinomana or her successors.

[3] The applicant seeks the following orders:

- (a) That the terms and conditions of the Order on Investigation made by the Court on 6 August 1903 provide that upon the death of Rangi Ati or failure of his direct descendants the land automatically reverts to Tinomana or her successors.
- (b) That upon the death of Rangi Ati or failure of his direct descendants the mana of the atu enua of the land comes into force automatically.
- (c) That upon any finding by this Court that the direct descendants of Rangi Ati have failed, the residential title granted to Rangi Ati and his direct descendants by the Order on Investigation of Title made on 6 August 1903 shall be deemed to be at an end.
- (d) That upon the residential title of Rangi Ati being deemed to have come to an end, all persons may deal with Tinomana, as atu enua, and as a corporation sole, but in any case, as the sole owner of the fee simple of the land Arerenga Section 7, Arorangi.

[4] If the orders are made as sought, the applicant will then seek to challenge succession orders of 1942 and 1965 under s 390A of the Cook Islands Act, as well as the succession order to Arerenga 7 as atu enua. It should be noted that these applications under s 390A had already been filed at the time of hearing.

### **The Law**

[5] Section 3(1) Declaratory Judgments Act 1994 provides:

**3. Declaratory orders on originating summons** – Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor-General in Council under statutory authority, or any bylaw made by a local authority, or deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or

Where any person claims to have acquired any right under any such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof, -

such person may apply to the Supreme Court by originating summons . . . . for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or of any part thereof.

[6] Section 4 Declaratory Judgments Act 1994 provides:

**4. Effect of declaratory orders** – Any declaration so made on any such originating summons shall have the same effect as the like declaration in a judgment in an action, and shall be binding on the person making the application and on all persons on whom the summons has been served, and on all other persons who would have been bound by the said declaration if the proceedings wherein the declaration is made had been an action.

[7] Section 9 Declaratory Judgments Act 1994 provides:

**9. Judgment or order in anticipation of any act or event** – Any declaratory judgment or order given or made in pursuance of this Act may be given or made by way of anticipation with respect to any act not yet done or any event which has not yet happened, and in such case the said judgment or order shall have the same binding effect with respect to that future act or event, and the rights or liabilities to arise therefrom, as if that act or event had already been done or had already happened before the said judgement or order was given or made.

[8] Section 10 Declaratory Judgments Act 1994 provides:

**10. Jurisdiction discretionary** – The jurisdiction hereby conferred upon the Supreme Court to give or make a declaratory judgment or order shall be discretionary and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

## **The Issues**

[9] Both counsel have raised a number of issues in the submissions filed.

[10] In my view the two issues which must be considered before all others include:

(a) Does the Court have jurisdiction to make the orders sought?

(b) Should the Court exercise its discretion to make the declaratory orders sought?

## **Jurisdiction**

### *The Applicant's submissions*

[11] The applicant submitted that they seek nothing more than an interpretation of the order of investigation of title made on 6 August 1907. The application does not challenge the validity of that order.

[12] They argue the lack of definition of the Court order in s 3 gives the Court latitude as a matter of policy to consider whether a Court order might be a document of title.

[13] It was also submitted that s 3 uses the word 'instrument' and, in the alternative, the order of investigation of title might fit in this definition.

[14] Mr Moore submitted that this case can be distinguished from *Tavioni*<sup>1</sup> in that the purpose and effect of the declarations is not to challenge the order of investigation of title but interpret it.

[15] Finally, it was submitted that unlike *Tavioni* no facts in this case are in dispute. The questions here are purely legal with factual matters left to the s 390A applications.

### *The Respondent's submissions*

[16] In response, Mrs Browne firstly submitted that it was not clear that any of the declarations sought properly relate to the list of documents subject to s 3(1) Declaratory Judgments Act. It is not an instrument prescribing the powers of a body corporate and it is not a document of title. Mrs Browne referred to the statement in *Tavioni* that a Court order does not fit any of the categories set out in s 3(1) Declaratory Judgments Act.<sup>2</sup>

[17] She submitted that the facts of this application cannot be distinguished from *Tavioni*. The purpose for which an application under the Declaratory Judgments Act is sought does not and cannot change the meaning of any definition in the Declaratory Judgments Act.

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<sup>1</sup> *Tavioni v Cook Islands Christian Church Incorporated of Avarua* [2016] CKLC 2; Application 196.2014 (24 November 2016).

<sup>2</sup> Above n 1 at [23].

[18] Further Mrs Browne disputes Mr Moore's submission and states that the facts are in dispute. These facts include the circumstances in which the 1907 order was made; the circumstances of the 1942 and 1965 succession orders; the relationship of Upokoina Nena to Rangi Ati; and whether the applicant is a successor of the Tinomana recorded in the 1907 order.

### *Discussion*

[19] Section 3 of the Declaratory Judgments Act provides that a declaratory judgment can only be made in relation to the following instruments:

... any enactment, or any deed, will or document of title or, any agreement made or evidenced in writing or any memorandum or articles or association of any company or body corporate or any instrument prescribing the powers of any company or body corporate ...

[20] I found in *Tavioni* that "a Court order did not fit any of these categories".<sup>3</sup>

[21] Mr Moore for the applicant submitted that *Tavioni* could be distinguished because in *Tavioni* the declaratory orders were sought to invalidate a Court order. In the present case the declaratory orders are instead sought to interpret a Court order.

[22] Mrs Browne submitted that *Tavioni* could not be distinguished as the purpose of the declaratory order does not change the categories set out in s 3(1) Declaratory Judgments Act.

[23] S 3(1) of the Declaratory Judgments Act sets out clearly the instruments to which a declaratory order can be made.

[24] Mr Moore has looked to various definitions of instruments and submitted that in terms of those definitions, an order on investigation of title may fit a document of title or an instrument prescribing the powers of a body corporate. Mrs Browne disagrees and simply states a Court order is neither an instrument prescribing the powers of a body corporate or a document of title.

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<sup>3</sup> Above n 1 at [23].

[25] I cannot agree with Mr Moore. An order on investigation of title, and therefore the order subject to this application, is plainly an order of the Court. Section 2(1) of the Cook Islands Act 1915 defines a Court order as “in respect of the Island Court, any order, judgment, decision, or determination of that Court”

[26] By the above, a Court order is clearly not one of the categories set out in s 3(1) Declaratory Judgments Act and whether the purpose of the declaratory order is to invalidate the order or interpret it, the answer is the same. To decide otherwise would be to look past the plain meaning of the words in that section and the intention of Parliament in omitting orders from the list of matters subject to declaratory judgment. My decision in *Tavioni* stands, a Court order is not subject to s 3(1) Declaratory Judgments Act.

[27] On this basis I conclude that I do not have jurisdiction in the terms of s 3(1) Declaratory Judgments Act to interpret the order on investigation of title of 1907.

**Should the Court exercise its jurisdiction to make the declaratory orders sought?**

[28] Notwithstanding that I have found I have no jurisdiction in this matter, for completeness I consider this second issue.

[29] Section 10 of the Declaratory Judgments Act provides the Court with a wide discretion to exercise its jurisdiction in terms of the Act and the Court may “on any grounds which it deems sufficient, refuse to give or make any such judgement or order.”

*Submissions*

[30] Mrs Browne has submitted that the orders sought under the Declaratory Judgments Act are unnecessary because these are the legal issues the s 390A application will address. She further questioned the effect of any such orders on the ability of the Chief Justice to exercise his discretion in considering those issues.

[31] Mr Moore has confirmed that should the Chief Justice dismiss his application under s 390A, the declaratory judgment he now seeks would be meaningless. The current application is sought in order to clarify the applicant's standing should the 390A application succeed and result in the cancellation of succession orders. He conceded it is possible the applications are being heard in the wrong order.

[32] Mr Moore also confirmed in the proceedings under s 390A he would seek to clarify who is entitled to the land according to the succession orders of 1942 and 1965.

### *Discussion*

[33] As I indicated at the hearing on 19 April 2018, I considered the issues in the present applications and the s 390A application are intertwined.

[34] The issues in the present application will include issues canvassed by the s 390A application. As Mr Moore has stated the answers he seeks in the declaratory applications will be used to support the s 390A applications.

[35] In terms of s 4 of the Declaratory Judgments Act a declaratory order is binding on the parties. That being said, I must question whether it is appropriate to consider this application before the s 390A. I am of the view that to fetter or otherwise divert the decision of the Chief Justice in these circumstances would fit poorly with the proper exercise of his jurisdiction.

[36] The jurisdiction to make declaratory orders is wide and having regard to the above I do not consider it is appropriate to make declarations as to the meaning of an order on investigation of title which may be considered at a later time by the Chief Justice.

[37] Accordingly, I decline to exercise any jurisdiction in this matter.

### **Conclusion**

[38] For the reasons set out I make the following determinations:

- (i) S 3(1) Declaratory Judgments Act is not one of the categories which does not give the Court jurisdiction to interpret an order of the Court.
- (ii) The orders sought are inappropriate and in terms of s 10 I decline to exercise my jurisdiction to consider the orders sought.

Pronounced in Gisborne on this 20<sup>th</sup> day of May 2019.

W W Isaac  
**JUSTICE**