IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION) **APPLICATION NO. 1/2017**

IN THE MATTER	of Section 390A of the Cook Islands Act 1915
AND IN THE MATTER	of the land known as **ARERENGA SECTION 1, ARORANGI**
AND IN THE MATTER	of a Succession Order dated 18 October 1943 to the interest of TAKAA, deceased
BETWEEN	**TERE TAIO** Applicant
AND	**The Successors to ETETERA** Respondent

Date of Application:	30 September 2016
Date of Referral to Land Division:	21 March 2018
Date of Hearing in Land Division:	1 May 2019
Date of Report by Land Division:	1 August 2019
Appearances:	Mr T Moore as agent for Applicant Mrs T Browne for Respondent
Judgment:	20 August 2019

JUDGMENT OF HUGH WILLIAMS, CJ

[WILL0638]

Application

[1] On 30 September 2016 the applicant, Tere Taio, applied to the Court for an order cancelling a succession order dated 18 October 1943 to the interests of Takaa deceased[1], on the ground the Takaa Order erroneously vested Takaa's interest in the land described

---

1 "the Takaa Order".

as Arerenga Section 1 Arorangi in Takaa's niece Etetera – and thus not being Takaa's "direct descendant" – such being contrary to the language of an Order on Investigation of Title[2] made on 13 July 1903.

[2] As noted in the minute of 21 March 2018 and the report of Isaac J of 1 August 2019 the application is of importance in that it concerns the contemporary ambit of the land title called Akonoanga Oire – more commonly Taura Oire – found only in Arorangi and Avarua[3]. While the application is accordingly restricted to Taura Oire titles, it is important in that it appears there are at least 79 such titles so the rights of all those claiming interest in such titles are potentially affected. Some remain in residential use but some now have commercial premises erected on them.

Order on Investigation of Title

[3] The OIT in this case was made by Lt Colonel Gudgeon on 13 July 1903 and vested the land with which the application is concerned in Tinomana, as the fee simple owner as Atu Enua, and Takaa, for an occupation or residential right, with the terms of the OIT being:

> "It is hereby ordered that the Native whose name is set out in the first column of the Schedule endorsed herein, 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 1 Arerenga … 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 of Takaa and failure of his direct descendants the said land shall revert to the said Tinomana or her successors."

[4] However, the wording of the OIT differs from the wording shown on the Register of Title[4] in that the former refers to "the owner of an occupation or residential right" and the ROT refers to "an occupation right".

[5] It is common ground that the challenged succession order dated 18 October 1943 was to Etetera and that she was a niece of Takaa, not, as mentioned, a "direct descendant".

---

2 "OIT".

3 See the interesting articles on the history of the Taura Oire titles in *Cook Islands News* 12 & 13 November 2018.

4 "ROT".

Procedural

[6] It appears from the affidavit of the applicant, the Vaatuatua of Tinomana Ariki, that after Tinomana Tokerau Munro[5] was declared to have the right to hold the title of Tinomana on 11 September 2015 pursuant to s 409(f) of the Cook Islands Act 1915, a committee was appointed to research Taura Oire titles and the rights relating to them. That, it was said in an affidavit by Doreen Boggs, a witness for the respondents, to have resulted in notices being issued to some of the occupants challenging their right of occupation, something which concerned them as they and their ancestors had occupied the parcels of land for over a century without interference.

[7] That, in its turn, led to the successors to Etetera forming their own committee to research the Taura Oire titles and efforts, ultimately unsuccessful, to resolve the issue by agreement. And that, also in its turn, led to the filing of applications by Tinomana which were dismissed and then this application pursuant to s 390A of the Cook Islands Act 1915[6].

Report of Isaac J

[8] After recounting the application the report, correctly, described the issue as "whether or not the succession order from Takaa to Etetera was made in error having regard to the OIT"[7].

[9] Then, after considering the cases advanced by each of the parties and the authorities on which they relied, the report summarised the issues in the following way[8]:

> [36] In essence the applicant says the OIT which states that Takaa together with his direct descendants was ordered as an owner of an occupation or residential right on Arerenga 1, does not allow succession to anyone but a direct descendant.
>
> [37] The respondent says that Taura Oire titles have been succeeded to by direct descendants, near relatives, adoptees of the blood, adoptees of non-blood,

---

5 "Tinomana Tokerau".
6 See *Taio v Successors to Etetera*, App's 250/2016 & 356/2016, Savage, J, 13.11.2017 (Costs).
7 At [3].
8 At [36]-[37].

> and feeding children and this is in accordance with the custom relating to these titles.

[10] Isaac J then referred to his own decision in *Puia v Puia*[9] in which he had relied on passages from earlier judgments[10], particularly the decision of the Court of Appeal in *In Re. Roi; Roiauri v. Heather,*[11], and summarised the position in the following passage[12]:

> [41] As stated in *Puia,*[13] these pronouncements clarify a number of important issues regarding Taura Oire titles. The titles were for occupation or residential sites. The persons who held these titles had the authority to lease or sell them. These rights can be ascertained without interference from the Ariki and the titles have given each man his own land and make him independent of everything but the law.
>
> [42] The restrictions arose when the occupier had no further use of the land and had no descendants.
>
> [43] The research done by Mrs Boggs and accepted by the applicant confirms that succession has taken place by direct descendants, near relatives, adoptees by the blood and adoptees not of the blood. There is no hard or fast rule and succession orders are made in terms of the Act.
>
> [44] Moreover, if a succession order has been approved by one Tinomana, a subsequent Tinomana would not attempt to overturn or interfere with that order.
>
> [45] Therefore, the short point is that there is no consistent custom in relation to eligible beneficiaries of Taura Oire land. Of the 28 Taura Oire titles to which Arerenga 1 belongs, the results show:
>
> (a) direct descendants 11;
>
> (b) near relatives 4;
>
> (c) adoptee of the blood 0;
>
> (d) adoptee not of the blood 3; and
>
> (e) other 0[14].
>
> [46] These results were not disputed by the applicant.

---

9 [2017] CKLC 4, App 5882/1 and 228/16, 27 August 2017. It was a Taura Oire case: at [33].
10 Listed in the submissions of Mr Moore, the agent for the Applicant.
11 CA 2/85, 8 October 1985, to which this judgment will return.
12 At [41]-[46].
13 At [36]-[44].
14 Succession by feeding children, contended for by the respondent, does not seem to be supported by the research.

[11] In reliance on that passage, Isaac J concluded that in this case "no error of the Court or in the facts presented to the Court have been demonstrated or even referred to by the applicant"[15] and that the Native custom which the Court was required to consider under s 446 of the Cook Islands Act 1915 in succession matters was the succession in relation to Taura Oire occupation as it was in 1943[16]. and that, in its turn, permitted succession to Taura Oire titles to those identified in the cited passage.

[12] The report then said it would be difficult to conclude that the succession order challenged in this application was contrary to the custom of Taura Oire succession and, in the absence of countervailing evidence, recommended the application be dismissed.

[13] The application not being debarred by s 390A(10), the question is whether the recommendation should be adopted[17].

Discussion and decision

[14] Though, in a sense, obiter, the remarks of the Court of Appeal in *Roiauri v. Heather* provide a convenient starting point for a discussion as to the rights attendant on Taura Oire titles and should now be regarded as definitive.

[15] In that case, the Court of Appeal said[18]:

> The particular custom which is the foundation of the occupation right, the succession to which is what this case is concerned with, is that of Akonoanga Oire. That custom developed in early missionary days, when the arikis made house sites available, close to the centres of worship which the missionaries had established, to induce the population of the islands to move from mountain or other remote areas to the settlements around those centres. This practice is well documented in historical studies, and early came to be recognised and enforced by the courts. Its earliest available definition by a court seems to be a statement recorded in Minute Book 1/69, relating to a specific area of land, Akaoa, when the then Chief Judge of the then Land Court, Lt Col W.E. Gudgeon said:
>
> > "... But on all the other sections, there are occupation rights which in many instances give a title superior to that of the real owner of the land.

---

15 At [50].
16 At [51].
17 A Declaratory Judgments Act 1994 application, 356.2016, challenging the Takaa Order on the same land having been dismissed by Savage J on 15 August 2016: see fn 6 supra.
18 Pages 2 to 4.The rather quaint grammar being in the original.

> It will therefore be our duty to define these rights, and in doing so we will follow the arrangement made with the Mission. When the people were brought together and induced to build in the vicinity of the church in order to be near religious instruction.
>
> The arrangement as we read it is this. That all those who built houses should have an inalienable right to live on the piece of land chosen by them so long as the family lived or continued to occupy the land. Therefore in awarding this land to Tinomana and Te Uri the award will be subject to the following rights.
>
> 1. That each house holder shall pay one shilling in the month of January of each year as an atinga for the land.
>
> 2. That so long as the descendants or near relations of the present owner are alive they shall be deemed to be the absolute owner of House and land. But in the event of the family dying out Tinomana or any future representative of the Arikishop may apply to this Court to replace him or her in possession.
>
> 3. The occupier may sell or lease his or her rights acquired in the Section that is his or her own life interest but nothing further and any rent received shall be property of the occupier.
>
> 4. Any owner of a house may purchase. The soil on which his or her house is built and become the absolute owner provided such arrangement be made where the Court and with its consent.
>
> 5. The one shilling per annum shall represent the value of Tinomana's interest in each section during the occupation of the house owner." (our italics)

In January 1908 there is a further statement by the same Judge MB.4/21A which is often quoted:

> "From information supplied to me by the Revd Mr Hutchin, it would seem that the first regular, or I may say legal laying out of this township of Avarua took place in 1827, when the Revd Mr Buzzacott and the land Chiefs of Avarua came to an understanding somewhat to the following effect. That within certain defined limits extending from the Avatiu creek towards Tupapa, all persons desirous of living near the Church might take up a section on either side of the Main road in order to build a house thereon and by so doing acquire a residential right for themselves and descendants. I am however of opinion that in all cases where a Resident shall die childless and without near relatives, the consent of the Atu Enua is necessary to validate the transfer of the house to a stranger. There may be circumstances which would justify the court in departing from this rule, but speaking generally the land should return into the hands of the Atu Enua where a man dies without Heirs of his own blood." (our italics)

Finally, in relation to succession, we should quote what is perhaps the most authoritative passage of all. It is a Judgment of Chief Judge Morgan, a man of exceptional knowledge and experience of Native Custom – he having served for

many years as an official of the Land Court, followed by twenty years as Judge of that Court. In this Judgment, relating to succession to Edward Goodman and Others delivered in 1955, MB.22/385, Chief Judge Morgan stated the custom thus:

> "Briefly, then, the present custom of succession is as follows:
>
> (1) A person who has left the family or tribe is not entitled to succeed to his parents' rights. This is ancient custom as well as present-day custom but, with changing conditions, it would be unusual for a person to leave the family absolutely, under present-day conditions. The circumstances in each individual case can be the only guide to show whether or not a person has left the family.
>
> (2) Notwithstanding the fact that a person has left his family or tribe, he, or his descendants, or some of them, may be accepted back, in which case those who are so accepted back are entitled to succeed to such rights as are allowed them by the family or tribe. These rights do not extend to other descendants who may not be so accepted back.
>
> (3) Subject to the limitations set out in (1) and (2) above, all the children, whether male or female, of a deceased Native are entitled to succeed (Declaration of 1984), in equal shares.
>
> (4) If a Native dies without issue (or the issue become extinct or leave the family), the interest of the deceased goes back to the source from which it came. If that person is dead then it goes to the next of kin of that source, excluding those who have left the family or tribe but including any who may have been accepted back." (our italics)

Later explicit statutory power to make orders for occupation rights and to define the terms of those rights was conferred on the Land Court (now High Court, Land Division) by s.50 Cook Islands Amendment Act 1950.

That section reads as follows:

> "(1) In any case where the Land Court is satisfied that it is the wish of the majority of the owners of any Native land that that land or any part thereof should be occupied by any person or persons (being Natives or descendants of Natives), the Court may make an order accordingly granting the right of occupation of the land or part thereof to that person or those persons for such period and upon such terms and conditions as the Court thinks fit.
>
> (2) Any person occupying any land under such order of the Court shall, subject to the terms of the order, be deemed to be the owner of the land under Native custom.
>
> (3) No order shall be made by the Court under this section without the consent of the person or persons to whom the right of occupation is granted."

[16] Then, after dealing with the history of the case before it, the Court of Appeal held[19]:

> …It is true … that the phrase "near relatives" has been from time to time included as well as "direct descendants", in descriptive passages of some judgments relating to descent and succession but in other sections of those same judgments the term "issue", or similar terms, connoting only direct descent, are also employed in prescribing successors.
>
> We have carefully read … judgments and the historical writings of recognized standing …. We need not list these last. But we have found no persistent and overall selection of words defining the course of descent of occupation rights which we must treat as exclusive. Often, indeed most often, the phrase is simply "direct descendants" or "issue". Sometimes it is "direct descendants or near issue". In others again, one reads an inclusion of near relatives but only subject to the consent of the family of the grantor.
>
> This exercise has shown us how unwise it would be to dogmatise in favour of the custom of Akonoanga Oire being implemented exclusively in compliance with a particular or standard set of words over different times and places. Its evolution, though generally consistent, seems, as one would expect, to have produced variations in its application. We have also noted evidence of this in the wording of the printed forms of Court orders, as we shall now show.
>
> The particular printed form of order in this case, as will have been observed, expressly restricts the succession to "direct descendants". The same form was used for a number of years. We were told that 60 or more such orders were sealed in respect of Arerenga land alone, and probably a great number more for other areas of Rarotonga. But by 1949, in some cases at least, the form was changed to read: "The right of occupation shall be for so long as the occupier or his descendants shall use the land for the purpose specified and shall comply with the other conditions contained here". And later in the same document: "on the death of the occupier, her occupation right shall pass to her children and registered adopted children who shall decide subject to the approval of the Native Land Court, who of those children or adopted children shall occupy. If the occupier leaves no children or registered adopted children, then the successors appointed by the Native Land Court shall decide who shall occupy." (MB.18/102). This seems to extend the class. But in 1972 (MB.31/231) the form returns to the earlier wording, "for so long as (the occupier) or his direct descendants or any of them shall occupy". Finally we mention an order made in 1979, (MB.42/49) where the right is again for the benefit of the occupier "and her direct descendants".
>
> Against this history of varying language in written judgments and formal orders we would certainly not be justified in changing in an important respect, even if we could, the terms of an order which has stood for over seventy years.

---

19 Page 6.

> Especially is that so when we know that a large number of existing rights were issued in similar or like words by the Land Court over those years and are the bases of so many occupations today.

[17] The Court of Appeal then commented in relation to the wording of s 390A that the "Order" mentioned in s 390A(10) is the "formal document sealed and issued by the Court"[20] and dismissed the appeal.

[18] As Isaac J observed in the passage cited above, not only does the law remain as described by the Court of Appeal in *Roiauri v. Heather* and his decision in *Puia,* it has been followed in a number of cases decided since that decision and appears to be supported by the researches undertaken by Mrs Boggs offered in evidence in this case without challenge by the applicant.

[19] A further reason not to differ from *Roiauri v Heather* is that it is consistent both with Cook Islanders' attitude to land[21] and with the oft-quoted decision on succession in *Succession to Edward Goodman*[22] where Morgan, CJ, a highly-regarded authority on the land laws of the Cook Islands held:

> It is true that upon Investigation of Title occupation plays a very large part but, conquests apart, occupation is usually only the result of the observance of the custom of succession and therefore a prima facie proof of inheritance from the previous owner. The persons found by the Court to be the owners of the various lands were not "all the descendants" of the original owner but were those who, according to the Native Custom of Succession, had become the ones entitled to the use of the land. Actually, succession according to Native Custom has been going on over the many generations since the first people acquired ownership rights and the observance of the Custom has given us the owners of today.

[20] All the cases on which those appearing relied are consistent with the principles enunciated in *Roiauri v Heather,* and included those which demonstrate the departures from the strict "direct descendant" succession summarised in the authorities. The results in each were dependent on the terms of the OIT. Mr Moore, for the applicant, laid special emphasis on *Samatua v. Tanner*[23] but that was a costs decision in which the then Chief

---

20 At [7] & see *Tavioni v Baudinet* CA 1,2&3/09 at [30], p8.
21 See eg *Baudinet v Tavioni* [2012] UKPC 35 at 61 per Lady Hale.
22 MB 22/385, 4 July 1955, p2.
23 Application 3/2013, 13 May 2014, Weston CJ.

Justice accepted the recommendation of Isaac J of 1 May 2014 which relied on Chief Judge Gudgeon's remarks to recommend dismissal of the application[24] and *Hunt v. Pokoroa and Parima*[25], but that, too, was a costs decision based on a report noting a different form of OIT. Neither judgment includes a detailed consideration of the case's merits and are therefore not a precedent on which great reliance should be placed in the present context.

[21] This Court being bound by the decision in *Roiauri v. Heather* and in light of other precedent such as *Puia*, concludes, on the evidence, that Isaac J's summary of the position cited above is correct: succession to Taura Oire titles may be by direct descendants, but has also, by consent, been in favour of near relatives and by adoptees of the blood and not of the blood, so that there is no hard and fast rule for succession in such cases, except that Taura Oire titles are in the giving of the Tinomana of the time and will not be altered by a subsequent Tinomana.

[22] In this case the OIT in favour of Takaa and his "direct descendants" was to grant them an occupation right – the wording taken from the ROT – to the land in question, with the right declared to terminate "upon the death of Takaa and failure of his direct descendants" in which case the land reverted to "Tinomana or her successors".

[23] It is agreed that Etetera was not a "direct descendant" of Takaa but the Tinomana of the time agreed to the succession order and it has remained unchallenged for over three quarters of a century. The recommendation for dismissal of the application is accordingly appropriate and there will be an order accordingly.

[24] But, orders under s 390A affecting persons' property rights, it has become the practice, even though not necessarily required as a matter of a statutory interpretation, for dismissals to be referred for the Queen's Representative's consent pursuant to s 390A(8), particularly as such decisions are unappealable under s 390A(2).

---

24 By consent.

25 Application 1/15, 13 September 2017, Hugh Williams CJ.

[25] This judgment is to be distributed at this stage to the parties together with Isaac, J's report but the above conclusion is tentative and conditional on the Queen's Representative consenting to the same.

[26] Should consent be forthcoming, the parties will be invited to make submissions on costs, though, this seemingly being an application involving the public interest, it may turn out to be the case that no order for costs is appropriate.

Hugh Williams, CJ