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

APPLICATION NO. 10/2015

IN THE MATTER	of Section 390A of the Cook Islands Act 1915
AND	
IN THE MATTER	of the land known as **TE REVA SECTION 2C, NGATANGIIA**
BETWEEN	**ERUERA NIA** for himself and on behalf of others, of Rarotonga
	Applicant
AND	**ANI PIRI**, of Rarotonga
	Respondent

Date of Application:	1 July 2015
Date of Referral for Report:	31 July 2015
Dates of Hearings:	20 and 21 August 2015
Date of Land Division Report:	31 January 2019
Date of Judgment:	5 September 2019
Counsel:	Mr C Little for Applicant Mrs T Browne for Respondent

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JUDGMENT OF HUGH WILLIAMS, CJ

[WILL0541.dss]

Application

[1] By application dated 1 July 2015, lodged under s390A of the Cook Islands Act 1915, the applicant, the late Mr Eruera Nia[1], applied personally and on behalf of his siblings[2] for the rehearing of an order made on 28 August 2007 confirming the resolution of the majority of a Meeting of Assembled Owners[3] to approve an alienation, namely a deed of lease between the

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[1] Whose cause of action enures notwithstanding his death.

[2] Ngapuretu Wea, Rangi Maoate, George Maoate, Vaine Abbott, Joan Greaves, Tuvaine Paruru, Pari Manuel, Dorothy Nicholas (Uirangi Mataiapo) and Mere O'Connor as successors to their late father's interest.

[3] "MOAO".

landowners and the respondent, Ani Piri, dated 5 August 2012 of 680m^2 being Te Reva 2C Ngatangiia and, secondly, an order that the lease be cancelled.

[2] In addition Mr Nia sought an injunction to prevent the respondent and those under her direction from carrying out any construction work, or work preparatory to construction, on the leased land until further order of the Court.

Procedural

[3] Both applications were filed on 1 July 2015 and by minute dated 31 July 2015 Weston CJ referred both to the Land Division of the Court for decision on the injunction application and a report on the s390A application, with the Chief Justice expressly directing that the delay between confirmation and commencement of these proceeding should be investigated as part of the inquiry.

[4] Both matters were heard by Savage J on 20 and 21 August 2015. The injunction application was granted and the s 390A application adjourned, following evidence, for further submissions. They were received by 21 December 2016[4].

[5] Savage J's report under s 390A is dated 31 January 2019[5].

Facts

[6] The parent block of the land, with a total area of 25,000m^2 was partitioned on 18 March 1907 in favour of eleven owners, Uirangi and her ten children. Uirangi's surviving children succeeded to her interests in 1912 following her death. One of them was the respondent's father, Kaveariki Te Ariki Akania. In addition to the respondent's lease of 680m^2 which is presently challenged, Kaveariki's children also hold two leases of 1172m^2 and 1122m^2 of the same block.

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[4] Before the untimely death of Mr Little, counsel for the applicant.

[5] The delay between the hearing, receipt of Savage J's report and delivery of this judgment is regretted.

[7] The alienation was confirmed by Mrs David JP on 28 August 2007 under s 54 of the Land (Facilitation of Dealings) Act 1970 but, for some unexplained reason, the lease under challenge is dated nearly five years later, namely 5 April 2012.

[8] On 21 March 2007 there was a MOAO which preceded execution of the lease. The minutes are in evidence. The Deputy Registrar who chaired the meeting said the resolutions and the draft lease were read to the assembled landowners and explained in both Maori and English. The landowners were told they had the right to support, object or amend the resolution agreeing to the lease, but the only objector was the applicant and he, though invited to sign an objection form, did not do so.

[9] The minutes of the confirmation hearing were also put in evidence. They show, as Savage J said is common, that the hearing was brief. Mr Nia said he was not advised of the date of the confirmation hearing. That, too, Savage J said, is commonplace.

[10] However, the background to that recital of events is rather more complex.

[11] The whole of the block in question is at Muri immediately adjacent to the Pacific Resort. It runs down to the beach.

[12] Mr Nia said that, following the succession order of 21 June 1912, Uirangi's eight surviving children were each entitled to 3125m^2. The respondent's father was one. Of the seven others, three passed away without issue. So, of the entitlement of each of Uirangi's eight children to 3125m^2, the respondent is entitled to 625m^2, one of her sisters, Cecilia Short, has leased 1172m^2 including the beachfront and the late Te Ariki Kave Nia has leased 1122m^2. Those two leases, taken with the respondent's lease of 680m^{2,} total 2974m^2 being, Mr Nia asserted, 2349m^2 in excess of their father's entitlement to shares in the land. He asserted the respondent's personal share should be 89.28m^2. Thus not only do the respondent and her siblings occupy well in excess of their shares in the land, they occupy a substantial part of the valuable beach frontage. By confirming the 5 April 2012 lease, the Court not only confirmed that excess of shares above their entitlement in terms of the occupation by the respondent and her siblings, it failed to take account of the occupation of the most valuable portion, the beachfront, by Cecilia Short.

[13] The respondent said that in the 1960s her late father cleared a piece of land on the beach and built a beach house for the family – though it was rented out during summer – and from the late 1970s-1988 Cecilia Short lived in the house. She said that in 2005 their late father asked her sister and herself to obtain the family's consent to lease the piece of land on which the house stands and said there was a family meeting in 2006 to discuss the descent of the family title of Uirangi Mataiapo and their father's wish for the land on which the beach house was located to devolve to her. The 2006 meeting was followed by the MOAO of 21 March 2007 where the resolution to grant a lease over the house land was approved by all except the applicant.

[14] That version of events was strongly contested by the applicant and his side of the family. In particular the current Uirangi Mataiapo said that before any lease is approved by the family an occupation right must first be granted – something that never occurred as regards the respondent – and that, before any lease is approved by the family, a meeting must be held outside Court, something which was not followed in the respondent's case.

[15] Noting that the respondent's lease is over the same area of land in relation to which the respondent's father unsuccessfully applied to the family in 1992, she said that family leases are granted in accordance with the following procedure:

a. A member of the family asks for an occupation right at a family meeting;

b. At the family meeting, the elders of the family decide whether the occupation right should be granted and determine which area of the Land it should be over. This is to ensure that everyone receives their fair share and everything is just and equal;

c. If an occupation right is granted, that person may later ask the family that it be converted into a lease. This is also done at a family meeting;

d. If the family decide to approve the granting of a lease, those who attended the meeting of assembled owners at Court follow the decision reached at the family meeting. The elders of the family never attend meetings of assembled owners in Court.

[16] The Uirangi Mataiapo gave evidence of a number of occasions when the family had unsuccessfully tried to meet the respondent to discuss the lease, including the family's disagreement to the lease being granted. She has made at least six attempts since 2010 to persuade the respondent to attend, always unsuccessfully.

[17] The applicant also strongly rebuffed the respondent's version of events saying the family always regarded the land leased as a family reserve and that the 2006 meeting was just called to discuss the family title, not the lease, neither the lease nor the earlier negotiations being mentioned. He also made the point that the 2006 meeting was not properly constituted as only two of the five branches of the family were represented by senior members, particularly when there was, at that time, no Uirangi Mataiapo who would always have to consent to a lease of family land.

[18] His evidence was confirmed by Ngapuretu Wea, an owner who attended the 2006 meeting.

[19] What is clear is that, apart from an informal meeting in 2012, in discussions between the parties the landowners were never told that the respondent had, at about that time, agreed with Pacific Lagoon Limited for an associated company, Pacific Resort & Villas Limited which owns and operates Pacific Resort at Muri for Pacific Lagoon Limited, to construct and fit out eight beachfront tourist accommodation units to a 5-star standard on the respondent's land at a then estimated cost of NZ$1.6M. Under the deal, the respondent was to receive 7.5% of the accommodation receipts from the new property amounting, as Savage J found, to about $80,000 p.a. Savage J said the landowners only became aware of the Pacific Lagoon deal after the confirmation hearing.

[20] The construction of the new units, originally intended to begin on 1 August 2015, has, presumably, been stalled by the injunction since that date with the financial consequences being outlined in the affidavit of the CEO of Pacific Resort & Villas Limited.

[21] As to the over-occupation issue, it appears the respondent accepts that her branch of the family over occupies the family land.

Relevant statutory provisions

[22] The application is brought pursuant to s 390A of the Cook Islands Act 1915 which relevantly reads:

> (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, 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.
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> (3) The Chief Judge may refer any such application to the Land Court for inquiry and report, and he may act upon that report or otherwise deal with the application without holding formal sittings or hearing the parties in open Court.
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> (5) Any order of amendment, variation, or cancellation shall take effect (subject to appeal) as from the making thereof; but no such amendment, variation, or cancellation of any order made by the Chief Judge hereunder shall take away or affect any right or interest acquired for value and in good faith under any instrument of alienation executed before the making of the order of amendment, variation, or cancellation, but the instrument may be perfected and confirmed as if no such order had been made by the Chief Judge. Any such alienation shall thereafter ensure for the benefit of the person eventually found by the Chief Judge's order to be entitled to the share or interest affected, and all unpaid or accruing purchase money, rent, royalties, or other proceeds of the alienation, as well as any compensation payable, shall be recoverable accordingly. Any bona fide payment made in faith of the order amended, varied, or cancelled shall not be deemed to be invalid because the order was so amended, varied, or cancelled.

[23] The following principles are accepted as applicable to s 390A applications: The burden of proof rests on the applicant to prove a mistake, error, or omission. That is not easily satisfied, and the approach is: as set out in – to take one example from many available - *Tuake v Toeta – Raupa Section 87E3B Arorangi* as follows:[24]

> (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);
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> (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;
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> (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.

[24] As certainty of outcomes – especially long-standing ones - is important applications under s 390A have been said will only be successful in "exceptional circumstances" where the applicant has shown a "clear mistake or error in the original order which [is deemed] necessary or expedient to remedy"[6]. As a matter of semantics, "exceptional circumstances" may put the test a little too high but, whatever phrase is chosen, it is clear applicants must show a clear mistake or error leading to a view that it is necessary or expedient to remedy the same.

[25] Section 54 of the Land (Facilitation of Dealings) Act 1970 is also relevant. It reads:

> **54. Court may confirm, modify or disallow resolutions**
> (1) On application for the confirmation of any resolution the Court subject to the provisions of this Act may –
> (a) Confirm the resolution either absolutely or subject to any conditions that it is authorised by this Act to impose; or
> (b) Disallow the resolution.

as is s 482 of the Cook Islands Act 1915 which provides:

> **482. Conditions of confirmation**
> (1) Subject to the provisions of this section, the confirmation of an alienation shall be in the discretion of the Court.
> (2) No alienation shall be confirmed unless the Court is satisfied as to the following matters:
> (a) That the mode of execution of the instrument of alienation is in conformity [to] this Act;
> (b) That the alienation is not contrary to equity or good faith or to the interests of the [persons] alienating or to the public interest; and
> (c) That the consideration (if any) for the alienation is adequate.

Savage J's report

[26] Savage J provided his s 390A report on 31 January 2019. It is a careful and comprehensive review of the situation and the evidence, at the conclusion of which he recommended the application be granted and the confirmation of alienation set aside.

[27] After dealing with the background and the procedural history[7], Savage J summarised the applicant's case and noted counsel submitted the alienation should never have been

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6 *Tuake v Toeta* at [53].

7 As summarised previously.

confirmed because it failed to take into account relevant precedent and was based on an incomplete summary of the facts. The rehearing was sought on the basis that the respondent's family had exceeded their entitlement to a share in the land and had failed to disclose this to the Court; they had also failed to disclose that the beachfront area was already occupied by the respondent's sister when confirmation was granted; or that the lease covers part of the land which was a family reserve and encroached on a beach reserve; or that there was confusion during the meeting of owners; or that the respondent's family had already profited significantly from the land over the past 50 years without benefit to the rest of the owners.

[28] The areas held by the respondent's family varied somewhat from the occupation, but the report recorded the applicant's submission that the respondent's family occupied 1698.83m^2 in excess of their entitlement before the challenged lease was granted and the lease further exacerbated the over-occupation to five times the area of entitlement by shares instead of being 2.4%[8]. Counsel submitted that confirmation hearings should look at all relevant factors and the overall equity of the matter when confirmation is considered[9].

[29] The applicant's submissions noted that the respondent's leased land is of a significant value being next to the Pacific Resort and overlooking Muri Beach, while a large portion of the inland side is uninhabitable swamp. Counsel submitted the respondent was under a duty to disclose her family's existing holdings and the fact the lease would encroach on a beach or family reserve. The propositions of law which the confirmation hearing failed to follow included considering the land as a whole to ensure family units share equitably across the land; that the Court is not obliged to follow a majority decision at an MOAO if the result would be unfair or inequitable to other owners; and that the Court must consider over-occupation and excess of share entitlement, particularly where confirmation would exacerbate that over-occupation[10]. The submissions matched the s 390A (1) test of; "any mistake error or omission whether of fact or law" with an invocation of equity, good faith and the interests of other persons coming within s 482(2)(b).

[30] The question of delay was met by the applicant saying he was unaware of the confirmation hearing until news reached him in March 2015 that the land was to be

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8 At [12]-[14].

9 *Terai Ama v Joseph – Ekeua Section 25 Vaipae Aitutaki*, App.382/05, 23 July 2007 and *Tutara Teatuairo Terei – Tikioki 47C Takitumu*, JP Appeal 3/11, 6 March 2012.

10 Disregarding the majority is permissible if unfair or inequitable is *Ihaka v Nicholas* [1985] CKCA 3.

commercially developed. Then, after summarising the proposed development, it was noted that the respondent admitted not informing the landowners of the commercial proposition when she sought the lease; not disclosing the existence of the arrangement at the confirmation hearing; and not telling other owners she would receive approximately $80,000 p.a. from the development when those other landowners would receive nothing[11]. The respondent's admissions also included failure to advise the confirmation hearing that her family already occupied a significant area of the beachfront; the lease would exacerbate that; and the lack of advice to other landowners that her family had benefitted financially for a number of years by renting out the house on the land. The development proposal might also constitute a breach of the lease by parting with the possession of the land to a third party.

[31] For the respondent, counsel submitted that the "exceptional circumstances" hurdle had not been met; a submission that the delay had not been satisfactorily explained[12]; and the Land (Facilitation of Dealings) Act 1970 process for calling meetings in ss 43 - 50 had been followed. The failure to discuss the lessees' share entitlement was not a mistake, error or omission and the applicant failed to raise the matter at the MOAO or sign a dissent. The holding of a meeting to explain a proposal prior to an MOAO was only "common practice rather than custom"[13] ;and three branches of the family line had exceeded their shares in the land.

[32] The report then summarised the applicable law[14], adding to the previous discussion that New Zealand provisions, though now repealed, comparable with s 482 required satisfaction that the alienation is in the interests of the alienor with the Court's decision being on full information in a process which is of an "inquisitorial character and only faintly resembles a proceeding inter-parties" leading the Court to make proper enquiries[15].

[33] In the discussion section of the report, Savage J considered the requirements of s 482 and the necessity for the Court to be "satisfied", that is to say have evidence or material before it to satisfy itself of the requisite issues, with lack of opposition at a hearing being insufficient for the Court to make up its mind. Savage J noted[16]:

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11 At [21] and [23].
12 Particularly in the light of para [11] of Weston CJ's minute.
13 At [28]-[31], [33] and [34].
14 At [36]-[42].
15 *Wilson v Herries & Ors* (1913) NZLR 417, 423-4.
16 At [46].

> "David JP in this case simply had the jurisdictional precursors and silence. The confirmation hearing was brief and appears to have proceeded on the basis that, if there was no objection, there is no need for the Court to inquire further."

[34] Noting that confirmation hearings have a "strong flavour of the ex parte process and there is a consequent duty on the applicant to disclose matters which may be adverse to their case"[17], the Judge noted Mr Nia was not advised of the confirmation hearing and there was a "real issue in relation to over-occupation in this case saying[18]:

> "these family leases are not leases as would be understood outside the Pacific. The rent is nominal and for any particular member of the group of owners is non-existent. They are a device to allow occupation of defined portions of land in multiple ownership, and the ownership is in common. It is only when such leases are assigned to an outsider that realistic payment is due. If it is recognised that they are commonly used as a device to provide occupation to owners, rather than a device to generate income, the issue of fair occupation, apportionment inevitably arises and is important in terms of equity and fairness."

with failure to disclose over-occupation being a serious omission of fact, especially when there is a "commercial transaction … in the back pocket of the applicant and is not disclosed to the owners at the meeting of owners"[19].

[35] The Judge concluded that "what is clear is that the respondent's family now hold leases over a much larger area of the land than their shares would entitle them to"[20].

[36] The report then moved to the annual amount the respondent would expect to receive under the arrangement with Pacific Lagoon Limited and the legal necessity under the lease for the lessee to obtain majority support from the landowners before subleasing any part of the land[21].

[37] The Judge reviewed the history and delay and concluded that "it appears to me that the delay issue is not as potent as might have been first thought"[22] and concluded:

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17 At [48].
18 At [50].
19 At [51].
20 At [52].
21 At [54].
22 At [55]-[56].

a. The delay has been properly explained and is not a factor in the particular circumstances of this case as would cause a remedy to be declined under s 390A;

b. In both cases, the hearings can be considered as something akin to *ex parte* applications where there is a duty to disclose matters adverse to the applicant's case;

c. The respondent failed to disclose a relevant matter to both the meeting of owners and to the Court, namely that she had an important commercial transaction to follow;

d. The respondent failed to disclose to the Court the true position with regard to occupation of a particular family line to particular lands, and she should have;

e. The two points above constitute omissions of fact; and

f. Accordingly, the hearing of the matter could not have resulted in the Court being satisfied as to the matters required by s 482(2)(b) of the Cook Islands Act 1915 in that there was a want of the necessary evidence and a failure to disclose the matters I have discussed.

Discussion and decision

[38] In light of Savage J's careful discussion of the facts of this matter against the background of the relevant statutory provisions and precedent, coupled with the fact that he saw and heard the witnesses, the appropriate conclusion is that the report and its recommendation are persuasive, should be followed, and the Court's discussion and decision on the matter under s 390A(1) need therefore not be comprehensive.

[39] Was there a mistake, error or omission of fact and law which led the confirmation hearing in the Land Division to make a decision it would not otherwise have made? The authorities cited to the effect that applicants in confirmation hearings have a duty to disclose all relevant circumstances to the Court to enable it to make the correct decision under ss 54 and 482 are accepted.

[40] Here, it is clear the respondent failed in her duty to advise the confirmation hearing of the very lucrative commercial deal which sat behind the proposed lease. That was a very significant factual omission which should have been brought to Mrs David JP's attention and would, almost undoubtedly, have affected her consideration of the application. The respondent

admitted not advising Mrs David JP of anything about the commercial proposition when she sought confirmation.

[41] Further, the respondent also accepted she failed to advise the confirmation hearing of her family's existing occupation of a significant area of the beachfront, an occupation which would be exacerbated by confirming the lease. That, too, was a serious omission and one which would, in this case undoubtedly, have affected Mrs David JP's consideration of the matter, especially when that omission was coupled with the respondent's failures to disclose either her family's receipt of rent from the land over a significant period or the failure to share that income with other owners. Additionally, the respondent did not mention that part of the land was a family reserve and part encroached onto a beach reserve.

[42] While the proposed lease may apparently have had majority support from the landowners, it is clear there were also serious deficiencies in disclosure at the MOAO, particularly as to the purpose of the meeting – and the previous family meeting – the Pacific Lagoon deal and the over occupation position. The authority that permits the Court to overturn a confirmation notwithstanding majority support of the landowners is accepted.

[43] Finally, it appears this family has, for a lengthy period, adopted the method of granting leases set out in the Uirangi Mataiapo' s affidavit. It is clear that method was not followed in this case, if for no other reason that senior representatives of branches of the family did not attend.

[44] All those failures bring the applicant's behaviour at the confirmation hearing within the opening words of s390A. There is therefore jurisdiction to act under the section.

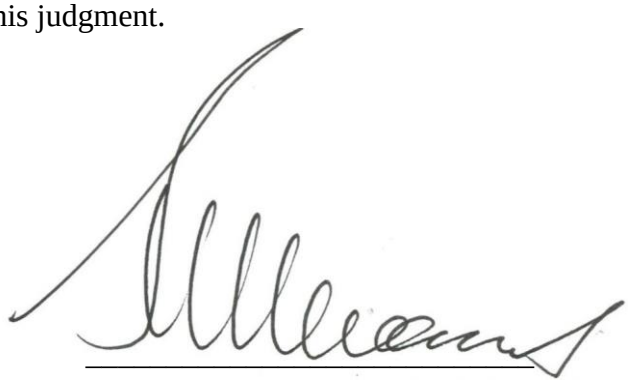
[45] In all those circumstances, Savage J's recommendations, conclusions and his report are adopted. The report is to form part of this judgment. The order confirming the alienation by way of a lease between the landowners as lessor and the respondent as lessee for an area of 680m^2 made by Mrs David JP on 28 August 2007 is overturned and a rehearing of the same ordered. The application for a succession order can follow the usual path. For completeness, the injunction is to remain in place pending further order of the Court.

[46] The application also sought an order cancelling the lease. That matter was not considered by Savage J and in any event, as a result of the order for rescission just pronounced, the fate of the lease is a matter for the future.

[47] Given the dates of the lease, the confirmation hearing and the s390A application, s390A (8) is not triggered.

[48] This judgment and copies of Savage, J's report are to be sent to the late Mr Little's firm and to Mrs Browne

[49] Should any further matters, including costs, require consideration, counsel may file memoranda within 20 working days of delivery of this judgment.



Hugh Williams, CJ