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

APPLICATION NO. 427/19

UNDER	Section 492(4), Cook Islands Act 1915
IN THE MATTER OF	the land known as Arerenga Section 7, Arorangi
BETWEEN	UPOKOINA NENA Applicant
AND	TINOMANA ARIKI Respondent

Hearings:	30 September 2019 10 October 2019
Appearances:	T Browne for Applicant T Moore for Respondent
Judgment:	23 July 2020 (NZ)

JUDGMENT OF JUSTICE P J SAVAGE

Copies to:
T Browne, Browne Harvey and Associates, PC, Avarua, Rarotonga
T Moore, Land Court Services, Ngatipa, Rarotonga

Introduction

[1] Upokoina Nena seeks an order pursuant to s 492(4) of the Cook Islands Act 1915 directing that the proceeds resulting from the assignment of the lease on Arerenga Section 7, Arorangi, be paid to her. She claims that, as the sole landowner, she is entitled to receive the relevant funds and payment should not wait until other proceedings before the Court have been determined.

[2] The application is opposed by Tinomana Ariki who asserts that the applicant is attempting to "side-step" an application currently before the Chief Justice pursuant to s 390A of the Cook Islands Act 1915, which will ultimately determine who is entitled to the proceeds of the lease assignment.

Background

Assignment of the lease

[3] In 2018, an application was made to the Leases Approval Tribunal to approve an assignment of the lease on Arerenga Section 7, Arorangi. The deed of assignment provided for consideration to be paid to the owner of the land and Upokoina Nena, also known as Ina McDonnell, consented to the assignment as the recorded owner. The application was opposed by Tinomana Ariki whose objection was that, as the land was a "Taura Oire" title, the transfer consideration should be paid to her as the "Atu Enua" and rightful owner.[1]

[4] Tinomana Ariki advised that two applications had been made to the High Court (Land Division). Firstly, for a declaratory order effectively challenging Upokoina Nena's ownership in Arerenga Section 7, on the basis that, in accordance with the order of investigation of title, the land should have reverted to Tinomana Ariki when the original occupation right holder's direct descendants died out. Secondly, to overturn the succession orders by which Upokoina Nena became an owner in the land, and to overturn succession orders which vested Tinomana's interest as Atu Enua in another title holder.

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1 "Akonoanga Oire" commonly known as "Taura Oire" is the Native custom which is the foundation of the occupation right developed in early missionary days. The Arikis made house sites available close to the centres of worship established by the missionaries, to induce the population to move from the mountains and remote areas to settle around those centres. See *Roiauri v Heather* CA Cook Islands, CA2/85, 8 October 1985. This custom is found only in Arorangi and Avarua.

[5] It was proposed that the Leases Approval Tribunal approve the assignment of lease and leave it for the High Court to determine the ownership and other issues relating to the land. Mrs Browne, as counsel for Upokoina Nena, objected to this course of action and argued for the transfer consideration to be paid, submitting that the objector should seek an injunction from the Court to either stop the assignment or have the funds held on trust.

[6] The decision of the Leases Approval Tribunal was issued on 26 February 2018 approving the assignment of the lease.[2] However, while the settlement was allowed to proceed and be concluded, the issue of payment of the transfer consideration was reserved, pending the outcome of the applications filed with this Court.

The related applications

[7] The parties agreed that there were three related applications which are relevant to the present proceedings. All three applications relate to Taura Oire titles. These are:

(a) Application 1/17 – an application by Tere Taio pursuant to s 390A of the Cook Islands Act 1915, challenging a succession order in relation to Arerenga Section 1;

(b) Application 104/18 – an application by Tinomana Ariki pursuant to the Declaratory Judgments Act 1994, for declaratory orders in relation to Arerenga Section 7; and

(c) Application 1/18 – an application by Tinomana Ariki pursuant to s 390A of the Cook Islands Act 1915, challenging succession orders in relation to Arerenga Sections 7 and 8.

[8] Application 1/17 sought to amend a succession order in respect of Arerenga Section 1, on the basis that the order was made in error and without regard to the order on investigation of title made in 1903. The order on investigation of title awarded an occupation or residential right in the land to Takaa and his direct descendants, a Taura Oire title. However, the occupation right was succeeded to by Etetera, who was not a direct descendant of Takaa.

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2 *Miles – Arerenga Part Section 7, Arorangi,* LAT Rarotonga, App 13/18, 26 February 2018.

[9] Justice Isaac completed his report to the Chief Justice on 1 August 2019, recommending dismissal of the application. He considered the background to Taura Oire titles and the legal rights which flow from them, the custom of succession to such titles, and the role of the Tinomana. He found it would be difficult to conclude that the succession order did not comply with the custom of Taura Oire succession.

[10] Chief Justice Williams adopted the recommendation of Isaac J in his decision dated 20 August 2019 and dismissed the application, conditional on the consent of the Queen's Representative.[3] He stated:

> [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.
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> [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".
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> [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.

[11] Application 104/18 sought a declaratory order as to the interpretation of the order on investigation of title for Arerenga Section 7, made in 1903. That order declared Rangi Ati, together with his direct descendants, as the owner of an occupation or residential right in the land, subject to the payment of one shilling to Tinomana and her successors. The order further provided that upon the death of Rangi Ati or the failure of his direct descendants the land would revert to Tinomana or her successors.

[12] The applicant asked for orders confirming the conditions of the investigation of title order, that the direct descendants of Rangi Ati had failed and the occupation right was at an end, and that all persons may deal with Tinomana as Atu Enua and sole owner of the land. The applicant noted that if the orders were granted, she would pursue her application per s

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[3] *Taio v Successors to Etetera – Arerenga Section 1* HC Cook Islands (Land Division) App 1/17, 20 August 2019.

390A challenging the succession orders in the block, including orders of succession to the interest as Atu Enua, which had already been filed (Application 1/18).

[13] Justice Isaac issued his decision dated 20 May 2019.[4] He held that the Court did not have jurisdiction under the Declaratory Judgments Act 1994 in respect of Court orders. He further held that it was not appropriate for orders to be made in that case, given that the issues were intertwined with those before the Chief Justice in the s 390A application and it could be seen to fetter or divert that decision. The application was accordingly dismissed.

[14] Application 1/18, as I understand it, seeks to amend succession orders in respect of both Arerenga Section 7 and Section 8. Importantly, the application challenges the succession orders made in 1945 and 1967 in Arerenga Section 7, which led to Upokoina Nena becoming the sole owner of the occupation right and which led to Ati becoming the Atu Enua. Tinomana Ariki asserts that Upokoina Nena is not a direct descendant of Rangi Ati and the land should have reverted to Tinomana on the failure of Rangi Ati's line, in accordance with the order on investigation of title for Arerenga Section 7. In addition, she says the adoption order for Upokoina Nena prevented her from succeeding in any land unless she was entitled to do so by virtue of blood. Tinomana Ariki also asserts that the underlying Atu Enua ownership in the land was wrongly vested from Tinomana, an Ariki, to a Mataiapo.

[15] The application is currently with the Chief Justice awaiting a decision.

The present application

[16] The present application arises from a minute of the Chief Justice, which was issued in respect of the extant s 390A application, Application 1/18. Mrs Browne raised the issue of payment of the lease assignment consideration during those proceedings and sought a direction that the funds withheld by the Leases Approval Tribunal be paid out.

[17] In his Minute No.3 dated 22 July 2019, the Chief Justice advised that the s 390A application was to be adjourned until a judgment in Application 104/18 was available (which had not been issued at the time). He noted that, on its face, the decision of the Leases Approval Tribunal did not amount to a sequestering of the funds but rather a reservation of

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4 *Tinomana Ariki – Arerenga Section 1, Arorangi* HC Cook Islands (Land Division), App 104/18, 20 May 2019.

their decision on that topic. The Chief Justice directed that if Mrs Browne wished to pursue the payment in advance of delivery of the judgment in Application 104/18, then further information was required regarding where the consideration was held and how any sequestration came about. The filing of a draft order to effect Mrs Browne's application, citing any authority for the granting of that order, was also directed. Mr Moore, as agent for Tinomana Ariki, was to have an opportunity to consent or oppose and to file submissions in that regard.

[18] Mrs Browne then filed the present application in this Court on 15 August 2019. The application was initially heard on 30 September 2019. After traversing the relevant related applications, I adjourned the application sine die, directing that the minutes of the hearing be referred to the Chief Justice as a matter of urgency. I also issued directions for Mrs Browne to invest the lease funds, which were being held in her trust account, on call with the Bank of the South Pacific.

[19] The following day, on 1 October 2019, Mrs Browne brought to the Court's attention that the Chief Justice had issued Minute No.4 dated 26 September 2019 in respect of the 390A application. The relevant portions of that minute provide:

> [8] The question of the consideration for the assignment of the lease approved by the Leases Approval Tribunal is, at best, ancillary to the matters at issue in the s 390A application and the proposal in Minute (No.3) was intended to assist the parties to that application to deal with that ancillary matter.
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> [9] One of the many difficulties stemming from the wording of s 390A is that it confers jurisdiction solely on the Chief Justice to make orders which fall within the phrasing of the section when implementation of such orders is frequently a matter for applications under other sections of the Cook Islands Act 1915 where the jurisdiction reposes in judges of the Land Division.
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> [10] Here, Mr Moore and Mrs Browne know much more concerning the detail of this transaction than appears in 390A 1/18, and if Mrs Browne, knowing that detail., has chosen to endeavour to resolve that ancillary matter by the means discussed by Mr Moore, that is, first, a matter for Mrs Browne and Mr Moore and, secondly, for a Land Division Judge. It is not a usurpation of the only jurisdiction vested in the Chief Justice, namely the matters raised in 390A 1/18, and if Savage J feels unable to deal with Mrs Browne's latest application and decides to refer it to Isaac J, that is a matter for him as are the merits for Mrs Browne's application.

[20] Following the release of Minute No.4, a further hearing was held on 10 October 2019 and the application was adjourned. Mr Moore was to file closing submissions, following which a decision would issue.

Issue

[21] The issue for determination is whether an order should be granted, directing payment of the transfer consideration from the lease assignment on Arerenga Section 7, to Upokoina Nena.

Applicant's Submissions

[22] Mrs Browne submitted that, as a result of the decision of the Leases Approval Tribunal, the amount of $121,250.00 which was payable to the landowner on assignment of the lease over Arerenga Section 7, was withheld. Her interpretation of the decision was that the landowner consideration could not be paid until Application 104/18 was determined.

[23] Mrs Browne advised that the funds were currently held in her trust account but would be paid into the Court. She asserted that once the funds had been paid into the Court, the Court could then make an order per s 492(4) of the Cook Islands Act 1915 for the funds to be paid to the person entitled to it. Mrs Browne submitted that if the Court agreed that the person entitled to the funds is the current owner, Upokoina Nena, then she asks that the pay-out be made without provision for commission, given only one cheque would be written.

[24] Mrs Browne further submitted that, even if the respondent is successful in her s 390A application, in accordance with s 390A(5) any amendment of a previous order under s 390A will only take effect from the date of that order. Therefore, given the transfer consideration under the lease assignment was paid over 18 months ago and the title as it stands shows Upokoina Nena as the sole owner, any future order made under s 390A is not going to affect the transaction.

Respondent's submissions

[25] Mr Moore noted that the present application has been filed pursuant to s 492(4) of the Cook Islands Act 1915. However, that section does not provide jurisdiction for the Court to make a declaration or determination as to the ownership of the land, which in reality is what the applicant is seeking from the Court. Mr Moore referred to his submission at the hearing, that a more appropriate section for the application to proceed under would be s 409(a) of the

Act, which gives the Court jurisdiction to determine ownership of the proceeds of alienation. That approach however, was rejected by the applicant.

[26] Mr Moore submitted that the determination of who is entitled to the proceeds of the lease assignment, is a matter that is currently before the Chief Justice in the respondent's application per s 390A. That application is one of the two referred to by the Leases Approval Tribunal, which needed to be determined before the Tribunal would issue their decision with respect to payment of the transfer consideration. Mr Moore noted that Mrs Browne has already sought orders from the Leases Approval Tribunal to "release" the relevant funds, but the Tribunal has made no such orders. He says that, in filing the present application, the applicant is attempting to side-step the matter and is asking the Land Court to deal with a matter of which the Chief Justice is seized.

[27] Mr Moore asserted that if the Chief Justice finds in favour of the respondent's application and concludes that there were errors in the succession orders in respect of Arerenga Section 7, this means the applicant could not be the owner or lessor of the relevant lease and would not be entitled to receive the transfer consideration.

[28] As to the argument that any order under s 390A cannot be retrospective, Mr Moore submitted that there were at least two issues with that proposition. Firstly, the s 390A application is not before this Court to make that decision. Secondly, the Chief Justice under s 390A(5) is able to look at whether there has been any lack of "good faith" in the lease transaction, to which the applicant's authority as purported owner and lessor is directly relevant.

[29] The respondent submitted that the application is wholly misconceived and the question of entitlement to the proceeds of the lease assignment is a matter for the Chief Justice pursuant to the existing s 390A application. The respondent asks the Court to dismiss the application and reserve the question of costs.

Discussion

[30] Section 492 of the Cook Islands Act 1915 provides:

> **492 Payment into Land Court of rents and other proceeds of alienation**

(1) Unless in any case the Court otherwise directs, all proceeds derived from any alienation of Native land confirmed by the Court after the commencement of this section shall be paid into the Land Court.

(2) Upon application made to it by the lessee or any person owing money to Natives or descendants of Natives in respect of any alienation of Native land confirmed by the Court before the commencement of this section, the Court may, by order, direct that all or any of that money shall be paid into the Land Court, whether the money is already due or owing or not.

(3) The receipt of the Registrar of the Land Court shall be a sufficient discharge for any money so paid in the same manner as if that money had been then paid to the persons entitled thereto.

(4) All money so paid into the Land Court shall be paid out of Court to the persons entitled thereto, as determined by any order of the Court

(5) There shall be paid to the Registrar of the Land Court together with any money paid into the Court under this section (not being money laid by the Crown) a commission at the following rates:

(a) In the case of a payment made in respect of an alienation confirmed after the commencement of this section, at the rate of 5 percent of the money paid:

(b) In the case of a payment made in respect of an alienation confirmed before the commencement of this section, at the rate of 2 ½ percent of the money paid:

Provided that the Court, having regard to the amount of money paid, to the number of persons entitled thereto, and to any other relevant matters, may from time to time direct that a lower rate of commission be paid in any specified case.

[31] This section provides for the Court to receive rent money and other proceeds of alienation and to then pay such monies to the persons entitled, as determined by any order of the Court. In some cases, the Court has allowed for the payment of legal costs out of these funds or has ordered that payments to owners be temporarily withheld.[5] However, this provision has not been used to determine entitlement to receive such funds. The provision is an administrative one.

[32] This is supported by the fact that a specific provision exists which confers jurisdiction on the Court to determine ownership of any proceeds of alienation. Section 409(a) of the Cook Islands Act 1915 provides:

409 Miscellaneous jurisdiction of Land Court

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5 See *Landowners of Puoromea 49D, Avarua* HC Cook Islands (Land Division), App 390/11, 10 October 2013; *Bank of South Pacific – Aureikirei Part Section 48B* HC Cook Islands (Land Division), App 254/16, 26 September 2018; and *Turua v Henry-Anguna* HC Cook Islands (Criminal Division), CR 219/11, 27 July 2011.

> In addition to the jurisdiction elsewhere conferred upon [the Land Court] by this Act, that Court shall have jurisdiction-
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> (a) To hear and determine as between Natives or the descendants of Natives any claim to the ownership or possession of Native freehold land, or to any right, title, estate, or interest in such land or in the proceeds of any alienation thereof:
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> ...

[33] Mrs Browne does not seek an order determining the entitlement of the applicant to the transfer consideration, as proceeds of the lease assignment. Instead, she relies on s 492(4) of the Act and simply asks that the funds be paid to the applicant on the basis that she is the current landowner and is therefore entitled to those proceeds.

[34] However, as noted in s 492(4), the Court can pay those funds to the persons entitled as determined by an order of the Court. In that regard, Mrs Browne is effectively asking the Court to accept that the applicant is the person entitled to receive the transfer consideration.

[35] It is clear that the s 390A application currently with the Chief Justice could have an effect on the ownership of Arerenga Section 7. Equally, there may be no change to the ownership. However, a question arises as to the prudency of the Court making an order for payment of transfer consideration due to an owner, when there are challenges to that ownership.

[36] This situation is similar to the one that Isaac J was faced with in Tinomana Ariki's earlier application. There, he considered whether to grant declaration orders as to the interpretation of an order of investigation of title, when there was an application dealing with the same subject matter before the Chief Justice. As noted, Isaac J found it was not appropriate for orders to be made in that case, given that the issues were intertwined with those before the Chief Justice and it could be seen to fetter or divert that decision.

[37] It was Mrs Browne's contention that, even if an order was made by the Chief Justice per s 390A, this would not affect the lease transaction, as the order would not be of retrospective effect. She referred to s 390A(5) of the Act, which provides:

> **390A Amendment of orders after title ascertained**
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> ...
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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 enure 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.
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> ...

[38] Mrs Browne has argued that s 390A(5) does not allow for any orders to be retrospective, I do not agree with that interpretation. It seems inconsistent with the rest of the provision which allows for amendment and cancellation of orders to remedy errors. In any case, I do not need to decide the effect of that section as the s 390A proceedings are not before me.

[39] In considering this matter, I note that the matter before the Leases Approval Tribunal is still extant. While the Tribunal approved the lease and allowed settlement to take place, they specifically reserved the issue of payment of the transfer consideration, pending the outcome of the applications filed on behalf of Tinomana Ariki (Applications 104/18 and 1/18). One of those applications remains to be determined by the Chief Justice. If the issue of payment had not been reserved, the Leases Approval Tribunal may not have granted approval of the lease assignment at that time and consideration would not have been paid. I also note that the Tribunal dealt with similar considerations in coming to its decision, as Mrs Browne also argued there that payment of transfer consideration not be delayed to await the outcome of the relevant applications. Following the Tribunal's decision, Mrs Browne further sought to have the funds released.

Decision

[40] Over and above the matters discussed in paragraphs above, I would not allow this application.

[41] Both ownership and the money are keenly contested before the Chief Justice. The applicant has established no overwhelming reason why she should be paid while the contest

proceeds. She shows no need. The monies are safely invested. They are earning interest and there is no suggestion that they are being eroded by inflation. A decision must be close.

[42] The application is dismissed. Costs are reserved. The applicant is to file any submissions within 21 days and the respondent has 21 days to reply.

Dated at Rotorua this 24th day of July 2020, New Zealand

P J Savage
JUSTICE