IN THE COURT OF APPEAL OF THE COOK ISLAND
HELD AT AUCKLAND CA 4/02

IN THE MATTER OF Article 60(3) of the Constitution

BETWEEN **RAKE BROWN**

Applicant

AND **TANGAROA TE AMARU**

Respondent

Hearing: 9 December 2002

Coram: Casey JA (Presiding)
Barker JA
Smellie JA

Counsel: M C Mitchell for Applicant
R P Browne for Respondent

Judgment: 18 December 2002

JUDGMENT OF THE COURT

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[1] On 20 August 2001 the High Court (Land Division) made a partition order vesting land known as Motutapu Island in the name of Tangaroa Teamaru and Ngamata Teamaru. The present applicant, Rake Browne, appeared as an objector and it seems clear from the record of evidence that he was concerned about the family support for partition, but the Judge was satisfied that this had been properly evidenced at the appropriate meetings and made the order accordingly. On 12 April 2002 a Mr Gerald Garnier lodged an application for an occupation right in respect of

the land. This was followed by Rake Browne's present application to this Court seeking an enlargement of time to appeal, and special leave to appeal. Mr Garnier's application for an occupation right has been adjourned by consent to await the outcome of the present application.

[2] No supporting affidavit accompanied the application for enlargement of time. Nor were any particulars given of the grounds upon which the application for special leave to appeal was based – namely, that the matter raises questions of general or public importance such that it should be submitted to the Court of Appeal for decision. The application was made under Article 60(3) of the Constitution which reads:

> "Notwithstanding anything in subclause (2) of this Article, and subject to such limitations as may be prescribed by Act, the Court of Appeal may in any case in which it thinks fit and at any time, grant special leave to appeal to that Court from any judgment of the High Court, subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit."

[3] The appeal took an unusual course in this Court. Mr Mitchell conceded that an attack on the High Court partition order could not succeed on the material that was then available, but he told us that since the order was made, the present applicant became aware that there were plans to erect a permanent building on the island, presumably pursuant to the occupation licence being sought. We gather that this concern is shared by a number of surrounding owners who say that there is a well-understood custom that Motutapu and other islands should be preserved in their natural state. According to Mr Mitchell, this proposed development did not come to the applicant's attention until well after the making of the partition order, accounting in large measure for the delay in making the present application to us.

[4] Section 60(3) cited above imposes no time restraints, but we think delay is a relevant consideration to be taken into account by the Court in exercising its discretion to grant leave. We agree with the following comments of Roper CJ in *Lee Harmon v Peter Kikorio and William Estall* (Plaint No. 3/88); 27 July 1989:

> "If Article 60 stands alone, an appeal could be brought at any time after judgment, be it months or years and with the result that

> Respondents would be left to bear their own costs on unmeritorious appeals. The Constitution could not have intended those unjust results. Furthermore, express words would be necessary to deprive the Court of reasonable control of its process, and here they are lacking."

The delay here is substantial. The application was filed over a year from the date of the order, and there should have been an affidavit explaining the reasons to enable the Court and the respondent to be properly informed.

[5] There should also have been an affidavit particularising the questions of general or public importance raised in the grounds, and substantiating them by appropriate evidence. Mr Mitchell told us he hoped to put a dossier of supporting material to the Court, but we regarded this as an unsatisfactory method of dealing with the application, as well as being quite unfair to the respondent. We explored with him the possibility of having his client's concerns about the building resolved in the Land Division of the High Court, which seems the appropriate venue to decide the matter at a hearing in which relevant evidence could be properly put forward and tested.

[6] That Court has a discretion to make an occupation order upon such terms and conditions as it thinks fit, but Mr Mitchell had some doubts about whether a building restriction could be justified as a condition of occupation if (as appears to be the case) the owners of the land have consented. He felt he could be on stronger ground in a re-hearing of the partition application because s 429 of the Cook Islands Act 1915 ss (2) provides that:

> "Such jurisdiction [to partition] shall be discretionary, and the Court may refuse to exercise the same in any case in which it is of opinion that partition would be inexpedient in the public interest or in the interests of the owners or other persons interested in the land."

[7] Mr Mitchell submitted that, if his client were granted a re-hearing of the partition application, the Court could take into account his concerns about the subsequent developments in determining whether partition would be "inexpedient in the public interest". However, he had formed the view that, because s 390 of the Cook Islands Act 1915 allowing a re-hearing in the Land Court had been repealed by

the Constitution Amendment Act 1980-81, there was now no longer any right of a re-hearing in land cases. With respect, we think this view is mistaken, and that s 390 was repealed as a consequence of the High Court taking over the role of the former Land Court, so that the rules and procedure of the High Court as set out in the Judicature Act 1980-81 should now apply to all matters within its jurisdiction, subject, of course, to any statutory or other overriding provision.

[8] Rule 221(1) provides:

> "**Rehearing** – (1) The Court shall in every proceeding have the power to order a rehearing to be had upon such terms as it thinks reasonable, and in the meantime to stay proceedings:
>
> Provided that a rehearing shall not be granted on an application made more than fourteen days after the judgment or order, unless the Court is satisfied that the application could not reasonably be made sooner."

Mr Mitchell's attempt to use the appeal process in order to have the matter referred back to the High Court for a new hearing was inappropriate in the circumstances. Rule 221(1) affords the applicant a more acceptable opportunity to air his concerns, subject of course to his satisfying the High Court that he is not too late, and that a re-hearing is justified.

[9] The application for leave to appeal is dismissed with costs to the respondent of $750 together with any disbursements to be fixed by the Registrar if the parties cannot agree.

Casey JA | Barker JA | Smellie JA

Solicitors:
M C Mitchell & Co, Rarotonga for Appellant
Browne Gibson Harvey PC, Rarotonga for Respondent