IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND, NEW ZEALAND

CA9/03

IN THE MATTER	of Article 60(3) of the Constitution and Rule 17 of the Court of Appeal Rules
BETWEEN:	KAIRANGI ELIZABETH HENDERSON (nee PEYROUX) of Rarotonga on behalf of seven of the children of the late PA TERITO ARIKI
	Applicant
A N D:	PA TEPAERU TE ARIKI UPOKOTINI ARIKI (nee PEYROUX)
	Respondent

Hearing:	24 September 2003
Coram:	Casey JA (Presiding) Smellie JA Williams JA
Appearances:	N George for Applicant Mrs T P Browne for Respondent
Judgment:	2 October 2003

JUDGMENT OF THE COURT

Solicitors:
Norman George, Avarua, Rarotonga for the Applicant
Browne Gibson Harvey P.C., P O Box 144, Rarotonga for the Respondent

[1] The Applicant (Mrs Henderson) seeks an order extending time to bring an appeal against a judgment of McHugh J in the Land Division of the High Court on 17 July 1998, and for special leave to appeal against that judgment, relying on Article 60(3) of the Constitution giving this Court power in any case in which it thinks fit, and at any time, to grant such leave, subject to such conditions as to security for costs and otherwise as it thinks fit.

[2] The application is dated 9 July 2003, nearly five years after the time prescribed for bringing an appeal, and was supported by a belated affidavit by Mrs Henderson sworn only two days before the hearing, counsel's explanation being that this was due to oversight. We gave leave for it to be read, notwithstanding the serious charges of bad faith made in it against the Respondent to the effect that she abused the confidence placed in her by her brothers and sisters to gain for herself, as Ariki, family land. As there was no time for her to counter the claims made in this affidavit, we ignore those allegations of bad faith, and treat with reserve the explanation that the delay was due to financial difficulties and the inability to find a lawyer prepared to take an appeal.

[3] In the High Court Mrs Henderson sought revocation of eight succession orders made in Respondent's favour on 8 May and 23 September 1991 in respect of various blocks said to be Ariki land. The Respondent succeeded to that title but the Applicant maintained they were family lands and should have been distributed among the nine children of the deceased. There were a number of hearings involving detailed enquiries into the history of the lands and the families, and consideration of evidence, submissions and historical works. Two applications were withdrawn and His Honour delivered a lengthy judgment revoking three of the succession orders and upholding three, two of which were in respect of Papua Sec 4 and Papua Sec 4A forming the subject of this appeal. They are adjoining properties, and Block 4 is the subject of a tourist hotel project, so far incomplete. It is claimed that the Respondent has received substantial rental payments which she refuses to share with the family.

[4] It is well established that while there are no express restrictions on the Court's discretion to allow an appeal to be brought out of time under Art 60, nevertheless it

retains the power to control its own process in the public interest of bringing an end to litigation, and the principles which have been recognised in granting leave under earlier provisions are relevant: see Rake Browne (CA 4/102; 18 December 2002) and Lee Harmon v Peter Kikorio and William Estall (Plaint 3/88; 27 July 1989). The fundamental approach is summarised in the following extract from the judgment of Richmond J in Avery v No 2 Public Service Appeal Board [1973] 2 NZLR 86 (CA):

> When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.

The fact nobody has been prejudiced by the delay is merely one factor to be taken into account in determining the overall justice of the particular case, and regard must be had to the whole history of the matter including the conduct of the parties and the nature of the litigation, and the need of the applicant on the one hand for leave to be granted together with the effect which the granting of leave would have on other persons involved. (ibid p92).

[5] The other family members were in New Zealand and gave the Respondent powers of attorney to deal with succession to their late mother's land, involving some 33 properties. Mrs Henderson's original position seems to have been that her sister had used these to get the Papua land made into Ariki land so she could get hold of it. But clearly those authorities were needed to deal with all the properties, so there is on its face nothing sinister in the Respondent having them, and in ensuring that her own rights to land appearing to be Ariki Title land were duly recognised. It was also suggested that the Applicant was at a disadvantage in the High Court in conducting her case in person, but this is not apparent from the record where it can be seen that every point open to her was taken into account in His Honour's painstaking judgment. It is very likely that she would have been capable of taking her appeal competently in this Court if she could not get a lawyer to act for her for five years, a proposition we have difficulty in accepting.

[6] Likewise we are not impressed with her claim of lack of means. One would have expected enthusiastic family support for the case, having regard to the prospective hotel development. They all seem to have lived in New Zealand where financial support might have been more readily obtained than at home. There are simply no details of hers or the family's situation or expectations to support her claim that there was no money over this time to take an appeal.

[7] During the hearing of the application we endeavoured to get behind the sweeping condemnation of the Respondent's conduct and supposed motives to identify the Appellant's basic criticism of the High Court judgment. Mr George's main submission appears to be that His Honour had failed to grasp the ways in which land could be held by an Ariki, the first category being title land needed for personal and ceremonial support; then private, personal or family land; and then tribal land. Only land in the first category was exclusive to the holder, and it usually consisted of small areas, whereas the two Papua Blocks were very extensive. In counsel's submission the use of the word "solely" in a succession order did not necessarily mean the land of that type. He also claimed that the Judge had wrongly accepted the evidence given in 1934 that these were Ariki lands and accordingly should go to the present Ariki.

[8] The judgment demonstrates convincingly that His Honour was fully aware of the different interpretations that could be given to the words describing land interests in the court records, as one would expect from his great experience in these cases. He also took into account the surrounding circumstances in determining the effect of the language used. And he was alert to the difference in size between these Blocks and other Ariki lands, stating at p 24 of his judgment that "as a general rule land allocated for title use is usually small in area but this is not compulsorily so". In his historical survey he traced the fortunes of the Ariki under early New Zealand administration, when the policy was to reduce their personal land holdings, but he noted that later judges were more favourably disposed towards them (ibid p12). The judgment demonstrates a comprehensive and painstaking assessment of the situation, and we are satisfied that there will be no miscarriage of justice if it is allowed to stand. The delay is very substantial and we have not been persuaded to exercise our discretion to extend the time and grant leave.

Decision

[9] The application is dismissed with costs of $750 to the Respondent together with disbursements and reasonable travel and accommodation expenses of her counsel to be fixed by the Registrar if the parties cannot agree.


Casey JA


Smellie JA


Williams JA

Signed at am/pm on 2003