IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 12/07
APPLICATION NO. 344/94

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

AND

IN THE MATTER of an application by **TE TIKA MATAIAPO** and **KAUTAI MATAIAPO** for special leave
Applicants

Before: Barker JA (Presiding)
Fisher JA
Paterson JA

Counsel: Mrs T P Browne for Applicants in support
Mr A Manarangi for members of the Raina family to oppose

Date of hearing: 26 November 2008

Date of judgment: 28 November 2008

JUDGMENT OF THE COURT

1. On 9 May 1995 Quilliam CJ accepted a report from Dillon J sitting in the Land Division, a report which the Chief Justice had requested pursuant to s. 390A(3) of the Cook Islands Act 1915 ('the Act'). The Chief Justice in line with Dillon J's recommendation, declined an application made by the applicants pursuant to s. 390A(1) of the Act, which had sought to amend a Partition order made in 1908.

2. On 5 November 2007, the applicants filed in this Court an application for special leave to appeal the above decision. The application was made pursuant to Article 60(3) of the Constitution.

3. In the Tumu appeal (CA 3/08), in which judgment has been delivered today, this Court held that there was no jurisdiction under Article 60(3) of the Constitution to entertain an application for leave to appeal from a decision of the Chief Justice declining an application under s. 390A(1). This is because s. 390A(2) is to be treated as "a limitation as may be prescribed by Act" of the kind envisaged by Article 60(3). S. 390A(2) expressly forbids appeals against orders of the Chief Justice refusing an order under s. 390A(1).

4. Accordingly, following its decision in the Tumu appeal, the Court determines that there is no jurisdiction to grant special leave to appeal the decision of the Chief Justice declining the application under s. 390A(1).

5. However, Mrs Browne for the applicants submitted that there was jurisdiction for this Court to entertain an application for special leave to appeal a ruling of Dillon J, made in the course of the hearing which he conducted before presenting his 390A(3) report to the then Chief Justice on 8 May 1995.

6. Mrs Browne submitted – and the contemporary documentation supports her claim – that the formal orders as drawn up in the Minute Book in 1908 did not accord with the record of the "Cook and other Islands Land Titles Court" dated 1 October 1908. In particular the names of some persons in whose favour orders were made, had been omitted.

7. Dillon J in his report considered that s. 390A(10) constituted a bar to his amending the Partition Orders. Counsel for the applicants before him had felt obliged to concur in the Judge's view.

8. Counsel for the applicants then argued before Dillon J that s. 44 of the Judicature Act 1980-1 entitled the Judge to make an

amendment to the formal order so as to reflect the intention of the Court when making the partition order back in 1908.

9. S. 44 of the Judicature Act provides: *Amendments: "A Judge may at any time amend any minute or judgment of the Court or any other record of the Court in order to give effect to the true intent of the Court in respect thereof or truly to record the course of any proceeding."*

10. Dillon J held that s. 44, described by him as 'the slip clause', did not provide jurisdiction to amend a sealed Court decision made 85 years previously. He considered that s. 390A(10) applied to require him to report against granting the application and that he had no jurisdiction to consider the s. 44 application.

11. However, the decision which but for Article 60(3) of the Constitution, could have been the subject of a leave to appeal application is that of the Chief Justice. He may or may not accept the recommendation in the Land Division Judge's report. In this case, the Chief Justice did accept the report in toto.

12. Therefore, the decision to be considered as a candidate for the granting of special leave to appeal is that of the Chief Justice. S. 390A(2) precludes an appeal.

13. Even if a right of appeal against Dillon J's refusal to make a s. 44 order were possible, there is no justification for granting special leave to appeal in the circumstances of this case.

14. The delay is one of 12 years from the date of the order of Quilliam CJ to the date of the filing of the present application. The affidavit of Te Tika Mataiapo states that leave to appeal the Chief Justice's decision had been given in the High Court by Gilbert J on 7 December 1995 and security for costs was then fixed. The appeal

was formally dismissed by Greig CJ on 16 May 2001 because the security for costs had not been paid.

15. Nobody seems to have drawn the attention of either judge to the difficulty raised by Article 60(2) as to the granting of leave to appeal against a decision refusing a s. 390A(1) order. The prohibition of certain appeals imposed by Article 60(2) (relating to appeals to this Court by leave of the High Court) is differently expressed, but is to the same effect as the prohibition in Article 60(3), as discussed in the Tumu decision.

16. Moreover, the file reveals a letter from the Registrar to the applicant's then solicitors, dated 9 July 1999, advising that, since security had not been paid and no attempt made to bring the appeal to finality, the Registrar proposed to refer the files to a judge formally to record that the appeal is to be regarded as abandoned.

17. Te Tika Mataiapo deposes that the agreement to the abandonment of the appeal had been on the instruction of a Mr Numanga then representing the applicants and who had instructed counsel to withdraw the appeal. She had no knowledge of what Mr Numanga had done. He had had health problems and did not communicate the condition about security for costs to her. She said that it was "*only when we encountered problems recently*" that she approached counsel and was told that the appeal had been withdrawn in 2001. She claims that there would be no prejudice to the respondents if leave to appeal were granted.

18. In our view, the delay is inordinate. It is compounded by the fact that the person evidently having carriage of the proceedings chose to abandon an appeal seven years ago. In fact, the appeal was deemed to have been abandoned much earlier by virtue of rule 12 of the Court of Appeal Rules. Gilbert J's order required security for costs to have been paid within two months – i.e. by 7 February

1996. When it had not been paid by that date and without any extension having been sought, Rule 12 meant automatic abandonment.

19. Authorities under Article 60(3) of the Constitution stress the need for the Court to consider delay as a significant factor in granting special leave. Since the long delay has no proper explanation and there has already been one application for leave which the then representative of the applicants allowed to expire, it would be quite wrong for the Court to allow this application.

20. It is not to be assumed that applications for leave brought years out of time under Article 60(3) will succeed in the absence of plausible and reasonable explanations for the delay and/or important question of public interest to be determined. We cannot see any public interest consideration here which could possibly outweigh in seriousness that inordinate delay.

21. For all the above reasons, the application for special leave under Article 60(3) is dismissed with costs to the respondent of $750 plus disbursements as fixed by the Registrar.

R.J. Barker JA | Fisher JA | Paterson JA