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

CA NO. 7/06
Rehearing application No. 666/05
Application No. 247/05

IN THE MATTER of Section 54 of the Judicature Act 1980-81 and Article 60(2)(e) of the Constitution

AND
IN THE MATTER of the lands known as **AVARUA SECTION 190A1, AVARUA SECTION 190A2, TE TAORA SECTION 128D, TUTAKIMOA SECTION 14E, TAPATEA SECTION 107B1, TAPATEA SECTION 107B2, TAPATEA SECTION 223, PARAKO SECTION 134, AVARUA**

BETWEEN **1. TAUPINI JOHN TEARIKI, 2. OTENIERA JOHN TEARIKI, 3. TEREEMI JOHN TEARIKI, 4. RIMATUTOKO TERAI JOHN TEARIKI, 5. JOHN JOHN TEARIKI, AND 6. VAIORA JOHN TEARIKI**

Appellants

AND **HOWARD TAIRIATA STRICKLAND,** as Tairi Te Rangi Rangatira of Avarua and his Kopu Tangata

Respondent

Before: Barker JA (Presiding)
Weston JA
Grice JA

Counsel/Agent: Mrs T Browne for Appellants

Mr N George for Respondent
Date of Hearing: 26 November 2007
Date of Judgment: 30 November 2007

JUDGMENT OF THE COURT

INTRODUCTION

[1] This is an appeal from a judgment of Hingston J given on 22 August 2006 in which the Judge granted an application for rehearing a previous application decided by Smith J in a judgment given on 19 September 2005. The original application concerned eight parcels of family (as opposed to title) land. The essential issue in dispute was whether an adopted child (not of the blood-line) could take an unrestricted interest in land pursuant to s. 446, Cook Islands Act 1915 ('the Act').

[2] Mrs Browne for the Appellants argued that Emma Moetaua ("Emma") took an unrestricted interest in the eight parcels of land pursuant to two judgments given in 1968. Mr George accepted that Emma took an interest thereunder but said it should have been a life interest rather than unrestricted interest. In effect, Mr George argued that the 1968 judgments were wrong.

[3] S. 446 focuses attention on what it calls "Native custom". It is in the following terms:

> "**Succession to deceased Natives** – The persons entitled on the death of a Native to succeed to his real estate and to his personal estate so far as not disposed of by his will, and the persons entitled on the death of a descendant of a Native to succeed to his interest in Native freehold land, and the shares in which they are so entitled, shall be determined in accordance with Native custom so far as such custom extends; and shall be determined, so far as there is no Native custom applicable to the case, in the same manner as if the deceased was a European." (emphasis added)

[4] This case has followed a complex procedural path. It is necessary for some of the details of this to be canvassed even though the matters in dispute can be summarized as in paragraph [2] above. There are two main reasons for setting out this detail. First, it provides important context in which to understand the 1968 judgments, and a more recent decision of this Court. Secondly, we wish to say something about the procedure that has been followed in this case.

A PROCEDURAL HISTORY

[5] We start with the 1968 judgments. The first is a decision of Chief Judge Morgan dated 29 August 1968 wherein he determined who would succeed to the interest of Tuokura Maeva in the eight parcels of land. At the end of a closely-reasoned judgment, he determined that Emma should succeed to Tuokura.

[6] This had been an opposed application. Makeanui Ariki opposed succession in relation to all lands, except Tutakimoa Section 14E where there was no opposition. We would be inclined to treat that parcel as a special case but we think it unnecessary to do so as a result of our other findings.

[7] In the course of his judgment, the Chief Judge noted that the rights of an adopted child (not of the blood) to succeed to land of the foster parent had always been "somewhat confusing". He went on to review the "two extremes" of the argument. On the one hand, an adopted child (not of the blood) could receive no more than a life interest. On the other hand, there were many cases where such children had taken unrestricted interests.

[8] The Court found there was no absolute rule as to the relevant custom. It was a matter of evidence in each case. Here, the evidence supported the making of succession orders in favour of Emma. Such orders were made. They were unrestricted.

[9] There was then an unsuccessful appeal by Makeanui Ariki against the decision of Chief Judge Morgan. In accordance with the then Court structure, this appeal was determined by the Land Appellate Court. For all present purposes, a decision of the Land Appellate Court is to be regarded as a decision of the Court of Appeal (s. 20 The Constitution Amendment Act (No. 9) 1980-81).

[10] The Land Appellate Court said of the first instance decision:

> "The decision and this appeal turn on the rights of adopted children to succeed to the interests of their adopting parents."

[11] The extent of those rights (the rights of adopted children to succeed) depended on custom. Without setting out a comprehensive view, the Court posed the essential question for resolution in the case before it as follows:

> "does the law or Native Custom preclude a legally adopted child from succeeding to the interests of its adopting parent."

[12] The Land Appellate Court concluded that Emma was not precluded by custom from succeeding. Therefore the appeal failed and the succession orders made by Chief Judge Morgan effectively were upheld. For convenience we will refer to the combined effect of the judgment of Chief Judge Morgan and of the Land Appellate Court as the "1968 judgments".

[13] That was where the matter lay until 1996 when an application was made to the High Court pursuant to s. 450, Cook Islands Act. S. 450 is in the following terms:

> **"Revocation of succession orders** – a Succession order made in error may be at any time revoked by the Land Court, but no such revocation shall affect any interest theretofore acquired in good faith and for value by any person claiming through the successor nominated by the order so revoked." (emphasis added)

[14] We shall return to that application shortly. Before we do, we note various developments that occurred in the period between 1968 and 1996 which, ultimately, have some relevance to our decision.

[15] First, we acknowledge and refer to a paper prepared by the House of Ariki and forwarded to the Legislative Assembly in 1970. This paper was entitled "Maori Customs approved by the House of Ariki 1970". This paper was followed in 1977 by a Statement of Maori custom made by the first Koutu Nui of the Cook Islands.

[16] Both of these papers were reviewed by a Commission of Inquiry into Land presented to the Queen's Representative on 25 March 1996. This Commission made various recommendations concerning the rights of adopted children to succeed to land. None of these recommendations has been adopted by the Legislature.

[17] The second intervening event was that Emma died on 23 January 1982. Her death does not appear to have generated any immediate applications to the High Court concerning her land.

[18] The application referred to in paragraph [13] came before Dillon J in the High Court. This s. 450 application was made by a Mrs Parker in relation

to two of the eight parcels of land. It appears to be accepted that the issues raised by Mrs Parker were essentially the same as those now being advanced by the Respondent. Mrs Parker argued that a succession order made in 1918 should be revoked because Pau Tairi had not died without issue, contrary to the assumption made in 1918.

[19] Dillon J, in his decision of 31 January 1996, rejected Mrs Parker's application. Mrs Browne appeared as counsel in that case to oppose the application. Mr Lynch as counsel appeared in support. On page 2 of his judgment, Dillon J referred to both counsel making submissions. This seems to put paid to Mr George's suggestion that Mrs Parker was unrepresented.

[20] Mrs Browne argued that Dillon J was bound by the 1968 decision of the Land Appellate Court. However, the Judge was not necessarily persuaded by this, preferring to base his view on the evidence before him (it appears that the hearing had occurred on 13 December 1994). In the event, he was not satisfied that the evidence adduced provided any basis to revoke the relevant succession order. Hence the failure of the application.

[21] Later, in or about November 1996, Dillon J made succession orders in relation to the eight parcels of land (these were not before the Court but it is common ground that such were made). Emma had died without issue. The succession orders were made in favor of her uncles and aunts. We understand that such would be a properly orthodox order if Emma held the parcels of land on an unrestricted basis (as Mrs Browne argues). Mr George's subsequent application (see below) focused on these succession orders.

[22] Three years later, further applications were brought pursuant to s. 450 of the Act. These applications resulted in two judgments of the High Court, given by Smith J, on 14 December 1999. Hearings had been conducted before Dillon and McHugh JJ but both had died before giving judgment.

[23] The first of Smith J's judgments concerned another application by Mrs Parker. He dismissed the application, concluding there was no substantive new evidence before him. He said new evidence was little more than an elaboration upon the evidence rejected by Dillon J in January 1996.

[24] The second of Smith J's judgments concerned an application by Mii Collier. It is not entirely clear from the judgment which of the eight parcels of land was involved. It involved at least one of them but possibly more.

[25] The judgment records a submission by the applicant that, in 1968, the family had "consented" to Emma succeeding because her adoptive mother "left a will." There seems to be good evidence that Tuokura desired that Emma should succeed to the eight parcels of land. This application, like the first, failed. The Judge considered himself bound by the Land Appellate Court decision of 1968 and referred, further, to the doctrine of res judicata.

[26] In October 2003 this Court issued its judgment in *Maui Short v Whittaker and Others* (CA 3/2003). Mr George, in large measure, based his case on this, and we return to it below.

[27] On 3 March 2005, the Respondent was formally declared by Smith J to be the title holder Tairi Te Rangi Rangatira. It appears that Mr Strickland has been recognized in this title since 1990. Mr George relied on the formal declaration in 2005 as justifying the steps then taken by Mr Strickland.

But, as will become clear, we do not believe that declaration is particularly relevant.

[28] In 2005, the Respondent brought an application in his name pursuant to s. 450. It concerned all eight parcels of land. The Respondent sought to revoke the succession orders made by Dillon J in late 1996. There was no express attempt to challenge the unrestricted succession orders made in 1968 in favour of Emma.

[29] This application was dismissed by Smith J in a judgment dated 19 September 2005. In short, he considered he was bound by the 1968 judgments. Smith J mentioned Mr Strickland's status as title holder. But he clearly did not consider it determinative.

[30] Mr Strickland was not satisfied with Smith J's decision. Mr George, on his behalf, filed both an appeal to this Court and, also, an application for a rehearing pursuant to R 221 of the Code. He elected to proceed with the application for rehearing and in our view must be taken as having abandoned the appeal.

[31] Hingston J was prepared to entertain the R 221 application but did not say that he was doing so. As noted below, we believe he acted incorrectly. Following prompting from the Court, Mr George accepted that he had proceeded under R 221 because he thought he stood a better chance of succeeding compared to the proper route using an application under s. 390A of the Act. While we commend his candour, we do not approve the course taken by him. We understand, however, that that course may reflect a practice that has grown up in the Land Division of the High Court. If there is such a practice, we deprecate it.

[32] Hingston J heard evidence and argument in February 2006 and issued his judgment, a brief two pages, in August 2006. This is the judgment under appeal. We discuss this judgment in more detail below.

[33] This superficial summary (even so, it is longer than we might desire) illustrates just how many times the respondents have had to resist attack in relation to the subject land. While we express no view on the merits, we note it is entirely unsatisfactory that they should have faced so many challenges, even though all (or virtually all) appear to have raised essentially the same issues. And Hingston J's telescoped decision to allow the rehearing would have generated a further hearing still.

THE JUDGMENT OF HINGSTON J

[34] The judgment was prefaced with a statement of the following issues. As noted earlier, he did not canvas whether this was an appropriate occasion for the use of R 221. The issues were:

> "(1) Are the persons who succeeded to Emma Moetaua in the various lands the subject of this applications (sic) the correct successors; if not should this Court revoke the 1996 orders.
>
> (2) If the Court revokes the 1996 succession order are the Howard Strickland group represented by Mr George the persons properly entitled to succeed and if they are should the Court make succession order (sic) in their favour".

[35] The Judge referred to the competing arguments of Mr George and then Mrs Browne. Mr George relied upon the *Maui Short* decision of this Court and the 1970 report of the House of Ariki: Mrs Browne relied upon the 1968 judgments. The Judge then said he accepted Mr George's analysis of *Maui Short*. He apparently saw this judgment of this Court as reducing

the significance of the 1968 judgments (he said the judgment of the Land Appellate Court was "not helpful"). He reasoned that Emma had a life interest only. He appears to have overlooked that the 1968 judgments were not properly before him for decision (as we discuss below).

[36] He concluded:

> "I am of the opinion that I should grant a rehearing, primarily because on what is before me Smith J did not address the question of whether the succession orders made by Dillon J in 1996 were inherently wrong because custom required Emma Moetau's (sic) interest determine on her death."

[37] In Hingston J's opinion, Smith J had made an error of law. This conclusion was reached on his interpretation of the *Maui Short* decision and his analysis of the consequence of that on the 1968 judgment. The Judge reserved the merits of the case for further argument consequent upon granting the rehearing.

***MAUI SHORT v WHITTAKER* AND ITS RELEVANCE TO THIS CASE**

[38] This judgment of this Court concerned the right of an adopted child (of the blood line) to succeed to the land interest of her natural parents. Her brothers and sisters, and other blood relatives, opposed her right to succeed.

[39] It was not a case concerned about the rights of adopted children (not of the blood) to succeed to the land interests of foster parents. The Court made no reference to the 1968 judgment of Chief Judge Morgan nor of the Land Appellate Court.

[40] The Court considered the issue of custom by reference to the 1970 and 1977 papers and the 1996 Commission of Inquiry discussed above. Paragraphs [29] and [30] of the judgment of this Court are particularly revealing. It would burden this judgment unnecessarily if those paragraphs were repeated in full. But they make it clear that adopted children can inherit land rights through adoptive parents.

[41] Although, on the facts of that case, the claimant child was of the blood, we do not read the judgment as requiring a re-think of the 1968 judgments. They are simply not addressed and no necessary implication exists that they should be re-considered by this Court.

[42] The Court repeatedly (see, for example, paragraphs [24] and [30]) made the point that none of the recommendations in the various material has been implemented by the Legislature. Mr George, in his submissions, invited us to fill that void but we see no role for this Court in that regard. It is properly a matter for the Legislature.

[43] We accept that identifying land interests through the relevant blood lines is of cardinal importance in Cook Islands custom. But, on the basis of the materials before us, we cannot reach a conclusion that as a matter of custom, an adopted child, who is not of the blood, only ever takes a life interest. There will be circumstances when that is so but it is not an inevitable conclusion in all cases.

[44] In our opinion, Hingston J misinterpreted the decision of this Court in *Maui Short*. That decision does not support a conclusion that Emma had a life interest only. In our view, the 1968 judgments remain good law. Consequently it is Hingston J, and not Smith J, who has erred in law.

[45] These findings would be enough to dispose of the appeal. Because we have significant reservations about the procedures adopted we now address those as well.

PROCEDURAL CONCERNS

[46] This Court has two particular concerns. First, that R 221 was relied upon as the basis to set aside the judgment of Smith J. Secondly, that the s. 450 application originally made to Smith J raised no objection to the 1968 judgments but, nevertheless, directly confronted the orders made therein. We now address those two concerns.

[47] This Court is reluctant to make wide pronouncements about procedures in the Land Division of the High Court. Clearly that division deals with large numbers of applications, many of which do not involve lawyers. Equally clearly, a degree of flexibility may be desirable.

[48] At the same time, the Land Division is bound by the law and the Code of Civil Procedure. In cases such as the present there should be no reliance on R 221. S 390A of the Act is the appropriate vehicle for applications of this sort. S 390A(1) provides:

> "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 or 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 of either of those Courts." (emphasis added)

[49] Mr George's application for a rehearing dated 29 September 2005 specifically alleged that Smith J "erred in law and fact". That is an appropriate formula for justifying the filing of an appeal – which was the only other procedurally acceptable mode of challenging Smith J's decision.

[50] The s. 390A procedure should have been followed here. As Mr George acknowledged, he did not use this procedure because he thought he would fail. But that concession really provides the answer to the appeal. His R 221 application was a try-on. It succeeded, but it should not have done.

[51] If the s. 390A procedure had been followed, it would have been necessary, too, for Mr George to apply for leave to have fresh evidence admitted. On the basis of what we have seen it seems unlikely that Mr George would have persuaded the Chief Justice that such evidence was admissible. Mrs Browne referred us to a number of instances when Mr Strickland has accepted that the so-called fresh evidence was the same evidence given in 1996 and 1999.

[52] While we have decided that R 221 should not have been used in this case, this judgment does not purport to be a definitive analysis of the scope of R 221. We express real reservations about whether the rule can ever be relied upon to re-hear a substantive matter disposed of following full argument and with a reasoned judgment. We did not hear argument on this aspect of the case. Resolution will need to wait another

day. A good argument exists for saying that the use of R 221 in this context is ultra vires given the specific provisions of s. 390A.

[53] On the face of s. 450, of the Act, an applicant can bring successive applications to revoke a succession order where there has been an error. But this is not a right to be exercised in a vacuum. It does not entitle an applicant repeatedly to raise the same objection. Issues of precedent and res judicata inevitably impact on the process. We have not felt it necessary to deal with such argument at any length in this judgment because we have already concluded quite easily that Hingston J erred.

[54] Our second procedural concern is even more fundamental. The application heard before Smith J (and delivered by him on 19 September 2005) challenged the succession orders made in 1996. It did not challenge the 1968 orders. But, as Mr George eventually accepted, his argument rested on a proposition that the 1968 judgments were wrong to give Emma an unrestricted interest.

[53] It seems to us that both or either of these procedural concerns would be sufficient, without more, to allow the appeal.

CONCLUSION

[54] The appeal is allowed.

[55] The appellants are entitled to costs which we fix at $2000 plus disbursements as fixed by the Registrar. Costs are to be paid initially out of the amount held as security for costs.

R J Barker JA

Barker JA

Weston JA

Grice JA