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

CA 8/99
(Land Application No. 395/98)

IN THE MATTER of Section 409(f) of the Cook Islands Act 1915

AND

IN THE MATTER of determining the right of a person to hold the title of **MAKEA NUI ARIKI**

AND

IN THE MATTER of an application by **MAKEA NUI SATARAKA NOOROA** for an extension of time for the filing of records and the settlement of the security for costs.

APPELLANT

Sir G A Henry for Appellant

Mr Manarangi for First Respondent

Mr Mitchell for Second Respondent

Mr Nia for self and family

Date: 10 November 2000

JUDGMENT OF GREIG CJ

This is another part of what has been a lengthy and unfortunately somewhat bitter and acrimonious dispute within the family and the tribe as to who has the title of Makea Nui Ariki. The Appellant after a hearing last year in this Court was found not to be entitled to that title. He appealed. The former Chief Justice fixed security for costs in the sum of $15,000. That is and was a very large sum. It is not a sum that is

unprecedented at least in relation to what I am told has been an order of Court of Appeal in one case but it is certainly an unusual sum to fix. It seems that the sum was fixed partly because of the Appellant's expressed desire to have the appeal heard in Rarotonga. That is a costly matter because the Court has to be brought to Rarotonga. If that affected the decision of the former Chief Justice, then with the greatest respect I disagree with that. The cost to be fixed by way of security are the costs which may be paid on a party and party basis to the successful respondents if they are successful. It is unusual to fix a very large sum in anticipation of the result and it is certainly never a part of the costs that may be awarded that the party is obliged to meet any of the actual costs of setting up the constitution and the conduct of the Court itself. It is limited to the costs which might be awarded as between the parties only.

The Appellant is I am told, seems to be accepted as a man of limited means. He was unable immediately to raise the sum required for security. There have been a number of applications for extension of time. I understand that there have been no applications for variation of the amount until now. There was no challenge of the order that was made by the former Chief Justice. In two payments the sum of $7,000 was paid into Court and is now standing in Court.

On the last application for extension of time the former Chief Justice allowed an extension until July and made it clear that that was to be a final extension. No further payment has been made beyond the $7,000. The Court of Appeal Rules, in Rule 12 it provides that:

> " If the appellant shall fail to give security for costs within the time specified in the Order granting leave to appeal the appeal shall be deemed to be abandoned."

That is somewhat similar to the corresponding Rules of the Court of Appeal in New Zealand and that Rule is said to be intractable; one which cannot be amended one which cannot be waived or varied. In New Zealand however there is a proviso to the Rule which allows a fresh notice of motion of appeal if the Rules can otherwise be complied with.

In the Cook Islands not only is there no proviso as in New Zealand but there is also a Rule 32 among the general provisions which provides that:

> "Non-compliance on the part of an appellant with these rules or with any rule of practice for the time being in force under the Act shall not prevent the further prosecution of his appeal if the Court of Appeal or the President thereof considers that such non-compliance was not wilful and that it may be waived or remedied by amendment or otherwise."

The corresponding New Zealand Rule, Rule 69 in the Court of Appeal Rules 1955 is not in the same wording as that. In New Zealand it has been held that rule does not apply to Rule 12 but that there has been some suggestion that may be not the final word on that. The position here however is complicated by the provisions of the Judicature Act 1980-81. Part 2 of that Act provides for the Court of Appeal of the Cook Islands, S54(3) provides for the fixing of the security of costs. It says:

> "Leave to appeal shall be granted only on condition that the appellant within a period to be fixed by the High Court, not exceeding 2 months from the date of the hearing of the application, gives security to the satisfaction of that Court or the Registrar thereof in a sum to be fixed by the Court for the payment of the costs of the appeal."

There is a proviso providing that appeals in the Criminal jurisdiction may be proceeded with without security. S72 of the Act provides that:

> "If the appellant does not with due diligence prosecute his appeal or observe any of the conditions imposed by section 54(3) of this Act (relating to security for costs), the Court of Appeal may dismiss the appeal and any costs thereof and any security entered into by the appellant

shall be dealt with in such manner as the Court of Appeal directs."

There is clearly a conflict between what is contained in the Rules and what is contained in the Act. If the Rules are to be read as intractable the Act provides a discretion for the continuance of the appeal and the waiver of non compliance. Rule 32 of the Court of Appeal Rules seems to embody the provisions of the sections in the Act in the Rules.

In my judgment the Rule is not as in New Zealand so intractable, the Act must prevail and so there must be a discretion which can be exercised to waive the failure so long as it is proper that the appeal should proceed. Underlying all of the provisions of the Act and of the Rules is the law that a party must be entitled to prosecute his appeal and bring to the Court for a decision on the merits of the case without being trapped or impeded by mere rules of procedure. The rules about security in costs are important not only to provide a fund for security for the parties but also to ensure that an appeal comes to an end; that litigation can be finalised. Counsel seem to be agreed that this is a matter of considerable importance not only to the family and the tribe in Rarotonga but more widely and more generally than that.

Mr Nia who has appeared today to oppose the application made by Sir Geoffrey on behalf of the Appellant has made it clear to me the strong feelings within his family and within the family of the tribe as a whole that are occasioned by these proceedings and by the continuation of that. This is an area where there is a conflict between what is tribal law and custom going back many many generations on one hand and the law of the Cook Islands embodied in Acts of Parliament the rules and the operation of the Court. All persons in the Cook Islands are entitled to come to Court to seek decisions on the matters which affect them in the Court. Some times it may be preferable for parties to resolve their differences rather than to come to Court but the right is present and that must be allowed to be exercised by all persons in this country. I believe with the greatest respect to the former Chief Justice that the amount he fixed was too high and that a smaller and lesser amount would have been appropriate. The failure to pay

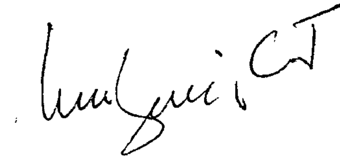
5.

has not been wilful in the sense that there has been an effort not to pay. I accept that the Appellant has made efforts to pay as in an endeavour to encourage his family to help that he has not been able to obtain more than the $7,000 now paid in. There has been some suggestion that in the conduct of the hearing before the High Court that the Judge was not assisted as he might have been and this may have affected the decision that he reached.

This is a matter that has gone on for a long time, it ought to be brought to an end as soon as possible, I think it is inevitable that a Court hearing by the Court of Appeal will be required to deal with the matter and make pronouncements by which the family , the tribe can then act. If the matter is stopped now there will remain the dispute and the doubt about the title and these may perhaps be unable to be resolved between the parties. It now needs some independent party, a Court, to come to a position to make pronouncements and directions and lead the family, the parties then to decide what is to be done.

The question is to whether I have any authority to deal with the matter now as I indicated in referring to the provisions. It is the Court of Appeal or the President of the Court of Appeal who is entitled to exercise the discretion of non-compliance by the Appellant with Rules. The President of the Court of Appeal is the judge of the Court of Appeal of the Cook Islands who is appointed from the Court of Appeal of New Zealand or the Judge in his place. As Chief Justice I am a member of the Court of Appeal of the Cook Islands ex officio and if the President being that particular Judge of the Court of Appeal appointed in his place is not present then I become the acting President and have the authority to act as the President of the Court of Appeal. It might be safer and more timid if I said that I will not deal with the matter and the matter could be referred to New Zealand to a sitting of the Court of Appeal of the Cook Islands. That would only mean some further delay and costs. It seems to me that the matter should be dealt with and dealt with promptly and therefore I have decided to exercise my jurisdiction as acting President of the Court of Appeal and I therefore do so in favour of the Appellant and waive the non-compliance to date by way of the payment for security of costs. To remedy the matter I vary the amount of

the order of the security of costs and reduce it to the sum of $7,000 and in that event the amount now paid meets the payment and the appeal is therefore properly constituted and may proceed now. I will reserve the costs of this hearing to be dealt with at a later date.



CHIEF JUSTICE