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

APPLICATION NO: 104/2011

IN THE MATTER	of s 409(e) of the Cook Islands Act 1915 and r 132(a) of the Code of Civil Procedure of the High Court 1981
AND IN THE MATTER	of the land known as **AREAU** s 35 Arutanga
AND IN THE MATTER	of an application for an interim injunction
BETWEEN	NGAOA RANGINUI Trustee for **MATA URI PUATI** Applicant
AND	**MAINA TRADERS LIMITED** Respondent

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Hearing: 9 September 2011

Counsel: T Moore for the Applicant
T Browne for the Respondent

Date: 9 September 2011

JUDGMENT OF THE HONORABLE TOM WESTON CJ

APPLICATION NO: 03/2011

IN THE MATTER	of s 390A of the Cook Islands Act 1915
AND IN THE MATTER	of the land known as **AREAU** s 35 Arutanga, Aitutaki
BETWEEN	NGAOA RANGINUI Trustee for **MATA URI PUATI** Applicant
AND	**MAINA TRADERS LIMITED** Respondent

[1] There are two proceedings before the Court. The first is an interim injunction application pursuant to which Savage J granted an interim injunction on 25 August 2011. The second is a s 390A application. While both of these were not commenced simultaneously, there is only a matter of a day or so between their commencement, and the two have effectively been treated as intermittently connected. Indeed, they raise different aspects of the same essential complaint.

[2] The dispute arises in circumstances of very considerable urgency, for reasons I will explain shortly. The reasons that I am giving now may well be less than are otherwise desirable, but I will endeavour to touch on what appear to me to be the main matters for decision.

The Facts

[3] The dispute involves a section of land in Aitutaki subject to a lease. As I understand it, but in any event, this will do for material purposes, the lease was to CITC, and was then assigned to Maina Traders Limited, which is the respondent to this proceeding. Maina Traders, as I understand it, is under some financial pressure and is in the process of selling its business. As part of that, it wishes to assign the lease to one of the entities associated with Vonnia's. If the interim injunction had not been granted and this challenge raised, it is likely that the assignment of lease to the new owner would have occurred by now.

[4] The applicant, who appears by her trustee as a current land owner having succeeded to her interest in 2006. There is an issue raised by her as to whether the proposed assignment to the new owner has been properly consented. That issue, however, is not before me; that is a matter primarily to be raised in the Leases Approval Tribunal.

[5] The essential challenge brought by the applicant concerns a meeting of land owners held on 6 November 1997. It appears to be common ground that on the face of it, there are some deficiencies in the calling of that meeting. An issue as to whether there is a quarum has been raised as to whether some of the representation was appropriate and lawful.

[6] Ten land owners are listed in the Minutes of the meeting held on 6 November 1997. I am advised by the parties that the land owners numbered 1, 2, 3 and 6 are the ones in respect of which concerns arise.

[7] Mrs Browne has referred to these as "technical failures" and explained that she has used that language because although she accepts the deficiencies on the face of it, she says that if there were proper powers of attorney or proxies, then these may not actually be deficiencies.

[8] I have heard submissions that the recording officer at that meeting was a very experienced recording officer. It appears that both parties have had discussions with her and, indeed, there has even been a letter prepared. I refuse to accept that on the basis that it seemed to me inappropriate that I should receive unsworn evidence without being in a position to understand the circumstances in which it came into being.

[9] In a Minute that I prepared earlier this week, dated 5 September 2011, I invited the parties to address whether the recording officer should prepare and file an affidavit. No such affidavit has been filed. Mr Moore quite reasonably points out that he cannot force the potential deponent to do so and she apparently is wanting to take some advice before she does. While that is a valid objection, the reality is that the burden for satisfying me of the deficiency does lie upon Mr Moore. On this critical point, I would expect there to be evidence.

[10] Following the land owners' meeting in November 1997, the matter came before Dillon J. Mr Moore has provided me with a copy of the judgment that he gave on 8 January 1998, in which he confirmed the resolution made on 6 November. Mr Puna appeared at that meeting in relation to some objectors, but that objection was not upheld. Mr Moore makes the point that the objection raised was of a different character to the one now raised by him.

[11] Mrs Browne has raised the issue of res judicata. While I think there is validity in what she says, I do not need to deal with that to dispose of the matter today.

[12] Finally, in this summary of the facts, I note there is a mortgage to the ANZ. I had originally understood this was a mortgage to Westpac. However, Mrs Browne has advised me that it is to ANZ, and that this is well known both to her and to Mrs Moore. As I understand it, the ANZ have not been appraised of this application. It seems to be common ground that if Mr Moore's challenge to the lease is upheld, then the ANZ mortgage will be a nullity. Plainly, they have a very significant interest in this matter, but they did not appear before me today.

Interim injunction

[13] There was detailed and lengthy argument before me in relation to the interim injunction application. As I will explain shortly, Mr Moore has withdrawn that. However, I believe I should set out some observations in relation to interim injunctions concerning land matters.

[14] I understand that injunctions are dealt with by JP's in the Land Division of the Court on a reasonably regular basis. Most of these appear to be of a reasonably low-level character and could perhaps be described as trespass orders. What I am about to say does not apply to those. The present case, however, is entirely different to that sort of plane. While it may arise out of similar circumstances, (that is as to the validity of a meeting of land owners), the consequences of the argument being upheld are so significant that it would not be proper for them to be dealt with other than on strict terms.

[15] This Court will usually address interim injunctions in three stages. First, it will decide whether there is a serious case to be argued. Secondly, it will address where the balance of convenience lies, and in some instances, it may well reach a decision here inconsistent with a decision under the first step. Finally, it will examine the overall justice of the case.

[16] As part of its examination of the second step, it will consider whether the applicant has given an undertaking as to damages and whether it has provided evidence that it is able to sustain that undertaking. This is an important mechanism whereby the Court protects the interests of the parties. The Court, in granting an

interim injunction, is always concerned that it is doing so on less than adequate information. There may be circumstances in which, after a full hearing, the interim injunction is set aside. If that can occur, the respondent may have lost considerable money, and the undertaking as to damages provides protection. There was no such undertaking in the present case, and in my opinion and as I indicated to Mr Moore, that may well have been fatal to his interim injunction here. In any event, Mr Moore, perhaps seeing the writing on the wall, withdrew the interim injunction application. He said he was content to rely upon his rights so far as they concern the recent assignment, which he says was not properly consented to, and which he says he will raise in the Leases Approval Tribunal.

[17] I pointed out to Mr Moore, before he withdrew the interim injunction, that in doing so, he could expose himself to costs. He accepted that. Mrs Brown has formally sought costs, and I will deal with costs in due course.

Section 390A application

[18] Normally, s 390A applications are considered in circumstances where there is no urgency. Indeed, in the year or so since I have been Chief Justice, this is the first where there have been circumstances of urgency. I have no doubt that this matter must be dealt with today. This is the last day of sitting in this sitting of the Court and I have other commitments in New Zealand when I return. That is why the matter must be disposed of now. Furthermore, if the matter is to be referred to the Land Court, this needs to be done so that Savage J can consider it in the October sitting of this Court.

[19] Section 390A is well known to the parties in this matter. However, I now set it out, but restricting that to subs (1), (2), (3) and (4):

> **390A Amendment of orders after title ascertained –**
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> (1) 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 of 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 or intended decision of either of those Courts.
>
> (2) Any order made by the Chief Judge upon any such proceedings amending, varying, or cancelling any prior order shall be subject to appeal in the same, manner as any final order of [[the Land Court]] but there shall be no appeal against the refusal to make any such order.
>
> (3) The Chief Judge may refer any such application to [[the Land Court]] for inquiry and report, and he may act upon that report or otherwise deal with the application without holding formal sittings or hearing the parties in open Court.
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> (4) The Chief Judge may require any applicant to deposit such sum of money within such time as he thinks fit as security for costs, and, unless that deposit is so made, may summarily dismiss the application. The Chief Judge shall have power to allow costs to any person opposing the application.

[20] I am satisfied that there is arguably an error in the calling of the meeting. However, I would have expected an affidavit from the recording officer as I have already described. I repeat that the burden is on the applicant to satisfy the Chief Justice that a prima facie case is made out that the jurisdiction should be exercised. The absence of the affidavit is a powerful factor in deciding against such an application.

The question of delay

[21] Delay is not a factor specifically set out in s 390A, but plainly, it is relevant to the exercise of the Chief Justice's discretion. As the parties will know, it has long been a matter of practice that delay must be explained. In this case, there was no explanation of delay in the original papers. I am not saying that in a critical way, because they were produced under circumstances of urgency.

[22] The question of delay has since been addressed and argued before me this morning. The essential explanation given for delay is that the applicant has large land holdings and it is not easy to research all of these and be certain of the correct position. Rather, the applicant does that research as and when dealings occur in relation to family land, and that acts as a trigger or a spur to the applicant to do the research. The inevitable consequence of such an approach, however, is that it will place the Court from time to time in impossible situations of urgency. In my opinion, it is not an adequate explanation for delay.

[23] I understand what Mr Moore says about the difficulties of undertaking research, and not only as to the condition of the records, but sometimes the complexity. However, there is very good reason why this Court is concerned about delay. The longer the delay in any instance, the harder it is to go back and resolve the facts. Memories dim, parties die and so on.

[24] The Court will always be astute to ensure that questions of delay are properly addressed. In the present case, the applicant knew about this land interest because from time to time she received rent from the lease. She did not investigate it because nothing was happening. She is quite entitled to take that decision, but it is not an acceptable approach to take when coming to the Court seeking the exercise of the Court's discretion.

[25] Mr Moore made the very fair point that many applicants do not know their rights and cannot be expected to investigate all of their land holdings at the point they acquire an interest. That is a valid point, but I do not think it is entirely relevant here where the applicant is an experienced land owner and has made the specific decision not to investigate an interest that she knew she had.

[26] I am also conscious that, in this case, Dillon J made the order a short time after the land owners' meeting. While Mr Puna's objection was not on point, the fact is that there was a dispute, and if there were obvious problems, which Mr Moore says there were with the meeting, I would have expected that Dillon J would be alert to those. There is no suggestion that he had the slightest concern. Indeed, some of the matters raised by Mr Moore in his submissions, including the inadequacy of

good will, were matters specifically discussed before Dillon J. I must also emphasise that his wife's mother's interest was not succeeded to until 2006. If an applicant for the exercise of the jurisdiction were entitled to raise that as a ground explaining delay, it would mean that with each generation, there is simply a new ground of delay established. I do not believe that can be right.

[27] As a consequence of what I have now said, I am not satisfied that there has been an adequate explanation of delay in this case, and that, coupled with the absence of an affidavit from the recording officer setting out her view of things, means that I would decline to exercise my jurisdiction.

[28] I now also mention two other matters which, although not determinative and not capable of final resolution, provide me some comfort in that decision. The first is that Mrs Browne has raised s 58(4) of the Land (Facilitation of Dealings) Act. This section is not apparently the subject of a formal decision by the Court as yet and it is clearly not appropriate that I reach a final view in a matter such as the present where there are circumstances of considerable urgency. On the face of it though, it seems to me that Mrs Browne raises an arguable case that s 58(4) prevents the applicant from raising the very issue which she now does. Mrs Browne explained that that Act was intended to deal with situations where there were large numbers of land owners and reading that section as best I can in that part of the Act, I can see how there is substance in her submission.

[29] Mrs Browne has also addressed me in relation to the Legal Contracts Act and s 6 of that Act. She has explained that the legal contract, should it be such, is the lease, and that there would be grounds in this case to validate. She drew particular attention to the interests of the bank who had relied upon the validity of the lease in order to grant the mortgage. Certainly, in the absence of the bank, I would be extremely reluctant to make any order in terms of that sought by Mr Moore today, so that is, of course, another factor in my decision.

[30] Ultimately though, whether the Chief Justice exercises his discretion under s 390A is a matter for the Chief Justice. As I understand it, the exercise of the discretion to refuse an application cannot be appealed, but that, of course, is a matter

for Mr Moore to consider. I am not, of course, inviting any challenge, but I simply want to record that I have noted that provision in the section.

[31] For the reasons that I have endeavoured to set out above, and for which I apologise might well be a less than complete explanation, I now refuse the application to refer the matter to the Land Court, whether sitting in October or at all.

[32] As a consequence of Mr Moore withdrawing the interim injunction application and my refusing his application under s 390A, there are now no current matters before this Court.

[33] Mrs Browne has succeeded on all fronts, and is entitled to costs.

Tom Weston
Chief Justice