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

APPLICATION NO. 334/2016

IN THE MATTER OF	of Sections 326 and 333(3) of the Code of Civil Procedure of the High Court 1981 and Section 390A of the Cook Islands Act 1915
AND	an application for leave to amend an application
IN THE MATTER OF	of the land known as **Ngakuriao 88B, Ngakuriao 88B1 and Ngakuriao 88B2 Arorangi**
BETWEEN	SAM N TAUEI Applicant
AND	TE ARIKI TAPURANGI RANGATIRA Respondent

Hearings: 23 August 2017

Appearances: Mrs T Browne for the Applicant
Mr W Rasmussen for the Respondent

Judgment: 3 May 2019

JUDGMENT OF JUDGE C T COXHEAD

Copies to:
Tina Pupuke Browne, offices of Browne Harvey & Associates P.C, Parekura Place, Avarua, Rarotonga
Travis Moore, office of the Land Court Services, Ngatipa, Rarotonga

Introduction

[1] The applicant, Sam N Tauei, originally applied for a declaratory judgment challenging an Order of Investigation of Title (OIT), an Order for Amendment of Title (OAT) and succession orders. Leave has now been sought to have this application amended to a s 390A application pursuant to the Cook Islands Act 1915.

[2] The issue for determination is whether leave should be granted to amend this application, or whether I should direct that a new s 390A application should be filed.

Background

[3] The application relates to land known as Ngakuriao 88B, Ngakuriao 88B1 and Ngakuriao 88B2 in Arorangi (the Land).

[4] An OIT was made in respect of the Land on 19 February 1906. Te Ariki Tapurangi (also known as John Salmon Senior) and John Salmon Junior were both named as owners of the Land with both of their relative interests noted as a life interest.

[5] An OAT was made in respect of the Land on 16 March 1948. The OAT struck out the words 'life interest' for John Salmon Junior, making him an absolute owner of the land.

[6] At the same time as the OAT, a purported Succession Order was said to have been made for the Land in respect of John Salmon Junior.

[7] According to Sam Tauei's affidavit, the Land has since passed down the Tepori line and the current Ariki of Arorangi is Tinomana Tokerau Ariki.

The present applications and procedural history

[8] While the issue to be determined is whether the application to amend can be granted, I think it will be helpful to the parties if I outline the procedural history of this application in full.

Application for declaratory orders

[9] On 26 May 2016, Sam Tauei filed an application for declaratory orders. Mr Tauei sought three orders.

[10] Firstly, that the OIT is in part a nullity on two grounds:

(a) The Court had no jurisdiction to make the part of the OIT that named Te Ariki Tapurangi as an owner of the land; and

(b) Te Ariki Tapurangi was not a Native or part-Native when the Court made the part of the OIT that named Te Ariki Tapurangi as an owner of the land.

[11] Secondly, that the OAT is a nullity on two grounds:

(a) That when the Court made the OAT by consent, it had no jurisdiction to amend the OIT; and

(b) Consent does not confer jurisdiction.

[12] Thirdly, that the purported Succession Order is a nullity, upon the ground:

(a) That if the Court had no jurisdiction to amend the purported OIT, then when the Court purported to make the Succession Order to the interest of John Salmon Junior such interest had already come to an end and, consequently, the Court did not have jurisdiction to vest the life interest of John Salmon Junior in any persons.

[13] In support of his application Mr Tauei filed an affidavit dated 26 July 2016. He explained that Te Ariki Tapurangi, or John Salmon Senior, was an Anglo-American who married the holder of the title, Mereana Tinomana Ariki. He was a member of Parliament and represented the Arorangi District. Parliamentary papers and minutes supplied by Mr Tauei provided that foreigners were not eligible to sit as a Member of Parliament except for John Salmon Senior who had already been elected.

[14] Mr Tauei explained in his affidavit that Mereana Tinomana Ariki died without issue. However, she adopted a child with John Salmon Senior in 1906 - John Salmon Junior.

[15] Mr Tauei determined that the effect of the application being successful would be that there are no successors to Te Ariki Tapurangi and John Salmon Junior shown on the OIT. The likely outcome would then be that he, among others, would be found by the Court during an application for investigation of title to be an owner of the land.

Notice disputing the claim

[16] On 27 June 2016, Teariki Tapurangi Rangatira (also known as George Taripo) filed a notice disputing the claim on behalf of the landowners.

[17] Counsel for Teariki Tapurangi Rangatira, Ms Browne, submitted that the Court had no jurisdiction to declare the above orders as nullities. She submitted that Sam Tauei has failed to identify the act that he has done or desires to do, the validity of which depends upon the construction of a legal document that is in doubt, as required by s 3 of the Declaratory Judgments Act 1994. She concluded that the applicant had no standing. Additionally, Ms Browne submitted that the application is misconceived, as when there are disputed facts and mixed law, the courts have consistently declined to entertain an application under the Declaratory Judgments Act.

Hearing for declaratory judgment

[18] Isaac J heard the matter on 27 July 2016 as an application for a declaratory order.

[19] The matter was adjourned to give parties time to consider the recently released *Tavioni v Cook Islands Christian Church Incorporated of Avarua* decision which discussed the jurisdiction of the Court to make declaratory judgments.[1]

Application for leave to amend

[20] On 28 December 2016, Sam Tauei filed an application for leave to amend his application. He sought to drop the challenge to the OIT in respect of the making of an order

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1 *Tavioni v The Cook Islands Christian Church Incorporated of Avarua* HC Rarotonga Application 196/14, 24 November 2016

granting the interest in Native freehold to a non-Native, while preserving the challenge to the OAT and Succession Order. He sought to amend the latter two orders to s 390A applications.

Hearing for application for leave to amend and subsequent filings

[21] On 23 August 2017, I heard this matter as an application for leave to amend the declaratory judgment to a s 390A application.

[22] Mr Moore appeared on behalf of the applicant and Ms Browne appeared in opposition for the landowners.

[23] At this hearing, I said that I would need to look further into whether I have jurisdiction to amend the application. The matter was adjourned for Mr Moore to provide the Court with authorities illustrating that the Court does have jurisdiction to amend the application.

[24] On 14 November 2017, Mr Moore filed a memorandum with authorities supporting the proposition that the Court has jurisdiction to grant leave to amend the application as sought. Mr Moore appended a letter from Ms Browne to Kopu Matua-Atuatika dated 5 December 2012 referring to a succession order which was originally filed pursuant to s 450 and amended to be determined by the Chief Justice pursuant to s 390A.

[25] While counsel did not provide a copy of this case, I was able to find a copy of the decision relating to costs in the same matter. There was a formal order made in that decision dismissing the s 390A application.

[26] On 17 January 2018, Ms Browne filed submissions in response to Mr Moore's submissions, opposing the granting of leave to amend this application to a s 390A application on several grounds.

[27] Firstly, she submitted that there are no provisions in the Code of Civil Procedure of the High Court 1981 (the Code) that provide for amending applications in the Land Division of the High Court.

[28] Secondly, Ms Browne submitted that s 8 of the Judicature Act 1980-81 gives the Court supplementary jurisdiction in the practice and procedure to be adopted, however this is subject to the Code.

[29] Thirdly, counsel submitted that it is unclear what authority Mr Moore was referring to in his memorandum. She says that the case he cites was filed soon after the Court of Appeal dealt with an appeal concerning s 450 of the Act. The Court in that case considered that the word "error" involves a simple clerical mistake or error which can be corrected easily because it is so obvious.[2] The Court found that:[3]

> Section 450 was never intended for such cases which require a rehearing of evidence. In short, this is a situation where if any claim was to be pursued it should have been pursued under s 390A.

[30] Ms Browne suggested that the above statement may have influenced the Court to allow the amendment from s 450 to s 390A in the example given by Mr Moore.

[31] Ms Browne further submitted that the amendment sought in the present case is substantially different, as it seeks an amendment from an application for declaratory orders to a rehearing application.

[32] The issues in this case are:

(a) Can the application be amended to a s 390A application; and if so,

(b) Is it within my jurisdiction to amend that application; and if so,

(c) Should I make the order to amend it?

The Law

[33] The Code of Civil Procedure of the High Court 1981 sets out:

326 Proceedings in Land Division

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2 *Teariki v Sanderson* CA Rarotonga Application No 188/2010, 19 October 2011 at [49].
3 At [50].

> Except as otherwise expressly provided for under any enactment or unless inconsistent with any other Part of these rules this Part shall apply to any proceedings in the Court exercising the jurisdiction of the Land Division of the Court.
>
> **333 Procedure at hearing**
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> ...
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> (3) The Court may, in its discretion, deal with the subject matter of any application wholly or in part or parts, and make separate orders in respect of each such part or parts, or dismiss any application, or grant leave to extend, **or amend**, vary or withdraw any application wholly or in part upon such terms as the Court thinks fit.
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> (emphasis added)

Discussion

[34] Section 333(3) of the Code allows for the amendment of an application. Therefore, I am satisfied that the application in the present case can be amended to a s 390A application.

[35] Under s 326 of the Code, this can be done by the High Court, including the Land Division. There is no wording that suggests that an amendment to an application so that it is brought under s 390A may only be made by the Chief Justice. Therefore, I am satisfied that I have the jurisdiction to make the order amending the application.

[36] The final question to consider is whether I should make this application, as s 333(3) specifies, that this is a matter within the Court's discretion.

Order of Investigation of Title (OIT) and Order for Amendment of Title (OAT)

[37] In *Tuake v Toeta* the Court considered its jurisdiction in relation to an OIT under s 390A, with the report by Isaac J stating:[4]

> [37] Section 390A of the Act provides the Chief Justice with a wide discretion to amend, vary or cancel any order of the Court where, through any mistake, error or omission of fact or of law, a person has been affected by the mistake, error or omission.
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> [38] This wide discretion is restricted however, by s 390A(10), which states that s 390A does not apply in relation to the investigation of title or partition 'save with regard to the relative interests defined there under'.
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> [39] This means that if there has been an error or omission in the making of an order and the Chief Justice deems it necessary or expedient to amend or vary or cancel, he

4 *Tuake v Toeta* HC Cook Islands Application No 01/2011, 13 March 2013 at [37]-[40].

> can do so, but the Chief Justice cannot interfere with orders creating title, such as orders made upon an investigation of title or upon partition.
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> [40] The only amendment or cancellation the Chief Justice can make is in relation to such orders is in relation to the relative interests defined in the orders of title.

[38] Therefore, s 390A cannot be applied to investigations of title unless it is in relation to relative interests.

[39] The question then is to determine whether the striking out of a life interest and replacing it with an absolute interest (as occurred in the OAT in 1948) is a relative interest.

[40] In *Tuake v Toeta* Weston CJ accepted the Land Division report which discussed relative interests:[5]

> [15] I think Mrs Browne is right that the application, as worded, is too wide. I do not think there is jurisdiction under section 390A to revisit, for example, the family meeting. The only way that a partition order can be re-examined under this jurisdiction is if the relative interests of the parties fall to be considered. It is not entirely clear to me whether this exception is open here. As I understand " relative interests", this term reflects a percentage interest held by a particular landowner in a whole section. Here, the effect of the Order made by Smith J was to create three new sections, two of which were wholly held by the applicant and respondent respectively. Mrs Browne submits (see paragraph 14 of her submission) that the amendment sought by the applicant here is not one with regard to the relative interests defined by the Order of Smith J. There seems to be some force to that submission.
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> ...
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> [47] In this case the applicant's mother received a sole interest in one title created by the partition order and the respondent a sole interest in the other. No relative interests were created in either order.

[41] Based on the above definition and discussion, the amendment of the life interest meant that it was no longer a relative interest. Relative interests are those which reflect a percentage interest held by a particular landowner in a whole section. The interests here are not split between different individuals and they are not relative interests. Therefore, s 390A cannot be applied to the investigation of title.

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5 *Tuake v Toeta* HC Raratonga Application No 1/2011, 5 April 2013 at [8] and [12].

Succession orders

[42] In *Paiti* Weston CJ agreed with Isaac J's report that a succession order could be amended where an error had been made in the original order under s 390A.[6]

[43] While *Paiti* is a case where succession orders proceeded as a s 390A application, in this situation the application relating to succession orders is linked and dependent on the Court having jurisdiction to amend the purported OAT.

[44] Given my finding above that s 390A cannot be applied to the investigation of title and given that the succession order amendments sought are linked and dependant on the investigation of title, it is difficult to see how in these particular circumstances s 390A will apply to allow a succession order to be amended.

Decision

[45] Having regard to the above matters I decline to amend the application to a s 390A application.

[46] The application is dismissed.

[47] A copy of this decision is to be sent to all parties.

Dated at Rotorua, Aotearoa/New Zealand this 3rd day of May 2019.

C T Coxhead
JUSTICE

6 *Paiti* HC Rarotonga Application No 14/2012, 30 April 2013 at [5].