IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
LAND DIVISION **APPLICATION NO. 390A 11/2012**

IN THE MATTER	of Section 390A of the Cook Islands Act 1915
AND	
IN THE MATTER	of the lands known as **TANGITOA 1B1 & 1B2, NGATANGIIA**
AND	
IN THE MATTER	of an application to rehear a Partition Order of 29 August 2000
BETWEEN	**MATA TATA MAKEA WICHMAN** Applicant
AND	**TANGAROA TEAMARU** Respondent

Date of Application:	3 October 2012
Date of Referral to Land Division:	23 April 2014
Date of Hearing:	2 May 2014
Date of Land Division Report:	30 April 2019
Appearances:	Mrs T Carr agent for applicant Mr T Moore agent for respondent Mrs T Browne for ANZ Banking Group (NZ) Limited in 372/12 Mr A Manarangi for Westpac Bank in 372/12
Date of Judgment:	20 August 2019

JUDGMENT OF HUGH WILLIAMS, CJ

[0636.dss]

Facts

[1] On 3 October 2012[1] Mata Tata Makea Wichman, the abovenamed applicant, applied for a rehearing of a partition order granted to Tangaroa Teamaru, the abovenamed respondent, on 29 August 2000 on the grounds that the respondent was granted about 3000m^2

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1 Not 2 May 2014 as in Isaac J's report.

more than he was entitled to in a partition order of Tangitoa Section 1B1, and that the partition affected the landowners in the balance of the land, Tangitoa 1B2, in that they have 3000m^2 less than their share.

[2] The applicant is the respondent's sister and holds a power of attorney from him and in view of that and the fact that the application is one which is consented to, it is regrettable that, for the reasons which will emerge later in this judgment, the application has taken as long as it has to reach this point.

[3] Mrs Wichman's affidavit says that Tangitoa 1B, prior to the partition, contained 4.5ha vested solely in the parties' grandmother. She had three children so the land was intended to be given to each child in thirds and the parties' mother had five children which gave each of the siblings 1/15th share or approximately 3000m^2 of Tangitoa 1B.

[4] In 2000 the respondent decided to partition his share and become the sole owner of his portion of Tangitoa 1B but, in what was claimed to be an error, instead of the partition order in the respondent's favour being for his share, approximately 3000m^2, Smith J on 29 August 2000 ordered the partition of Tangitoa 1B1 to be in the respondent's name solely[2]. The amount allocated was 6010m^2 and the balance of the land, Tangitoa 1B2, was partitioned to be in the name of 25 other persons in varying shares totalling 14/15$^{th's}$.

[5] It was only in 2004 that Mrs Wichman discovered the share of approximately 3000m^2 for which she was seeking an occupation right had been included in the respondent's partition order. She said:

> "When I was told of this, I spoke to my brother who told me he had included my area in his partition order so that he could 'protect' it for me. He readily agreed as the sole owner of Tangitoa 1B1 to grant me back my area as an occupation right. This was done on 16 December 2004."

[6] Mr Teamaru filed an affidavit saying that:

> "I agree that half of my partitioned area actually belongs to my sister"

going on to say:

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[2] Spelled in the order as Tangaroa Te Amaru.

> "I included my sister's area in my partition as she was in New Zealand at the time and I wanted to make sure that her entitlement was protected and could not be claimed by another family member. However, I agree that she should be the landowner of her own area and I give my full support to her application. … I understand that if the rehearing is successful, it will make my sister the underlying owner of the land but it will not disturb any third party agreements that have been made on the land."

Procedural

[7] The application was first referred to Weston CJ on 11 September 2013 when he recorded that nothing had happened since filing and made procedural directions.

[8] That was followed by a second minute dated 29 March 2014 which directed Mrs Carr and Mrs Browne "to confer and report to me with an agreed way forward … in order to bring the matter to a conclusion".

[9] That, in its turn, led to Weston CJ issuing a lengthy minute on 23 April 2014 which, after reviewing events concerning the file to that point, referred to two previous decisions issued by him which were argued to be inconsistent – and which will be discussed later in this judgment – and, in referring the application to Isaac J for enquiry and a report, asked the Judge to review the previous decisions and give advice on them[3].

S 390A(10)

[10] The previous decisions to which reference has just been made centre around the provisions of s 390A(10) which reads:

> (10) This section shall not apply to any order made upon investigation of title or partition save with regard to the relative interest defined thereunder, but the provisions of this subsection shall not prevent the making of any necessary consequential amendments with regard to partition orders.

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[3] Weston CJ issued a fourth minute on 1 December 2014 but its content requires no consideration at this point.

"Turoa" and "Raupa" decisions

[11] The two decisions of Weston CJ which were thought to be inconsistent are *re Tuoro 27A Takitumu, Beren v Teava Iro*[4] a judgment of the Chief Justice of 1 October 2012 (hereafter referred to as "*Turoa")* and *re Raupa 87E3B, Arorangi, Tuake v Toeta*[5] delivered by Weston CJ on 5 April 2013 ("*Raupa"*).

"Turoa"

[12] In *Turoa* Savage J delivered a 7 paragraph report to the Chief Justice on 21 August 2012 which, after noting procedural matters, said that at a "brief" hearing on 11 October 2011 the respondent had agreed the partition order at issue in that case should be set aside. It was thus a consent case.

[13] Weston CJ's short 4 paragraph judgment of 1 October 2012 noted that there was no dispute that the partition order at issue in that case should be set aside – which he did – but that "the challenge is not so much to the partition order itself but to the relative interests granted by the Court". It is not thus precluded by s 390A(10)"[6]. It is clear, therefore, that the views expressed by Weston CJ did not deal in any analytical sense with the scope of s 390A(10).

"Raupa"

[14] Weston CJ's decision in *Raupa* followed receipt of a report to him by Isaac J dated 13 March 2013 after a hearing on 27 February 2012.

[15] The report noted that the application related to Raupa Section 87E3B Arorangi alleging that the Court erred in granting a partition order which, in place of an equal share, allowed unequal distribution of the parties' interests into three sections: 87E3B1, of 2500m^2 and 8000m^2 vested solely in Tuakana Toeta; 87E3B2 of 1.4790 ha vested solely in Tuvaine Toeta; and 87E3B3 being the balance of the area vested in 79 residue owners. The applicant,

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4 Land 533/2002, s 390A 3/2009. Since receipt of the Land Division report, delivery of this judgment has been delayed until sufficient of the papers in *Raupa* and *Turoa* could be obtained.

5 Land 347/1998, s 390A 1/2011.

6 At [2].

Julia Tereapii Tuake, complained that the parent block 87E3B should have been equally divided between her mother[7] and the respondent.

[16] After analysing the parties' submissions and recounting ss 390A, 429 and 435, the report moved to consider the terms of s 390A(10) stating the issue as follows[8]:

> [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.
>
> [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'.
>
> [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 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.
>
> [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.
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> [41] The question therefore arises as to whether in the case of a partition the Chief Justice can disrupt the titles created or simply consider the relative interests determined within the titles created.
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> [42] In this case the applicant is stating that because of errors made by Justice Smith in his 2000 decision, the Chief Justice should amend the titles created by simply reversing the allocation of the available Moari share[9].
>
> [43] The respondent submits that the Chief Justice has no jurisdiction to make this amendment as the partition order complained of vested all of 87E3B1 in the respondent and all of 87E3B2 in the applicant. Therefore the respondent and the applicant's mother were the sole owners of their respective blocks and there are no relative interests defined in the partition order. If this is incorrect then the respondent considers that the order complained of was not in error.

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7 By then deceased.
8 At [37]-[43].
9 The respondent was for the Moari branch.

[17] The report then observed[10]:

> [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.
>
> [48] As a result and in terms of s 390A(10) the Chief Justice in my view does not possess the jurisdiction to interfere with the partition of Justice Smith. Accordingly, I would recommend that the application can be dismissed at this point without considering the submissions of the applicant relating to the alleged errors of the Justice Smith order.

[18] That view was supported by reference to the jurisdiction given the Chief Judge of the Maori Land Court in New Zealand[11] under s 44 of Te Ture Whenua Maori Act 1990 which is similarly worded to s 390A(1). The jurisdiction in the former is exercised in accordance with the following principles:

> [51] … These principles include:
>
> (i) When considering s 45 applications, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence produced by the applicant (and any evidence in opposition);
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> (ii) Section 45 applications are not to be treated as a rehearing of the original application;
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> (iii) The principle of Omnia Praseumutur[12] Rite Esse Acta (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies to s 45 applications. Therefore in the absence of a patent defect in the order, there is a presumption that the order made was correct;
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> (iv) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct;
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> (v) The burden of proof is on the applicant to rebut the two presumptions above; and
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> (vi) As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decision. These principles are reflected in s 77 of the Act, which states that Court orders cannot be declared invalid, quashed or annulled more than 10 years after the date of the order[13]. Parties affected by orders made under the Act must be able to rely on them. For this reason, the Chief Judge's special powers are used only in exceptional circumstances.

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10 At [47]-[48].
11 Also Isaac, J.
12 Sic: Praesumuntur.
13 A restriction absent from s 390A.

> [52] Also, in *Bennett – Te Puna Parish Lot 154G Block* (2011) 2011 Chief Judge's MB 68 (2011 CJ 68) it was stated that a Chief Judge application is not to be treated as a rehearing or appeal of the original application just because the applicant disagrees with the decision of the Court. It is necessary for the Chief Judge to uphold the principles of certainty and finality.
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> [53] These principles in my view make it clear that the general intent of the legislation is that orders of the Court should be binding and conclusive on all parties and that the applications to the Chief Justice are only made in exceptional circumstances where the applicant can show a clear mistake or error in the original order which the Chief Judge deems necessary or expedient to remedy.
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> [54] Also, the Cook Islands' jurisdiction s 390A(8) requires the consent of the High Commissioner before making an order when the application has been filed over five years after the order complained of. This reinforces the need for certainty and the conclusive nature of orders, especially those affecting title.

[19] Weston CJ's decision recited the facts and noted a minute he had issued which commented[14]:

> "as I understand, certain 'relative interests', this term reflects a percentage interest held by a particular landowner in a whole section"

[20] The judgment then turned to a review of Isaac J's report[15], set out the similar New Zealand provisions and then simply said "I dismiss the application"[16].

Report in 11/2012

[21] After recounting something of the history of the matter[17] and referring to *Raupa*, the report noted that it was "not a decision of the Land Court but a report which can either be accepted or rejected by the Chief Justice"[18] and moved to a consideration of the two cases noting that, in *Raupa*, Isaac J had interpreted s 390A(10) as follows:[19]

> "I interpreted this ["save with regard to the relative interests defined thereunder"] to mean that the Chief Justice's jurisdiction in terms of s 390A(10) was restricted

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14 At [15], cited in para [8].
15 Which was adopted by the Chief Justice as part of his judgment; at [11].
16 At [14.]
17 And apologizing for the delay between the hearing on 2 May 2014 with submissions filed later that year and the report dated 30 April 2019 Isaac J summarised the parties' submissions including those for ANZ Banking Group (NZ) Limited as mortgagee of Tangitoa 1B1.
18 At [12].
19 At [18].

> to amending or cancelling the relative interests defined in an order of title or partition order, the relative interests being the interests of owners in common in relation to each other".

[22] He went on to pose the rhetorical question as to whether the "relative interests defined thereunder" was the parent title prior to partition or the title created by the partition"[20] opining that[21]:

> [20] I considered that the words 'defined thereunder' must refer to the titles created on partition. My rationale for this interpretation was that the order the subject of the s 390A decision was the partition order. It was this order which the applicants sought to amend and there were no complaints with the parent title. Thus the 'relative interests thereunder' in my view must refer to the title under question. In this case the titles created by the partition order.
>
> [21] In *Raupa* three titles were created on partition. Two vested in an owner solely and the other vested into the balance of owners. In relation to the solely owned titles under review there are no relative interests and hence my recommendation to you that had no jurisdiction to interfere in terms of s 390A(10).
>
> [22] If a concern was raised in relation to the balance block and the relative interests in that block, then clearly your jurisdiction in terms of s 390A(10) would be triggered.

[23] Turning to *Turoa*, Isaac J agreed with Weston CJ's comment earlier cited saying that the judgment in *Turoa* was[22] "not at odds with that used in *Raupa* in that if there were relative interests created by the partition order this would trigger your jurisdiction" and there was therefore no inconsistency between the two.

[24] The report then moved to the possible disposition of the case saying[23]:

> [27] The partition order of 29 August 2000 created two titles from Tangitoa Section 1B which contained 4.5 hectares as follows:
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> (i) Tangitoa 1B1 containing 6010m2 which vested solely into Tangaroa Te Amaru.
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> (ii) Tangitoa 1B2 containing the balance of the land vested into 25 owners in their respective shares including the applicant Mata Tata Makea Wichman.

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20 At [19].
21 At [20]-[22].
22 At [24].
23 At [27]-[31].

> [28] Therefore in terms of my interpretation of s 390A(10) the Chief Justice would have no jurisdiction to interfere with the title Tangitoa 1B1 as there are no relative interests created.
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> [29] Notwithstanding I note that Tangaroa Teamaru agreed by affidavit on 9 November 2012 that he was effectively holding half the area he received on partition in trust for his sister, the applicant.
>
> [30] Having regard to this affidavit evidence of Mr Teamaru I would recommend that you could amend the present application on notice, to an application to vest a half share of Tangaroa Teamaru to his sister Mata Tata Makea Wichman pursuant to s 23 of the Cook Islands Amendment Act 1960.
>
> [31] The application to vest could then be referred to the Land Court for determination.

Discussion and decision

[25] Whilst it is clearly somewhat difficult for one Chief Justice to endeavour to reconcile two decisions of a previous Chief Justice which are said to be inconsistent, the present Chief Justice agrees with the experienced and insightful observations of Isaac J in the report of 30 April 2019 that there is, on analysis of the exception in s 390A(10) "save with regard to the relative interests defined" in orders made on investigation of title or partition, no apparent inconsistency between *Turoa* and *Raupa*.

[26] *Turoa* was clearly a decision not founded on rigorous analysis of s 390A(10), largely because the outcome in that case was a matter of consent, so ordering rehearing of the relative interests in the challenged partition order was a straightforward issue.

[27] *Raupa* is a more considered decision, at least in the sense that it includes the evaluation and adoption of the Land Division's report, the salient parts of which have already been cited.

[28] The observation that s 390A(10) debars intervention "with orders creating title such as orders made upon an investigation of title or upon partition" and confers power only to amend or cancel "orders in relation to the relative interests defined in the orders of title" is persuasive, as is the consideration as whether, in partition cases, s 390A(10) gives power to "disrupt the titles created or simply consider the relative interests determined within the titles created". In *Raupa*, because the two parties received sole interests in the titles created by the partition order, no relative interests were created and there was therefore no jurisdiction to

intervene under s 390A(10). In *Turoa*, though only a part-file was available, it may be that the principle is correct, but its application may not be, and its application was diverted by the matter being by consent.

[29] At all events, the principle is that, if a partition order or one on investigation of title, creates a solely owned title, s 390A(10) operates as a bar to the Chief Justice making any order under s 390A, even if the error is manifest or the matter is one of consent. If, however, the order on investigation of title or the partition order creates relative interests within the titles created, challenges which fit within the balance of s 390A can be brought and are not debarred by s 390A(10).

Further steps

[30] In light of that discussion, the appropriate conclusion is that the Chief Justice has no jurisdiction to grant the application for a rehearing of the partition order of 29 August 2000 insofar as it relates to the partition of Tangitoa 1B1 to the name of the respondent solely and the application is accordingly dismissed.

[31] In paragraphs [29]-[31] of the 30 April 2019 report, a way is suggested for the respondent's admissions to be translated into orders effectively vesting a half share of Tangitoa 1B1 in the applicant but, given it is nearly 7 years since the application was filed, it may be the case that the method suggested is no longer appropriate.

[32] There will, however, be leave reserved to the applicant to file an application for a vesting order pursuant to s 23 of the Cook Islands Amendment Act 1960, with such to be undertaken, if considered appropriate, within one month of delivery of this judgment.

[33] In the circumstance of this matter – one where there is a clear aspect of public interest in the outcome – it may be unlikely that costs are to be pursued but, if such is not the case, memoranda may be filed with that due from the respondent within 15 working days of delivery of this judgment and that from the applicant within a further 10 days.

[34] Although dismissal of applications under s 390A does not arguably trigger the necessity of obtaining the Queen's Representative's consent pursuant to s 390A(8), for precautionary reasons, and because people's property rights are involved and such orders are

unappealable, applications for consent are made in all s 390A applications where the challenged order is made more than five years previously to receipt of the application. An application for consent will therefore be made once the other issues surrounding this matter are resolved[24].

[35] In the meantime copies of this judgment are to be sent to the parties together with a copy of the Land Division report of 30 April 2019 which is adopted as part of this judgment, and those appearing may file memoranda, if they consider it appropriate, as to the proposed disposition of this long-standing application.

Hugh Williams, CJ

[24] It is understood that an application for a declaratory judgment brought by ANZ Banking Group (NZ) Ltd (probably in relation to 372/12), has been settled.