

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

APPLICATION NO. 3/2014

IN THE MATTER of Section 390A of the Cook
Islands Act 1915 (NZ)

AND
IN THE MATTER of the lands known as **MANGAITI
KAIROA SECTION 30 & 54
NO.2B, AVARUA**

AND
IN THE MATTER of an application to rehear a
Succession Order made on 8
September 1969 to the interest of
Aitu

BETWEEN **GEORGE TURIA**
Applicant

AND **DESCENDANTS OF AITU¹**
Respondent

APPLICATION NO. 9/2016

IN THE MATTER of the lands known as **ENUAKURA
5, 6 & 205A2, AVARUA**

AND
IN THE MATTER of an application to rehear a
Succession Order made on 15
September 1969 to the interest of
Aitu

BETWEEN **DOREEN BOGGS** on behalf of
the issue of Kuruatu
Applicant

AND **SUCCESSORS TO AITU**
Respondent

APPLICATION NO. 3/2017

IN THE MATTER of the lands known as **TIRAONGO
117, ENUAKURA 4, NGATI
TIARE 91 & 92, TEKOU 126A,
AUMARU 180A4, TAKAREU
186B, PAKIMATO 203, AVARUA**

AND
IN THE MATTER of an application to rehear a
Succession Order made on 19
August 1970 to the interest of Aitu

BETWEEN **DANIEL NGAWAKA
MITCHELL** on behalf of the
issues of Cecil Roi

¹ Mata Brown @ Mata Mereana @ Mata Mereana Aitu and her daughter Mavis Aitu Pari. Adopted by Aitu on 5 May 1909 and 6 August 1952 respectively (per Coxhead, J.)

Applicant

AND

SUCCESSORS TO AITU

Respondent

Date of Application No. 3/14: 14 October 2014**Date of Application No. 3/17:** 8 June 2017**Date of Application No. 9/16:** 3 October 2016

Appearances: Ms C Evans for Applicants in 3/2014 and 9/2016
 Ms T Carr, Ms M Henry & Ms M Houra for Applicant in 3/2017
 Mrs T Browne for Respondent(s) in all three applications

Minute (No's 1 to 4): 27 March 2018; 29 October 2018; 20 September 2019; and
 7 February 2020

Date of Judgment: 21 August 2020

JUDGMENT OF HUGH WILLIAMS, CJ
(re. jurisdictional challenge in 3/2014 & 9/2016)

[0821.dss]

[1] Minute (No.3) issued on 20 September 2019 described the then position concerning these three applications under the Cook Islands Act 1915 (NZ) in the following way:

[1] All three of the above intituled matters are applications pursuant to s 390A of the Cook Islands Act 1915 (NZ) and in two, No's 3/2014 and 9/2016, quite apart from the merits of the application, a jurisdictional issue is raised by Mrs Browne, counsel for all respondents. That queries whether, having regard to the wording of s 390A and the Constitution, Chief Justices have jurisdiction under that section to rehear decisions of Appellate Courts, particularly the Native Appellate Court (now the Court of Appeal).

...

[3] Ms Evans counsel for Mr Turia ... filed a memorandum dated 30 August 2019 dealing, relatively briefly, with the jurisdiction created by s 390A and the possibly applicable principle of res judicata. She submitted that, in view of the matters set out in her memorandum, 3/2014 be adjourned from the September/October 2019 sessions for hearing in the first Land Division sitting in 2020 and for a timetable order in the meantime.

[4] Application 3/2014 was referred to the Land Division of the Court for inquiry and report on 29 October 2018, but referral is in limbo pending resolution of the jurisdictional point.

[2] Minute (No.4) issued on 7 February 2020 then read:

[1] The current position concerning these three applications under s 390A of the Cook Islands Act 1915 (NZ) was fully set out in Minute (No.3) delivered on 20 September 2019.

[2] In particular, the minute observed² that the jurisdictional question raised in relation to applications 3/2014 and 9/2016 needed resolution without further delay and set a timetable for the filing of submissions on that issue, the outstanding portion of which gave Mrs Browne, counsel for the respondent in all three applications, 10 working days from receipt of the minute to file any submissions in reply.

[3] As far as is known to the Chief Justice, Mrs Browne has not yet filed those submissions and accordingly the jurisdictional question remains unresolved.

[4] In 3/14 Ms Evans, on 20 January 2020, filed a memorandum saying that she, too, had not yet been served with Mrs Browne's memorandum in reply as a result of which Ms Evans sought timetabling directions that:

- a) Mrs Browne's memorandum in reply be filed within 14 days of Ms Evans' submissions with Ms Evans having a right of reply to new issues raised in the Mrs Browne's memorandum, Ms Evans' reply to be filed within 14 days of receipt of Mrs Browne's memorandum.
- b) The matter to be set down in the next Land Division sitting to monitor progress, set a date for hearing or a date for mediation.

[5] Ms Evans' application for a further timetabling direction in relation to Mrs Browne's memorandum in reply is an appropriate one and accordingly there will be a further direction that Mrs Browne file her memorandum in reply on the jurisdictional question within 10 working days of the issue of this minute, with a further direction that, if Mrs Browne chooses not to file a memorandum in reply, the jurisdictional issue will be determined on the material currently on these three files concerning that aspect.

[3] On 20 July 2020 Ms Evans³, filed a memorandum saying no further submissions had been filed by Mrs Browne since Minute (No.4), her clients were "waiting to have their respective applications determined and have been generous in their patience while

² At [12] and [14].

³ By then counsel for the applicants in both 3/2014 and 9/2016.

they await the reply submissions from the respondents” and commented that further delay “prejudices the ability of the applicants to proceed with work they have planned following their determination”.

[4] Having regard to the lack of any further submissions by Mrs Browne, despite the terms of the timetable orders set out above, it was assumed that Mrs Browne did not intend to take the opportunity of filing any further submissions and the Chief Justice then proceeded with the drafting of a lengthy and complex judgment dealing with the jurisdictional issue.

[5] However, on 18 August 2020, when the judgment was almost at the point of delivery, Mrs Browne filed further submissions referring to paragraphs [14] b) and c) of Minute (No.3), to the extensions to that timetable which were granted and expired on 18 October 2019, and said:

“3. Counsel refers to paragraph 14-17 of Counsel for the Applicant’s Submissions dated 11 September 2019 and accepts that between 1950 and 1981 the Chief Justice could correct errors, mistakes or omissions of the Native Appellate Court. The position is of course different post-1981.

4. The orders complained of in the two applications were made prior to 1981 and Counsel accepts that the Chief Justice has jurisdiction to hear the applications.”

[6] Applications 3/2014 and 9/2016 were commenced on 14 October 2014 and 3 October 2016 respectively and the notices of opposition challenging Chief Justices’ jurisdiction were filed on 25 February 2015 and 26 July 2018 respectively. It is to be regretted that progress on those applications has been stalled for a lengthy period pending resolution of the jurisdiction question but, in light of Mrs Browne’s memorandum of 18 August 2020, the respondents challenge to Chief Justices’ jurisdiction outlined above, being abandoned, is formally dismissed.

[7] The making of that order should not, however, be taken as acceptance of Mrs Browne’s submission that the jurisdictional question “is of course different post-

1981". If a similar challenge arises in other applications under s 390A, it will require future determination.

Future conduct of applications

[8] Though there was no jurisdictional challenge in 3/2017, as the respondents in all three applications were generically described as the same and the underlying adoption issues seemed likely to be legally common to all three, they were, for a time, all dealt with together.

[9] As to 3/2017, that application was referred to the Land Division for inquiry and report on 27 March 2018 but Minute (No.3) directed that no action be taken to implement the orders for referral in both 3/2014 and 3/2017. Despite that, for some reason, the inquiry in 3/2017 was heard on 18 July 2019, Coxhead, J's report was received on 25 June 2020 and, following further submissions, a final judgment is nearing delivery.

[10] As to the two other applications appearing in the intituling, the order made on 29 October 2018 for the referral of 3/2014 to the Land Division for inquiry and report is now to be implemented and there will be a similar order for referral of 9/2016.

[11] The notices of opposition filed to date in those two proceedings deal principally with the jurisdictional challenge. Any further notices of opposition dealing with other issues in those applications are to be filed within 20 working days of delivery of this judgment.

[12] If costs in 3/2014 and 9/2016 are to be pursued at this stage of those proceedings, memoranda may be filed with that from the applicants being due 20 working days from delivery of this judgment and that from the respondent within 10 further working days.

[13] In view of the commonality of the respondents to the three applications and thus the possibility that the resolution of 3/2017 may be relevant to the inquiry, report and resolution of 3/2014 and 9/2016, there will be a direction that the whole of the file in 3/2017 is to be available to those involved in 3/2014 and 9/2016 in case it assists in the disposition of the inquiry and final judgment in those applications.

[14] Further, because not all s 390A reports and judgments are public, it may be relevant to suggest that those involved in 3/2014 and 9/2016 may derive assistance from the 2 April 2020 report of Savage, J to the Chief Justice in *Samuel v Successors of Emma Moetaua*⁴ and the subsequent documents on that file.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ

⁴ S 390A application 8/2015, *Samuel v Cook Islands Government Property Corporation & Westpac Banking Corporation*.