IN THE COURT OF APPEAL OF THE COOK ISLANDS
(LAND DIVISION)

CA 1/2001
OA NO. 2/83

IN THE MATTER	of Article 59(1) and (2) of the Cook Islands Constitution as amended by Constitution Amendment (No. 9) 1980-81
AND **IN THE MATTER**	of an application to the Court of Appeal for leave to appeal to Her Majesty the Queen in Council from a judgment of the Court of Appeal delivered at Rarotonga on the 26th day of July 1998 and numbered Appeal No. 2/83.
BETWEEN	The descendants of **METUA MOEAU**, landowner **Appellantss**
AND	**NGAMETUA** and **TAIMAU** being persons named by the Land Court as owners in **TE ARAKURA SECTION 83A ARORANGI** **Respondents**

Hearing date:	09 November 2005
Coram:	Williams CJ (presiding) Barker JA Smellie JA
Counsel:	Mrs T Browne for Appellantss Mr M Mitchell for Respondents
Date of judgment:	09 November 2005

JUDGMENT OF THE COURT

[1] The underlying application in this matter is an application for leave to this Court to appeal to Her Majesty in Council from a judgment of this Court delivered in favour of the Respondents on 26 July 1988. There is a helpful summary of the background to this application for leave to appeal in the Judgment of this Court dated 18 December 2002 ("the 2002 judgment") as follows:

> "[2] The present application arises out of an unusual situation. In a reserved judgment delivered on 1 March 1989, this Court (McCarthy, Roper and Quilliam, JJA) granted conditional leave to Metua Moeau to Appeal to Her Majesty in Council. An order granting final leave was made, by consent, on 31 January 1991.
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> [3] On 9 June 1993, before a fixture had been sought in the Privy Council, the Cook Islands Legislature enacted the Privy Council (Judicial Committee) Amendment Act 1993 ('the 1992-3 Act'). Section 7 of that Act purported to abolish appeals to the Privy Council from decisions of the Court of Appeal in certain cases regarding land ownership and the right to chiefly office in these words:
>
> > **Limitation of Appeals** - Notwithstanding any royal prerogative, or anything contained in the Judicial Committee Act 1844 of the United Kingdom Parliament, or any Orders made pursuant thereto, no appeal shall lie to Her Majesty in Council from a decision of the Court of Appeal relating to –
> >
> > (a) the right of any person to hold any chiefly office;
> >
> > (b) the ownership of –
> >
> > (i) any land which, or any undivided share in which, is owned by a Cook islander or a descendant of a Cook Islander for a beneficial estate in fee simple whether legal or equitable, including any

such land the fee simple of which is vested in a corporation formed pursuant to the Land (Facilitation of Dealings) Act 1970: or

(ii) any Ariki land or Customary land as those terms are defined or used in the Cook Islands Act 1915;

whether or not any such appeal is pending on the date of coming into force of this Act."

[3] On 1 December 2000, the Cook Island Legislature, by the Privy Council (Judicial Committee) Amendment Repeal Act 2000, simply repealed the whole of the 1992-3 Act but without any reference to cases which had been pending at the time of the 1992-3 Act.

[4] Counsel for the Appellants explained that the present application to the Court had been filed in the event that the correct legal position turned out to be that the final leave given by this Court in 1991 had become ineffective as a result of the 1992-3 legislation. Counsel, in that event relied upon Article 59(2) of the Cook Islands Constitution which provides:

> "There shall be a right of appeal to Her Majesty the Queen in Council, with the leave of the Court of Appeal, or, if such leave is refused, with the leave of Her Majesty the Queen in Council, from judgments of the Court of Appeal in such cases and subject to such conditions as are prescribed by Act."

[5] In the event that a further application for leave to appeal be necessary, then counsel submitted that leave should be granted because the appeal concerns interests in land worth in excess of $50000NZ and involves a matter of public and general importance - ie the interpretation and effect of certain orders made by the

Native Land Court of the Cook Islands in 1942 and 1944.

[6] Counsel for the Appellants sought an adjournment of the present application to enable the Appellants to commence proceedings in the High Court to have that Court declare the 1992-3 Act unconstitutional on the grounds that it purported to abolish a right enshrined in the Constitution ie the right of appeal to the Privy Council conferred by Article 59(2). A further constitutional challenge would be made on the ground that the 1992-3 Act was retrospective in its operation because it purported to stop the then pending appeal by Metua Moeau who had been given final leave to appeal to the Privy Council.

[7] Counsel for the Respondent opposed the adjournment application. He pointed out that Article 59(2) gave the right of appeal to Her Majesty in Council from judgments of the Court of Appeal only "in such cases and subject to such conditions as are prescribed by Act." He submitted the 1992-3 Act was constitutional in that it restricted the right of appeal in certain types of case and that it was the very sort of legislation that Article 59(2) of the Constitution envisaged. Counsel had a number of other submissions as to the merits of the present application, including one that the Court was **functus officio**, having already granted final leave in 1991. It is unnecessary to consider these submissions at the present juncture.

[8] We see some merit in the submissions that the 1992-3 Act came within the limits envisaged by Article 59(2). However, we are troubled by the constitutionality of the retrospective nature of the statute. We accordingly consider that the Appellants should have an adjournment in order to test the constitutional argument in the

High Court which is the proper first-instance venue for such challenges. The adjournment should be on strict terms.

[9] The Respondent is entitled to costs of this application. Counsel had been prepared to deal with it on the merits before being advised of the adjournment application.

[10] The present application is adjourned **sine die** on the following terms:

[a] The Appellants are to pay the Respondent costs of $1500 plus disbursements as fixed by the Registrar by 14 February 2003.

[b] The Appellants re to bring their declaratory proceedings in the High Court by 14 February 2003.

[c] The Appellants are to prosecute those proceedings with all due diligence.

[d] If any of these conditions is not complied with, the Respondent may apply for the present application to be brought on for hearing.

[e] Liberty to apply reserved."

That 2002 judgment sets the stage for today's hearing. It also enables a full record of the background to be available should this matter come before Her Majesty in Council.

[2] As noted in paragraph 7 of the 2002 judgment, when the matter came before that Court, counsel for the Appellants sought an adjournment of the application for leave to appeal to enable the Appellants to commence proceedings in the High Court to have that Court declare that the 1992-3 Act,

which had repealed the right to appeal to the Privy Council, was unconstitutional. This was on the grounds that it purported to abolish a right enshrined by the Constitution ie the right of appeal to the Privy Council conferred by Article 59(2). It was said that a further constitutional challenge would be made on the ground that the 1992-3 Act was retrospective in its operation because it purported to eliminate the then pending appeal by Metua Moeau, who had been given final leave to appeal to the Privy Council.

[3] Before the Court in December 2002, counsel for the Respondent opposed the adjournment application and pointed out that there was a right of appeal to Her Majesty in Council. Counsel made other submissions in opposition to the adjournment application. In the end the Court decided that the Appellants should have an adjournment in order to test the constitutional argument in the High Court. The adjournment was to be on strict terms already referred to.

[4] The first term, that the Appellants were to pay Respondent's costs, was obeyed. The second and third terms have not been complied with. There have been no declaratory proceedings brought in the High Court. Although Mrs Browne indicated that recently consideration had been given to filing them, the undoubted fact is they have not been filed. It necessarily follows that the Appellants have not complied with condition [c] which was that such proceedings were to be prosecuted with all due diligence.

[5] The matter comes before this Court today in the following circumstances:

> [a] There was a callover of cases for this session which I conducted in the High Court in August. This case was on the list for the Court of Appeal sitting in November 2005. At the callover there was some discussion about the case and in a Minute of 20th September I directed that the matter should be in the Court of Appeal list for November 2005 and directed that both parties file any relevant applications no later than 30 September 2005.

[b] By a letter to the Registrar of 10th of October 2005 Mrs Browne for the Respondents explained the history and concluded by stating "PC 1/01 cannot therefore proceed until the application for a declaratory judgment has been determined by the Lower Court. The appeal should therefore come off the list and be adjourned to the next Court of Appeal sitting."

[6] Having become aware of Mrs Browne's applications for an adjournment and her request that the matter be taken off the list, Mr Mitchell counsel for the Respondent, wrote to the Registrar advising that the matter should be called on the 9th of November and he would be filing a memorandum.

[7] He lodged the memorandum on the 28th of October indicating that the application for adjournment was opposed and that the application for leave to appeal should be struck out, no steps having been taken by the Appellants since December 2002.

[8] - So before the Court today are an application for adjournment by the Appellants and, in reliance on the conditions in the 2002 judgment paragraph 1(d), an application to strike out the appeal for non-prosecution.

[9] As to the nature of the adjournment sought, this was addressed in a memorandum dated 4th of November from Mr Farmer QC, senior counsel for the applicants.

[10] After canvassing the history Mr Farmer said in paragraph 9

"The applicants do have the option of simply seeking to have a fixture made in the Privy Council and, if necessary, presenting a Petition under Rule 37 to have the appeal restored in the event that it has been removed by the Registrar for non-prosecution under Rule 36 of the Privy Council Rules Order."

He went on to say:

> "On the hearing of that Petition the legal validity of the final leave was given would no doubt be agitated and the Privy Council may well decide that it has the power to hear argument on the constitutional issue."

He noted that he had not been able to ascertain whether the Petition had been removed for non prosecution. He concluded paragraph 9 by saying:

> "It can be reasonably predicted that on such a matter their Lordships would much prefer to have the views of the Cook Islands Courts (and in particular the Court of Appeal) known."

[11] Coming to the precise nature of the adjournment application, he said in paragraph 10:

> "My application therefore will be that the present application for leave to appeal out of time (which assumes that the final leave originally given is no longer extant) should be adjourned to a firm date – say 12 months from now – to provide the Applicants with one last opportunity to seek a declaratory judgment from the Cook Islands High Court on the retrospectivity issue.

He then went on to indicate that he would like to have the opportunity of presenting submissions orally but indicated that due to other commitments he was in difficulties in doing that at this November sitting. He then concluded by suggesting that, since he understood there was some prospect of a Court of Appeal sitting in March 2006, the competing applications for adjournment and striking out could be adjourned to that sitting.

[12] In passing we note that while it is true that there will be very likely another Court of Appeal sitting before November 2006, it may not be until the middle of 2006 or thereabouts.

[13] We naturally considered Mr Farmer's application to be heard on the matter and the matter was mentioned briefly in Court yesterday when Mrs Browne was appearing on another matter. We advised Mrs Browne that we did not think it was appropriate to adopt Mr Farmer's suggestion and defer consideration of the competing applications until 2006. We also considered that she was well able to deal with the application for an adjournment and the application to strike out.(We note in addition that Mr Mitchell, appearing for the Respondent today, made the point that before the Court of Appeal last time he was led by senior counsel. The position we have today is therefore one of equality in that highly experienced junior counsel are dealing with the matter and are well able to do so).

[14] Coming to the question of whether there should be a further adjournment, it is quite clear from the 2002 judgment that strict terms were imposed. It is also not without relevance that the proposal that the High Court be asked to rule in a declaratory judgment emanated from the Appellants. Thus we have a situation whereby, having made that suggestion and the Court being willing to grant the adjournment on that basis, the Appellants has failed completely to abide by the terms of the adjournment.

[15] Mrs Browne did her conscientious best to support the application for the adjournment but in the face of such lengthy inaction she had an impossible task. We find that the application for adjournment is not only unwarranted but if granted, would make a nonsense of what the Court of Appeal ordered in the 2002 judgment.

[16] We of course recognize that there may be important issues at stake concerning the right of the Appellants to have brought the original appeal. No

one would wish to minimize the significance of that issue including the question of the validity of retrospective legislation.

[17] On the other hand, it is right to point out that our decision today to refuse the adjournment and strike out the application is not the end of the road for the Appellant. As Mr Farmer has fairly and frankly acknowledged, it is possible that a fixture can be sought in the Privy Council at which to revive the earlier appeal if indeed it has lapsed. Additionally, the Court has to take into account the public interest in finality and the right of the Respondent to know where it stands in relation to a land matter. For all those reasons the Court grants the application to strike out the application for leave to appeal and refuses the adjournment.

[18] Mr Mitchell made an application for costs. We consider that a modest order for costs in the sum of $750.00 is appropriate. The further order is that the Appellants will pay the Respondents $750 costs within two months from today's date. The Court is obliged to counsel for their assistance.

Williams CJ

Barker JA

Smellie JA