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

CA NO. 10/05

IN THE MATTTER	of Section 429 and 430 of the of the Cook Islands Act 1915 and Rules 4 and 17 of the Court of Appeal Rules 1981
AND **IN THE MATTER**	of partition orders of the land known as **POKOINU SECTION 107 J-M AVARUA**, being awarded to **Mr Jake Numanga** and the **Vai Family** on 25 August 2004 in a decision by Mr Justice N Smith in the Land Court
AND **IN THE MATTER**	of an Application by **AKE UTANGA** on behalf of the **TIKITAU KOKAUA FAMILY** to seek leave to appeal against the above decision
BETWEEN	**AKE UTANGA** of Avarua, Rarotonga on behalf of the **TIKITAU KOKAUA FAMILY** **Applicants/Appellants**
AND	**JAKE NUMANGA** and the **VAI FAMILY** of Rarotonga **Respondents**

Hearing date: 08 November 2005

Coram: Williams CJ (presiding)
Barker JA
Smellie JA

Counsel: Mr N George for Appellants
Mrs T Browne for Respondents

Date of judgment: 08 November 2005

JUDGMENT OF THE COURT

[1] This is an application for special leave to appeal against the decision of Justice Smith given on 25 August 2004. The relevant chronology of events is as follows.

[2] After the judgment of Justice Smith no steps were taken to lodge an appeal to this Court. The appellants sought advice from Mr George and, as a result, on the 10th of February 2005 there was an application made to the Chief Justice under s. 390A of the Cook Islands Act. The application was stated to be:

> "for a rehearing into the above Partition Order under s. 390A, 409(a) of the Cook Islands Act and Article 65(1) and (2) of the Cook Islands Constitution."

[3] There were extensive details provided in the application referring to various alleged imperfections in the decision of Justice Smith and to a variety of factual matters which it was said had not been correctly understood by Justice Smith. The application ended with a prayer that the Court rescind the decision of Justice Smith to partition and allow the appellant's family to claim the Occupation Rights to the same sections.

[4] The application was considered by the Chief Justice and before very long, (no date given but it seems to be probably some time in February 2005), he issued a Minute. This drew attention to the fact that s 390A(10) on its face appeared to preclude the invocation of s. 390A in relation to Partition Orders.

[5] As a consequence of the Chief Justice's minute an amended application under s. 390A was filed. The amended application sought to bring the matter within the proviso to s. 390A(10) which states that the "provisions of this sub-section shall not prevent the making of any necessary consequential amendments with regards to Partition Orders."

[6] There was a telephone hearing of the amended application on the 15th of June 2005 followed by a written decision by the Chief Justice on the 20th of June 2005. It found in summary that it was not possible to bring the application within s. 390(10) proviso and therefore the application failed.

[7] There appears to have been some delay in the transmission of that judgment to the Appellant and to counsel for the Appellant. It seems that it was received by Mr George on or about the 2nd of August. Approximately two weeks later on the 17th of August the present application for special leave was filed.

[8] The authorities on applications for special leave are well established and they were referred to by Mrs Browne who argued the case for the Respondents in opposition to the application for special leave. It is sufficient to quote from *Avery v No. 2 v Public Services Appeal Board 1973 2NZLR86* where speaking for the Court of Appeal page 91, Justice Richmond said:

> "When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given the opportunity to attack the judgment from which he wishes to appeal."

[9] The Court of course has a discretion and one of the primary factors to be considered is the length of the delay. Cases have been cited by Mrs Browne including one where 7 months delay was described as fatal with the matter being hopelessly out of time. There are many other cases where substantial delay has led the Court to refuse the application.

[10] Even if the delay in the receipt of Justice Greig's decision is put aside there is still a very substantial delay here running from August 2004 until either June or

August 2005. We uphold Mrs Browne's submission that if this Court were to overlook delay of this length it would be an encouragement to litigants to take as much time as they want in lodging their appeals. The approach of this Court must be the reverse. It should emphasize the importance of strictly adhering to the time limits for appeals which are contained in the Rules.

[11] Looking at the matter more broadly there are other reasons why it would be inappropriate to grant special leave. First, as shown by the chronology, the appellant and his advisers deliberately chose an alternative path, namely the 390A application. In other words it is not a case where they were not alert to the need to take some steps to overturn an unfavourable judgment. They were obviously concerned with it but they spent a very considerable period of time pursuing another route which, as it happened, was a route that was not open to them.

[12] Without wishing to be unduly critical, it can be said that when the Chief Justice issued his minute indicating the problems that would inevitably have to be overcome because of s. 390(10), the position should have been reviewed and a change in course taken involving an appeal to this Court.

[13] Mr George said that the failure to appeal within time was due primarily to a lack of legal representation at the hearing before Justice Smith. However, an examination of the transcript leads us to reject that suggestion. Although it is true that the family was not represented by a lawyer with a practicing certificate, it is quite apparent from a perusal of the record that the lawyer had a reasonable level of competence and asked the correct questions which needed to be asked and made the submissions which needed to be put in support of the case for the family. We do not think it is right to say that the family suffered because of the kind of representation they had before the Judge.

[14] Accordingly, looking at the overall justice of the case, and taking all relevant factors into account, this Court finds that it would be quite wrong to grant special leave to appeal and leave is accordingly refused.

[15] We should also record that, having carefully examined the four new grounds of appeal that Mr George put forward, we do not find that any of them raise an arguable point of appeal. Taking that factor into account, the view of the Court is that a reasonable award of costs to the Respondents is appropriate. The order of the Court to grant the Respondents $1500 costs, to be paid within two months from today's date.

Williams CJ Barker JA Smellie JA