IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA
~~CA~~ **NO. 10/2007**

BETWEEN **NGAMETUA EMI** of Rarotonga, Self employed
Intended Appellant

AND **METUANGARO VAETERU** of New Zealand, landowner
Intended Respondent

Before: Barker JA (Presiding)
Fisher JA
Paterson JA

Counsel: Mr McFadzien for Intended Appellant
Mrs T Browne for Intended Respondent

Date of hearing: 24 November 2008

Date of Judgment: 28 November 2008

JUDGMENT OF THE COURT OF APPEAL

1. On 1 December 2006, this Court (Fisher, Paterson, Weston JJA) allowed an appeal brought by Metuangaro Vaeteru (the Intended Respondent) against a judgment of Smith J given on 7 September 2006 in the Land Division of the High Court. Ngametua Emi (the Intended Appellant) was the respondent in that appeal.

2. Smith J had dismissed the Intended Respondent's application to occupy a certain 680 square metre piece of land on which a cottage is built. She had asked this Court to confer on her an exclusive right to occupy about one-sixth of the property. This Court allowed the appeal and ordered a rehearing in the Land Division of the High Court on a stipulated basis. The Court noted that the Intended Appellant might possibly be a party to the rehearing in the High Court as a possible direct descendant of Ringiao to whom "an occupation or residential right" had been granted in 1907.

3. At the conclusion of its judgment, the Court noted that the status of the Intended Appellant as a potential direct descendant of Ringiao had not been argued before it. Smith J had held that as an adopted child, the Intended Appellant did not qualify as a direct descendant of Ringiao. This Court then said:

> *"There has been no cross-appeal challenging the Judge's conclusion that as an adoptee the respondent does not qualify as a direct descendant of Ringiao. At least theoretically, there remains the possibility that the respondent may yet apply for leave to appeal against that conclusion out of time. We would not want this to be taken as encouragement to make such an application, or to indicate that any appeal which might follow would succeed. However it should not be thought that this Court has considered, and supports, the Judge's decision on that topic."*

4. Despite the narrow opening of the appellate gateway recorded in the judgment, no application for leave to cross-appeal Smith J's judgment by the Intended Appellant was made until 11 October 2007. No affidavit was filed explaining any delay. Mr McFadzien quite frankly acknowledged in his submissions that the significance of the point mentioned by the Court had not been appreciated by him as counsel when the appeal had been heard in December 2006. That was why no cross-appeal had been filed. Whilst we accept that frank admission of error as a reason for a cross-appeal not having been brought, there still is no explanation of why ten months elapsed from the time when the Court had given the indication quoted above until the application for special leave was filed.

5. The Intended Appellant now applies under Article 60(3) of the Constitution to cross-appeal against Smith J's judgment. Counsel submits that despite the delay, leave should be given in the public

interest. The argument is that Smith J was demonstrably wrong in revoking a 1984 succession order which had accepted the Intended Appellant as an adopted child for purposes of succession to land. There are many adopted children in the Cook Islands and any decision could have wide effect.

6. Smith J in a rather truncated judgment, had held that an adopted child was not a 'direct descendant.' Counsel submitted that this finding was at odds with the commonly-understood legal position regarding the succession of adopted children to land, i.e. an adopted child did not automatically upon adoption succeed to succession rights. However, adopted children could succeed to land with the approval of other adoptive siblings i.e. the natural children. The Intended Respondent who is the adoptive sister of the Intended Appellant is said to have so consented to the order made in 1984 which Smith J revoked.

7. Counsel for the Intended Appellant further submitted that the granting of leave would not prejudice the Intended Respondent who lives in New Zealand. The Intended Appellant had lived in the cottage for many years and was renovating it.

8. Counsel for the Intended Respondent submitted that the 1907 order was quite explicit in that it referred to "descendants" of a named person. She referred to Section 465 of the Cook Islands Act 1915 ('the Act') which provides that an order of adoption should have effect in respect of succession according to native custom. Section 446 of the Act also applied and provides that succession be determined by native custom.

9. Succession to the occupation right was determined in 1907. According to counsel the right was given only to "direct descendants' of the grantee with an express reversion to the landowner if the grantee died without direct descendants. Hence, in

counsel's submission, Smith J was correct to characterise the Intended Appellant as not being a 'direct descendant.' The principles and cases referred to by counsel for Intended Appellant were therefore irrelevant.

10. Counsel for the Intended Appellant had referred to the rights of adopted children summarised in the decision of this Court in re: *Vaine Nooroa o Taratangi Pauarii* (No. 2) (Judgment 28 October 1985) which adopted the discussion of the topic by Chief Judge Morgan in re *Moetaua* (MB 28/156). See also *Short v Whittaker (Court of Appeal 2 October 2003).*

11. Thus it can be seen that the issue in this case is whether "direct descendants' can include an adopted child when an occupation order was made in favour of a named person and his 'direct descendants'. The ancillary question is whether the settled law about the succession rights of adopted children has any application where there has been an occupation right – not an ownership right – granted to 'direct descendants'. In the submission of Mrs Browne there was nothing 'special' to justify leave.

12. Counsel for the Intended Respondent rightly drew our attention to the well-known authorities on the granting of leave to appeal under Article 60(3) of the Constitution such as *Harmon v Kikorio and Estall (Roper CJ, 27 July 1989)* approved by this Court in *Rake Browne 18 December 2002.* In *Rake Browne*, the delay in filing the leave application was a year, and, as in this case, as there was no affidavit explaining the delay. Counsel referred also to New Zealand case on the granting of leave out of time.

13. We consider that leave should not be granted. There should have been a cross-appeal filed against Smith J's decision. One asks why, if the objection to the Judge's ruling about the rights of an

adoptive child in this case had been so obviously wrong – a cross-appeal was not brought when the case was before this Court.

14. There is an additional factor. In its earlier judgment, this Court had given a clear indication that a cross-appeal could be a possibility. One would have thought that the extract from the judgment quoted earlier would have been a clear signal to the Intended Appellant to file a prompt application for special leave under Article 60(3). There is no explanation for the ten-month delay.

15. Although there may be an arguable point, about the right of an adopted child to be a 'direct descendant' we think in the peculiar circumstances of this case that the unexplained delay operates against the grant of special leave. Parties and counsel should realize that the normal time limits for the filing of appeals are to be followed and that the "special leave" provision of the Constitution has the limitations imposed on it by the need for there to be an end to litigation. Successful parties should not to have to meet applications for special leave to appeal, made long after they are entitled to assume that the litigation has ended.

16. The application for special leave is dismissed with costs in favour of the Intended Respondent of $750.00 plus disbursements as fixed by the Registrar.

R.J. Barker JA — Barker JA

Fisher JA

Paterson JA