IN THE MĀORI LAND COURT OF NEW ZEALAND
TE WAIPOUNAMU DISTRICT

A20100013088
2013 Chief Judge's MB 1018
(2013 CJ 1018)

UNDER	Section 45, Te Ture Whenua Maori Act 1993
IN THE MATTER OF	Shirley Dawn Quinn and a succession order made at 124 South Island MB 224-228 on 5 June 2008 relating to Titi Islands
BETWEEN	ROBERT TAWHIRI COOTE Applicant

Hearing: 22 August 2013
(Heard at Invercargill)

Judgment: 06 December 2013

RESERVED JUDGMENT OF CHIEF JUDGE WW ISAAC

Introduction

[1] This application, filed under s 45 of Te Ture Whenua Māori Act 1993, by Robert Tawhiri Coote ("the applicant") on 15 December 2010, seeks to cancel a succession order dated 5 June 2008 at 124 South Island MB 224-228 in respect of the Tītī Island blocks only.

[2] The applicant claims that he has been adversely affected by the order to which the application relates because the Māori Land Court did not consider the following in the making of the order:

- the customs ("tikanga") of the Beneficial Tītī Islands;
- the Tītī (Muttonbird) Notice 2005;
- the Tītī (Muttonbird) Regulations 1978;
- Section 48 (d) of the Conservation Act 1987;
- The implicit intent of the reservation of twenty-one (21) Tītī Islands within the Deed of Cession of Stewart Island; and
- The intent of Section 6 (4) of the Māori Purposes Act 1983.

[3] The applicant further submits that:

> Such omission by the Court has led to the circumstance where it is becoming increasingly possible [that the] descendants of the original Ngatimamoe and Ngaitahi owners of the Tītī Islands will be displaced by persons who are not such descendants. Such circumstance will undermine the ability of the ethnic minority defined as Beneficiaries to enjoy in community with other members of that minority its cultural heritage and therefore undermine those rights guaranteed by the New Zealand Bill of Rights Act 1990.

Background

[4] The Case Manager's Report and Recommendation, dated 5 August 2013, sets out the background to the application. The Report is produced in full as follows:

> **Introduction**
>
> 1. This application filed by Robert Tawhiri Coote ("the Applicant") pursuant to section 45 of Te Ture Whenua Māori Act 1993 ("the Act") seeks to

cancel a Succession Order dated 5 June 2008 at 124 South Island MB 224-228 relating to Shirley Dawn Quinn or Shirley Dawn Fisher ("the Deceased") and lands on the Tītī Islands.

2. The Applicant states in his application that he is a descendant of the original Ngatimamoe and Ngatitahu owners of the Tītī Islands mentioned in the Deed of Cession of Stewart Island dated 29 June 1864.

3. The Applicant claims that he has been adversely affected by the Order complained of upon the following grounds:

   a) The Order complained of does not consider the following:

   - the customs ("tikanga") of the Beneficial Tītī Islands;
   - the Tītī (Muttonbird) Notice 2005;
   - the Tītī (Muttonbird) Regulations 1978;
   - Section 48 (d) of the Conservation Act 1987;
   - The implicit intent of the reservation of twenty-one (21) Tītī Islands within the Deed of Cession of Stewart Island; and
   - The intent of Section 6(4) of the Māori Purposes Act 1983

4. The Applicant further submits that:

> Such omission by the Court has led to the circumstance where it is becoming increasingly possible [that the] descendants of the original Ngatimamoe and Ngaitahi owners of the Tītī Islands will be displaced by persons who are not such descendants. Such circumstance will undermine the ability of the ethnic minority defined as Beneficiaries to enjoy in community with other members of that minority its cultural heritage and therefore undermine those rights guaranteed by the New Zealand Bill of Rights Act 1990.

Concise history of Order sought to be cancelled

5. On 16 April 2008 an application was filed in Christchurch by Sean Brian Quinn (the Deceased's son).

6. The Deceased had left a will and clauses 3.1 and 4.1 left the Deceased's Māori land interests to her children.

7. The Deceased had the following legally adopted children:

   - Deborah Maree Strangward;
   - Irene Moana Quinn; and
   - Sean Brian Quinn.

8. The following land interests in the Tītī Islands were held by the deceased:

Te Waipounamu District

Block
Hauirapa (Tītī Island)
Puketakohe (Tītī Island)
Rerewhakaupoko (Tītī Island)

9. On 5 June 2008 the application went to hearing before Judge Wainwright at 124 South Island MB 224 – 228 (the order complained of).

Identification of evidence that may be of assistance in remedying the mistake or omission

10. The Applicant has provided the following documents in support of his application:

    a) Lengthy submissions in support of his application with the following exhibits:

        1) A copy of the Deed of Cession dated 29 June 1864;
        2) A copy of a letter from Mr H T Clarke, to the Hon. The Colonial Secretary dated 24 October 1864;
        3) A copy of the Tītī (Muttonbird) Islands Regulations 1978 (ss 1-4);
        3a) A copy of an extract from the New Zealand Gazette dated 30 May 1912;
        4) A copy of the Tītī (Muttonbird) Notice 2005 (ss1-6);
        5) A copy of s48 of the Conservation Act 1987;
        6) A copy of the Māori purposes Act 1983 (ss1-6);
        7) A copy of s 109 of the Native Purposes Act 1931;
        8) A copy of s 176 of the Native land Act 1931;
        9) A copy of s16 of the Adoption Act 1955.

11. From the Court record we have:

    a) A Report of Judge Carter dated 14 December 2009 at 139 South Island MB 159-165 arising from a Judicial Conference (A20090006516) and concerning adoption and succession rights to the Tītī Islands. A copy of this Report is set out below:

13South Island MB 159

IN THE MĀORI LAND COURT OF NEW ZELAND
TE WAIPOUNAMU DISTRICT

Application No A20090006516
In the matter of a Judicial Conference pursuant to section 67 of Te Ture Whenua Māori Act 1993 in respect of succession to the Tītī Islands.

Introduction

1. On 7 August 2009 I presided over a Judicial Conference under section 67 of Te Ture Whenua Māori Act 1993 concerning adoption and succession rights to the Tītī Islands. The Conference was set down after Robert Coote, Chairman of the Rakiura Tītī Committee had written to the Court expressing concern that the Court, in determining succession to beneficial interests in the Tītī Islands, was making orders in favour of adopted persons without regard as to whether they were connected to Rakiura Māori by bloodline.

2. The position of the Rakiura Tītī Committee was that only a person of blood descent from an original owner was entitled, as of right, to enter the Tītī Islands. It noted that the Court, in following the provisions of the Adoption Act 1955 in determining succession to beneficial interests in the Tītī Islands, was at times in the case of adopted children granting succession to people who were not Rakiura Māori. This meant that while they became beneficial owners in the islands they were not, as of right, entitled to enter the Islands.

3. 22 persons were present at the Conference. Robert Coote gave evidence as to the Rakiura Tītī Committee's position that only persons of blood descent should be entitled to succeed to beneficial interests in the Islands. He also presented useful background material. Mr Coote was followed in turn by Theona Heaslip, Michael Skerret, Stewart Bull and Denis Tipene all of who supported Mr Coote's presentation. No-one presented a contrary view.

4. I am mindful that this was a Judicial Conference. There are no proceedings before the Court. This cannot be a review of the decisions of the Court over

which those present had concerns. It was simply a Conference to facilitate discussion about the situation that has arisen.

5. At the end of the Conference I indicated that I would like to look more deeply at the law that applies and would then make some comment. I therefore make the following comments on the basis that they are only my views and not an opinion for Rakiura. I also caution that they are only made on the material presented to me and my interpretation of the existing law applying to the succession to the Tītī Islands. I have not undertaken a detailed investigation or a review of any precedent or authority that may apply to this situation.

Background

6. By Deed of Cession dated 29 June 1864 the owners of Rakiura and other lands sold them to the Crown. The Deed provided that certain lands were to be returned to them as reserves and these lands included the Tītī Islands.

7. A report prepared for my by staff at the Christchurch office continues:

> *On 10 August 1909, after disputes had arisen as to who had ancestral rights to gather birds on the islands, the Governor issued an Order in Council conferring jurisdiction upon the Native Land Court under the Native Land Court Act 1894 to determine the persons entitled to rights and interests in the islands under the terms of the Deed, and the persons entitled to succeed to such of them that were dead.*
> *After holding hearings, the Court made an order on 21 February 1910 determining the persons and their successors entitled to rights in the Tītī Islands. This list was amended by a further order of the Court on 14 July 1922, which found that an additional twenty-eight persons were entitled to rights on the islands.*

8. Since then the law has prevented beneficial owners from alienating the rights including leaving them by will. On the death of an owner the rights may be succeeded to as on intestacy. Succession has been by way of order of the Māori Land Court which has maintained an up to date register of beneficial owners.

9. Until 1983 the Crown held title to the Tītī Islands in trust for the beneficial owners. In that year the Tītī Islands were vested in the beneficial owners as recorded in the Court records.

10. Two separate sets of law apply to the owners. Their rights to ownership are governed by Māori land legislation to which I refer later. Rights to enter the Islands and to take muttonbirds are governed by the Tītī (Muttonbird) Islands Regulations 1978 made under the Land Act 1948. There has been one amendment to those regulations that being regulations in 2007 (SR 2007/375) made under the Conservation Act 1987.

Muttonbird Regulations[1]

12. Mr Coote drew attention to regulations for muttonbirding on the Tītī Islands which were gazetted on the 30th May 1912. These were a forerunner to the present regulations. In those regulations rights to harvest muttonbirds on the islands were given to "Natives" and conditions as to those rights prescribed. "Native" was defined and the definition followed by the proviso –

> *Provided that for the purposes of these regulations the term "Native" shall include only descendants of the original Native owners of Stewart Island.*

13. The Tītī (Muttonbird) Islands Regulations 1978 include the following definitions –

> *Beneficiary means a Rakiura Māori who holds a succession order from the Māori Land Court entitling him to any beneficial interest in any beneficial island:*
>
> *Rakiura Māori means a person who is member of the Ngaitahu Tribe or Ngatimamoe Tribe and is a descendant of the original Māori owners of Stewart Island.*

[1] As per the original report, the paragraph numbering in this section begins at paragraph 12, missing out paragraph 11.

14. The Regulations go on to provide that only a Rakiura Māori has birding rights.

15. Mr Coote said that the view of the Rakiura Tītī Committee was that by virtue of the above Regulations only those connected by bloodline to the original owners of Stewart Island were entitled to birding rights and that those persons who were legally adopted from outside those bloodlines and obtained succession orders to beneficial interest in the Tītī Islands fell into the category of non-Rakiura Māori.

16. Mr Coote pointed out that non-Rakiura Māori were not entitled to enter onto an island other than in accordance with regulation 3(1) of the regulations which reads:

> *(1) A non-Rakiura Māori –*
>
> *(a) must not enter onto a beneficial island without first obtaining a permit to enter onto that island;*
> *(b) must not, at any time, search for, pursue, or take muttonbirds or their eggs from that island.*
>
> *(1A) However, sub clause (1) does not apply to a non-Rakiura Māori who is a family of a beneficiary if –*
>
> *(a) the beneficiary has issued the family member with an authorisation to enter onto a beneficial island;*
> *(b) the authorisation has been issued in accordance with the traditional customs and practices associated with the island.*

Comments on the Regulations

17. The 1912 Regulations conferred muttonbirding rights on the descendants of the original Native owners of Stewart Island in accordance with the Deed of Cession. I have no doubt that descendants at that time would mean blood descendants. While Māori embraced customary adoption my reading suggests that the child adopted was invariably of the bloodline and that were an outsider

was involved the adoption was either not recognised as a customary adoption or did not confer on the adopted child rights to land.

18. Reference to the meaning of descendant in Black's Law Dictionary 9th Edition supports my view. "Descendant" is defined as follows –

> *One who follows in the bloodline of an ancestor, either lineally or collaterally. Examples are children and grandchildren.*

19. The word descendant is again used in defining a *Rakiura Māori* in the 1978 Regulations (see Paragraph 13 above).

20. Under the Adoption Act 1955 an adopted child is deemed to be a child of the adopted parent as if he or she has been born to that parent in lawful wedlock. This raises the question as to whether that provision serves to make the adopted child a descendant of the adopted parent and his or her ancestors.

21. The relevant provisions of the Adoption Act 1955 are contained in section 16(2). That section commences:

> *(2) Upon an adoption order being made, the following paragraphs of this subsection shall have effect for all purposes, whether civil, criminal, or otherwise, but subject to the provisions of any enactment which distinguishes in any way between adopted children and children other than adopted children, namely.*

22. Then follow a number of paragraphs. It is the first part of paragraph (a) that has most relevance to the present situation. It reads:

> *(a) The adopted child shall be deemed to become the child of the adopted parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock.*

23. Section 16(2) in providing for the effect of an adoption is expressed to be *subject to the provisions of any enactment which distinguishes in any way between adopted children and children other than adopted children.* The use of

the word descendant which has a particular legal meaning requiring a person to be of the bloodline creates a distinction between a natural child any adopted child who is from outside of the bloodline. I therefore take the view that section 16(2)(a) does not enable an adopted person from outside the bloodline to qualify as a descendant in the terms of the Tītī (Muttonbird) Islands Regulations 1978.

24. Consequently I find no fault in the interpretation placed on the Regulations by Mr Coote and his committee as set out in Paragraphs 15 and 16.

Legislation as to Succession

25. In 1983 the title to the Tītī Islands was transferred from the Crown to the beneficial owners as recorded in the records of the Maōri Land Court. Section 6 of the Māori Purposes Act 1983 vested the Islands in those beneficial owners and went on to regulate alienation of the beneficial interests held by the beneficial owners. The relevant provisions are contained in section 6(4) and (6) of that Act –

> *(4) The Court shall continue to have exclusive jurisdiction to determine relative interests and succession to such interests of deceased owners and appoint trustees for persons under disability in respect of the beneficial ownership of the islands; and in determining any such succession the Court may exercise its jurisdiction in the same manner as it did before the commencement of this section, notwithstanding any of the provisions of the principal Act relating to succession on intestacy to undivided beneficial freehold interests in common in Māori freehold land.*
>
> *(6) Except as provided in subsection (4), no owner shall have power to alienate any interest in the islands, and no will shall have any effect in so far as it purports to affect any such interest.*

26. The *principal Act* referred to in section 6(4) is defined in section 4 as the Māori Affairs Act 1953. That Act, from its coming into force on 1 April 1954 had no application to succession to the Tītī Islands as they were not Māori land, title being held by the Crown. There had to be special legislation to provide for such succession.

27. That legislation was provided under the Native Purposes Act 1931. Section 109 provides:

109. Jurisdiction of the Court regarding beneficiaries of Tītī Islands –

> *(1) The Crown shall hold the islands referred to in section thirty-two of the Land Act 1924, in trust for the persons found by the Court to be beneficially entitled thereto and for their successors in title, and shall administer and deal with the same in accordance with the said section thirty-two, except that it shall not be necessary to formally consult the Native owners before making regulations thereunder.*
>
> *(2) The Court shall have and be deemed to have had exclusive jurisdiction to determine relative interest, appoint successors, effect exchanges, and appoint trustees for persons under disability in respect of the beneficial ownership of the said islands as fully and effectually as if the said islands were Native freehold land subject to the principal Act, and may exercise such jurisdiction notwithstanding that the person in respect of whose interest the jurisdiction is to be exercised is not a Native as defined by the principal Act, if he be a descendant of a Native as so defined.*
>
> *(3) No will, whether of a Native or European, shall have any effect as regards the beneficial ownership of the said islands or any of them, and the beneficial owners shall have no power of alienation or disposition of the respective islands or their interests therein.*

28. Section 109(2) above empowers the Court to make orders of succession as if the islands were Native freehold land under the principal Act, the principal Act being the Native Land Act 1931. Succession on intestacy is covered in section 176 and sub-sections (1) and (2) provide:

> *(1) The person entitled on the complete or partial intestacy of a native to succeed to his estate, whether real or personal, except a beneficial freehold interest in Native land, and the shares in which they are so entitled, shall (save so far as otherwise expressly provided in this Act)*

> *be determined in the same manner as if he was a European. Any child, whether of the deceased or of any other Native, shall be deemed for the purposes of this subsection to be the legitimate child of any parent from whom he is capable, according to native custom, of taking Native freehold land by way of intestate succession.*
>
> *(2) The persons entitled on the complete or partial intestacy of a Native to succeed to his estate, so far as it consists of beneficial interests in Native land, and the shares in which they are so entitled, shall (subject to this Act) be determined in accordance with Native custom.*

29. The above subsection sets out the law that applied to successions to interests in the Tītī Islands immediately before the passing of the Māori Affairs Act 1953 and which by virtue of section 6(4) of the Māori Purposes Act 1983 continues to apply to those successions. Rights are to be determined, not in accordance with the general laws on intestacy, but in accordance with native custom. Under custom successions followed bloodlines.

30. Part IX of the Native Land Act 1931 gives jurisdiction to the Court to make adoption orders. Section 209 reinforces the dominance of custom law in the case of succession by stating:

> *209. Subject to the rules of Native custom in the case of succession to Native land, an order of adoption under this Part of this Act shall for all purposes have the same force and effect as an order or adoption lawfully made under Part III of the Infants Act 1908.*

Application of the Adoption Act 1955 to Tītī Islands successions

31. Mr Coote's position is that succession to interests in the Tītī Islands should be confined to successors related to the deceased by blood. He complains that the Court is using the Adoption Act to justify succession to adopted children. I have not looked at any such succession order as it is not my intention to review or criticise any particular decision. I refer simply to the general proposition as to whether the provisions of the Adoption Act 1955 apply to applications for succession to interests in the Tītī Islands.

32. Section 6(4) of the Māori Purposes Act 1983 (see paragraph 25) requires the Court to determine succession applications in accordance with the law applying immediately before the passing of the *principal Act.* The principal Act is specified as being the Māori Affairs Act 1953 which came into effect on 1 April 1954. The Adoption Act was passed in 1955 and given assent on 27 October 1955.

33. Section 16(3) of the latter Act provides:

> *This section shall apply with respect to all adoption orders, whether made before or after the commencement of this Act:*

and then contains 3 provisos the third of which, namely (c), is relevant to this question. It reads:

> *Provided that –*
>
> *(c) An adoption order made before the 1st day of April 1954, shall not affect the operation of any rule of Māori custom as to intestate succession to Māori land.*

34. Section 6(4) of the Māori Purposes Act 1983 specifies to the effect that the law to be applied to succession to the Tītī Islands is that in force prior to 1 April 1954. Consequently if a deceased died after 1 April 1954 the law to be applied to succession to those islands is the law existing prior to that date. The Court, in the case of an application is required to determine and apply the law existing prior to 1 April 1954. The Adoption Act 1955 did not exist prior to that date and can therefore have no application to the law as it existed prior to 1 April 1954. While some provisions of the Adoption Act may have retrospective effect they were not existing law prior to 1 April 1954 and could only be applied after that Act came into effect. I therefore fail to see how provisions of the Adoption Act 1955 can impact on succession to the Tītī Islands.

Conclusions

35. The fact that I am inclined to the above view is not a ruling or an opinion. If Mr Coote and his supporters want to take matters further they need to take legal advice. The fact that the Adoption Act 1955 may not apply to successions to the Tītī Islands does not necessarily mean that the succession orders including persons from outside the bloodlines are wrong.

36. While there appears no doubt that the succession orders are to be determined in accordance with Māori custom Mr Coote will need to show that Rakiura custom confined succession to those persons connected by bloodline. There are perhaps some pointers towards this – the importance of the land and provision for its retention in the Deed of Cession in 1864; the unique nature of the land, not as a place of occupation but as a food source; the regulations dating back to 1912 limiting harvesting to descendants of the original owners; the general acceptance of regulations governing harvesting possibly based on customs to protect the resource; the importance of the resource and therefore the need to limit and guard the rights to it.

37. On the other hand there may be decisions and practices of the Court or other legislation which impact on the application of custom. As these are issues to be argued if this matter is to be taken further I have not investigated or considered them.

Options

38. If Mr Coote or any owner wishes to take this matter further through the Māori land Court there appear to be two alternatives open to them. The first is to wait for an application for succession to be filed where persons from outside the bloodline are potential successors and then seek to appear as a person interested and put his or her case to the Court.

39. The second would be to file an application to the Chief Judge under section 45 of Te Ture Whenua Māori Act 1993 in respect of a succession order where persons from outside the bloodline were included as successors. This would enable the issues that have been raised to be considered by the Chief Judge. There is always the possibility that in such cases the Chief Judge, if he found

that the Adoption Act 1955 did not affect succession, would refer the issue of entitlement to succeed and the law to be applied back to the Māori Land Court for further hearing.

Dated at Hamilton this 14th day of December 2009

G D Carter
JUDGE

Details of subsequent Orders affecting lands to which this application relates

12. There are no subsequent orders affecting the Tītī Island lands to which this application relates.

Details of payments made as a result of the Order

13. A letter has been sent to the Te Tumu Paeroa (the Māori Trustee) and we are awaiting confirmation of any holds to be placed on any funds associated with this application.

Consideration of whether matter needs to go to full hearing

14. The matter is to be set down for hearing.

Recommendation of course of action to be taken

15. If the Chief Judge is of a mind to exercise his jurisdiction, then it would be my recommendation that:

    a) A copy of this Report be sent to all affected parties; and

    b) The matter be set down for hearing in Invercargill.

[5] On 5 August 2013 the Case Manager's Report and Recommendation was sent to all parties and no objections to it were received.

[6] On 22 August 2013 I heard this application in Invercargill. The applicant together with Theona Heaslip, William Mason, Sonia Rahiti, Michael Skerrett and Stewart Bull presented submissions in support of the application. There were no submissions in opposition.

Submissions of the Applicant

[7] The applicant's written submissions are summarised as follows:

(a) The applicant is by definition a beneficiary of the Tītī Islands and in terms of section 3 of the Tītī (Muttonbird) Regulations 1978 may legally enter onto the islands between 15th March and 31st May in any given year and for the purpose of harvesting Tītī (muttonbirds) between 1st April and 31st May in any such year.

(b) The applicant may also authorise his wife and children to enter on to those same islands pursuant to section 3 of the Tītī (Muttonbird) Regulations 1978;

(c) The applicant states that were he not a descendant of the original Ngatimamoe or Ngaitahu owners of Stewart Island (Rakiura Māori), but held a succession order from the Māori Land Court he would not legally be entitled to enter the Tītī Islands without a permit issued pursuant to the Tītī Regulations and would not be legally entitled to harvest Tītī unless authorised by his spouse or adopted parent, who would need to be a beneficiary by definition of the Tītī Regulations.

(d) The Rakiura Tītī Committee believes that the statements above at (a), (b) and (c) reflect tikanga and custom which considers that the rights to the beneficial Tītī Islands are conferred in accordance with bloodline.

(e) The applicant states that the Tītī Notice and Tītī Regulations are consistent with s 48(d) of the Conservation Act 1987 and s 48(d) is consistent with Henry Tacy Clarke's interpretation of the terms of the Stewart Island Deed of Cession as per his letter to the Colonial Secretary dated 24 October 1864.

(f) In the 1912 Regulations a native is defined as:

> *A person belonging to the aboriginal race of New Zealand and includes a half-caste, and an immediate descendant of a half-caste, a person*

> *intermediate in blood between half-castes and persons or pure descent from that race, and a European who is married to a Native: Provided that for the purposes of these regulations the term "Native" shall include only descendants of the original Native owners of Stewart Island.*

This definition is consistent with the definition of Beneficiary in the current Tītī Regulations:

> *"Beneficiary" means a Rakiura Māori who holds a succession order from the Māori land Court entitling him to any beneficial interest in any beneficial island:*
>
> *"Rakiura Māori" means a person who is a member of the Ngaitahu Tribe or Ngatimamoe Tribe and is a descendant of the original Māori owners of Stewart Island.*

(g) The applicant also provides the definition of "Descendant" from the 9th edition of Blacker's Law Dictionary and highlights that the definition includes children and grandchildren but not adopted children:

> *One who follows in the bloodline of an ancestor, either lineally or collaterally. Examples are children and grandchildren.*

(h) The applicant submits that "the privilege of the Tītī Islands was reserved for them by his ancestors, the original Ngaitahu and Nagtimamoe owners of Stewart Island and the tikanga (customs) of these islands does not suggest that those "natives" contemplated that this blood-right would be passed on to persons, not of their blood, as a matter of individual choice for their descendants. Indeed section 6(6) of the Māori Purposes Act 1983 would appear to negate such individual choice:

> *Except as provided in subsection (4) of this section, no owner shall have power to alienate any interest in the islands, and no will shall have any effect in so far as it purports to affect any such interest.*

(i) The applicant in his submission then sets out the law governing successions to the Tītī Islands in detail followed with the application of the Adoption Act 1955 in Tītī Island successions. His conclusion on the Adoption Act 1955 is that it cannot impact on succession to the Tītī Islands due to the Māori Purposes Act 1983 specifying that the law to be applied to successions to the Tītī Islands is that in force prior to 1 April 1954. The Adoption Act 1955 did not exist prior to that date and while some provisions of the Adoption Act can act retrospectively they were not existing law prior to 1 April 1954 and therefore could not be applied.

Submissions in Support of the Application

[8] Theona Heaslip, Shirley Quinn's niece, in support of the application, submitted as follows:

(a) The three children adopted by Shirley Quinn had no bloodline connection to Shirley. Ms Heaslip went on to state that right up until the year before her aunty (Shirley Quinn) passed away, she had always said that if anything should happen to her, her lands and her Tītī rights would go back to her brothers and sisters. In the last 12 months while she was unwell, Ms Heaslip submitted, that Shirley's son, Sean Quinn, had changed her mind.

(b) Ms Heaslip also raised the other side of the argument regarding her cousin's adopted son, Will (adopted *out* of the family) – because of his Fisher bloodline, he still has Tītī Island rights.

[9] The Court then heard briefly from William Mason, Sonia Rahiti, Michael Skerrett and Stewart Bull who were all in support of the application.

Discussion

[10] Pursuant to s 44 of Te Ture Whenua Māori Act 1993 the Chief Judge may cancel or amend an order made by the Court or a Registrar, if satisfied that the order was erroneous in fact or in law because of any mistake or omission on the part of the Court or the

Registrar, or in the presentation of the facts of the case to the Court or the Registrar. The Chief Judge may also make such other orders as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

[11] The applicant has requested that the Chief Judge amend the order that is the subject of this application. The burden of proof is on the applicant to prove the existence of the alleged mistake or omission either by the Court or in the presentation of evidence.

[12] In *Tau v Nga Whānau O Morven & Glenavy – Waihao 903 Section IX block* [2010] Māori Appellate Court MB 167 (2010 MAC 167) the Māori Appellate Court ruled that the Chief Judge must exercise his jurisdiction by applying the civil standard of proof of the balance of probabilities having regard to that standards inherent flexibility that takes into account the nature and gravity of the matters at issue.

[13] Further, the Chief Judge must be satisfied that an error has been made. In *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)* [2009] Chief Judge's MB 209-225 (2009 CJ 209), I summarised certain principles relating to s 45 applications as follows:

- When considering section 45 applications, the Chief Judge needs to review the evidence given at the original hearing and weigh it against the evidence provided by the applicant (and any evidence in opposition):
- Section 45 applications are not to be treated as a rehearing of the original application;
- The principle of *Omina Praseumuntur Rite Esse Acta* (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies to section 45 applications. Therefore in the absence of a patent defect in the order, there is a presumption that the order made was correct;
- 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;
- The burden of proof is on the applicant to rebut the two presumptions above; and
- As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decisions. These principles are reflected in section 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. 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.

[14] Section 45 is a unique section amongst the Courts of New Zealand. It was evidently felt that, as a titles Court, the principle of indefeasibility was extremely important and consequently orders should not be easy to overturn. The exceptions contained in s 45 explicitly refer to situations where the Court has not made a correct decision due to a flaw in the evidence presented, or in the interpretation of the law, and it is necessary in the interests of justice to correct this. For this reason, s 45 applications must be accompanied by proof of the flaw identified, through the production of evidence not available or not known of at the time the order was made.

[15] Bearing these principles in mind, I now turn to consider the question of whether the Court was in error when it found that Shirley Dawn Quinn's children were entitled to succeed to her Tītī Island interests in Huirapa, Puketakohe and Rerewhakaupoko, pursuant to section 6 of the Māori Purposes Act 1983.

[16] First, it is not in dispute that Deborah Maree Strangward, Irene Moana Quinn and Sean Brian Quinn are legally adopted children of Shirley Quinn. This was known at the time the order of 5 June 2008 (124 South Island MB 224 – 228) was made. Here the Court stated as follows:[2]

> The effect of the laws relating to the Tītī Islands is that whāngai children are not included because there was a desire for the interests to the Tītī Islands to be restricted to people who whakapapa to them. However, if you formally adopt somebody by law, that adopted child has all the rights as a natural child. So the law deems those people who are formally adopted through the law to be the natural child of the person who adopts them. So if your aunty didn't want her legally adopted children to succeed to these interests she would have needed to say that in her will. If they want to, they can. That's the law.

[17] The issue for me is whether the Court was in error when it found that adopted children with no blood connection to the Tītī Islands were entitled to succeed.

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[2] *Shirley Dawn Quinn or Fisher* (2008) 124 South Island MB 224-228 (124 SI MB 224-228) 227.

[18] It should be noted at the outset that in terms of the general law affecting succession to Māori land, in Te Ture Whenua Māori Act 1993 adopted children with no blood connection are entitled to succeed.

[19] Therefore, I have to consider whether the law relating to succession to Tītī Islands interests are distinct from the general laws as set out in Te Ture Whenua Māori Act 1993.

[20] In this regard I am extremely grateful for the helpful comments given by Judge Carter in his report on the succession rights of adoptive children to Tītī Island interests following a Judicial Conference held on 7 August 2009 at 139 South Island MB 159.

[21] Judge Carter concluded as follows:

> (i) In relation to the Tītī (Muttonbird) Islands Regulations 1978 which defines that a beneficiary to those islands means a Rakiura Māori who holds a succession order from the Māori Land Court entitling them to a beneficial interest in any beneficial island. A Rakiura Māori is further defined as a member of the Ngāi Tahu tribe or Ngātimamoe tribe who is a descendant of the original Māori owners of Stewart Island. Therefore only those connected to the bloodline of original owners are entitled to birding rights and those legally adopted persons with no blood connection are not.
>
> (ii) Legislation as to succession:
>
> Section 6 of the Māori Purposes Act 1983 vested the Tītī Islands in beneficial owners set out at ss 6(4) and 6(6) as follows:
>
> **Vesting of Tītī Islands in beneficial owners**
>
> …
>
> (4) The court shall continue to have exclusive jurisdiction to determine relative interests and succession to such interests of deceased owners and appoint trustees for persons under disability in respect of the beneficial ownership of the islands; and in determining any such succession the court may exercise its jurisdiction in the same manner as it did before the commencement of this section, notwithstanding any of the provisions of the principal Act relating to succession on intestacy to undivided beneficial freehold interests in common in Maori freehold land.

...

> (6) Except as provided in subsection (4), no owner shall have power to alienate any interest in the islands, and no will shall have any effect in so far as it purports to affect any such interest.

The law which still applies to successions to Tītī Island interests is s 109 (2) of the Native Land Act 1931. This determines that the rights to succession are not determined in accordance with the general law but in accordance with Native Custom which requires succession to follow the bloodline. Further s 6 of the Māori Purposes Act 1983 required succession to be in accordance with the law applying immediately prior to the Māori Affairs Act 1953 which came into force on 1 April 1954. The Adoption Act 1955 came into force on 27 October 1955 and while it provides that it applies to all adoptions made before or after the commencement of the Act it then states at s 16 (3) (c) that:

> An adoption order made before 1 April 1954 shall not affect the operation of any rule of Māori Custom as to intestate succession to Māori land.

Judge Carter concludes that the provisions of the Adoption Act have no impact on succession to the Tītī Islands.

[22] Having considered the report from Judge Carter and the laws controlling muttonbirding and successions to the Tītī Islands, there is a clear synergy in objectives between them. That is to enable the benefits of birding rights and succession to interests in Tītī Islands to be enjoyed by blood descendants of Rakuira Māori who were the original owners of the Tītī Islands.

[23] Further, I agree with Judge Carter that the legislation is clear that the Adoption Act 1955 does not apply to Tītī Islands successions, and that the entitlement to Tītī Islands interests is determined by the Native Land Act 1931 which ensures that entitlement is to be determined in accordance with Native Custom. That is, only persons who are blood descendants of Rakiura Māori who were the original owners of the Tītī Islands are persons entitled to succeed.

[24] As a result I find that the order complained of made on 5 June 2008 at 124 South Island MB 224-228 was made in error and should be cancelled. The interests of Shirley Dawn Quinn (nee. Fisher) should be vested equally back in to her eight siblings, as determined beneficially entitled at 54 South Island MB 366 dated 9 February 1978, namely:

a) Cavel or Cavill Bryce;

b) Niris or Nyris Murray;

c) Delma or Dalma Ray Fisher or Davis;

d) Russell or William Russell Fisher;

e) Richard Fisher or Richard Nicol Anderson Fisher;

f) Augustine or Arthur Gustine Fisher;

g) Lesley or Leslie Fisher or Whaitiri;

h) Fossie Fisher.

Orders

[25] Accordingly, I make the following orders pursuant to Te Ture Whenua Māori Act 1993:

a) Section 44(1) cancelling the succession order made under Section 6 of the Māori Purposes Act 1983 dated 5 June 2008 at 124 South Island MB 224-228 relating to Shirley Dawn Quinn or Shirley Dawn Fisher in the Huirapa, Puketakohe and Rerewhakaupoko (Tītī Islands) blocks only;

b) Revesting the shares in the named Tītī Island blocks back into the eight siblings of Shirley Dawn Quinn or Shirley Dawn Fisher as per the order of

the Māori Land Court at 54 South Island MB 366 dated 9 February 1978; and

c) Section 47(4) that all consequential amendments are made where necessary.

Dated at Wellington this 6 th day of December 2013.

W W Isaac
CHIEF JUDGE