IN THE COOK ISLANDS COURT OF APPEAL
HELD AT RAROTONGA **2/14, 3/14, 7/14, 8/14**

IN THE MATTER of Article 60(3) Constitution

AND

IN THE MATTER of Section 409(f) of the Cook Islands Act 1915, and section 58(3) of the Judicature Act 1980-81 and of an application to hear and determine the right to hold the Makea Nui Ariki Title

BETWEEN **STANLEY ADAM HUNT and CAROLINE TUPOU BROWNE**

First Appellants

AND **ELLENA TAVIONI**

Second Appellant

AND **MEREMARAEA TINIRAU MACQUARIE**

Third Appellant

AND Dame Margaret Karika (Makea Kariki Ariki)
Joseph Vakatini (Makea Vakatini Ariki)
Tekeu Framhein (Apai Mataiapo Tutara)
Elizabeth Araiti (Araiti Mataiapo Tutara)
George Taraare (NZ) (Taraare Mataiapo)
John Taraare (Kauono) (Taraare Mataiapo)
Alamein Vakapora (Vakapora Mataiapo)
Rei Jack (Uirangi Mataiapo)
Tenga Epi (Pi Mataiapo)
Terangi Kopu (Aus) Teava Mataiapo)
George Matutu (Komono) (Teava Mataiapo)
Teariki Simiona (Tamaiva Mataiapo)
Teanua Kamana (Tepuretu Mataiapo)
Ian Karika (Kamoe Mataiapo)
(UI MATAIAPO OF ARAI TE TONGA)

Fourth Appellants

AND **SUSAN LOVE DE MIGUEL**

First Respondent

Coram: Williams P
Barker JA
Paterson JA

Counsel:

R Holmes	For	Stanley Adam Hunt and Caroline Tupou Browne
		First Appellants
Ms R Edwards	For	Ellena Tavioni
		Second Appellant
J B Samuel	For	Meremaraea Tinirau MacQuarie
		Third Appellant
W Framheim: (A lay person appearing by special leave of the Court)	For	The Twelve Fourth Appellants
		Fourth Appellants
M Short	For	Susan Love De Miguel
		First Respondent
Ms K Saunders Solicitor-General	For	The Crown (Written Submissions)

Hearing: 8, 9, 10 June 2015

Judgment: 19 February 2016

JUDGMENT OF THE COURT

Introduction

1. The island of Rarotonga is divided into three large districts one of which is known as Te-Au-o-Tonga. It has three High Chiefs: Makea Nui Ariki, Makea Karika Ariki and Makea Vakatini Ariki.

2. This is an appeal against a judgment of Isaac J given on 3 February 2014. In the High Court four applicants sought a determination from the Land Division of the High Court pursuant to s.409(f) of the Cook Islands Act 1915 ("the Act") as to who has the right to hold the Makea Nui Ariki title and the manner of appointment to the title. Section 409(f) provides that the Land Court (now the Land Division of the High Court) shall have to hear and determine any question as to the right of any person to hold office as an Ariki or other Native Chief of any Island. Isaac J dismissed all four applications and all four applicants now appeal to this Court.

3. The title has remained vacant since Makea Teremoana died on 9 March 1994. There were applications to the High Court in 1995 and 1999 on the question of who has the right to hold the title as well as the hearing below before Isaac J. Notwithstanding these three hearings and the judgments which issued, the position of Makea Nui Ariki has not been filled.

4. The Applicants were:
   (1) Ellena Tavioni;
   (2) Stanley Adam Hunt;
   (3) Meremaraea Tinirau MacQuarie; and
   (4) Twelve individuals listed in the intituling and consisting of The Apai Mataiapo and the Ui Mataiapo of Arai Te Tonga).

5. There were also a number of objections to the various applications. These were:
   (1) Caroline Tupou Browne objecting to all four applications;
   (2) Eruera Nia and Thomas Lowry, objecting to all four applications;
   (3) Apera Teivirau Colin Uriarau, objecting to Ellena Tavioni's application, but supporting Mere MacQuarie;

(4) Ngatokorua Ata Piakura, objecting to Ellena Tavioni and Mere MacQuarie's applications; and

(5) Susan Beverly Lillian Love de Miguel, along with Paula Marama Erueta Tinirau Lineen and Myra Love, objecting to all four applications.

The Nature of the Applications in High Court

Mr Hunt and Ms Browne

6. The first appellants, Mr Hunt and Ms Browne, sought a declaration that their family were part of the Kopu Ariki of Makea Nui. They did not themselves seek the Ariki Title.

Mrs Tavioni

7. Mrs Tavioni, the second appellant, sought a determination that she had a right to hold the title. She acknowledged that if the strict primogeniture rule applied, she was not eligible to be the Ariki. However, she relied upon Court decisions which she considered stated that the Kopu Ariki can agree to allow exceptions to the primogeniture rule. She asserted that in 1994 the Kopu Ariki did agree to an arrangement in which the title is to be rotated amongst all the branches of the Kopu Ariki.

Mrs MacQuarie

8. Mrs MacQuarie, the third appellant, in effect claimed the title. Her position is that the Makea Nui Ariki is appointed from the senior line unless no suitable person is available or the Kopu Ariki has entered into a contrary arrangement. She is from the senior line and asserts that there has been no such contrary arrangement.

The Twelve Fourth Appellants

9. These persons lodged an Application in the name of Ui Mataiapo of Arai Te Tonga but later claimed to be the Aronga Mana of Te Au O Tonga. For reasons explained later in this judgment the Ui Mataiapo have never had any official role in appointments to the position of Makea Nui Ariki. It is first necessary to discuss what is meant by the Aronga Mana, if such a group became a party (as opposed to the individuals named as Fourth Appellants) in this case and, if so, by what means, what were its

arguments in the Court below, what were the rulings of Isaac J in relation to it, and what were its arguments on appeal.

Meaning of "Aronga Mana"

10. In broad terms the Aronga Mana may perhaps be defined as a group of traditional leaders for a particular district. There is no definition of the Aronga Mana in the Act or the Cook Islands Constitution. However, there are definitions in two ordinary statutes which provide some guidance. These statutory definitions are as follows:

> Rarotonga Local Government Act 1988:
>
> > "'Aronga Mana' includes those persons invested with the title in accordance with the native custom and usage of that part of Rarotonga from which that title is derived and which titles is recognised by such native custom and usage as entitling the holder to be a member of the Aronga Mana of Rarotonga in the Koutu-Nui of the Cook Islands."
>
> Environment Act 2013:
>
> > "'Aronga Mana' includes those persons invested with a title in accordance with the native custom and usage of the islands of the Cook Islands from which that title is derived and which title is recognised by such native custom and usage as entitling the holder to be a member of the Aronga Mana of the Cook Islands."

11. These definitions speak of including "persons invested with a title in accordance with the native custom and usage of that part of Rarotonga …" or "of the Islands of the Cook Islands". This rather implies that there might need to be some evidence of the investiture of the persons in question.[1] Under these definitions there seems to be no limit on the numbers who may be so appointed or invested. These provisions are devoid of any details as to the appointment and operation of the Aronga Mana. This may be contrasted with the extensive procedural mechanisms contained in the House of Ariki Act 1966 dealing at length with matters of appointment of Arikis to that House.

---

[1] No evidence of such investiture was supplied to the Court in relation to those who were listed as members of the Aronga Mana (Fourth Appellants) in this case. In the 1995 Makea Ariki title decision discussed below it was said that "the investiture ceremony is an important part of the process of appointing Ariki". In the Tinomana Ariki title case the Appellate Court stated "that at the best investiture could be a step in confirming the authority of the Ariki to act …".

How the Fourth Appellants entered this case

12. As noted by Isaac J in his judgment at para 26:

> "The application of the Aronga Mana of Te Au O Te Tonga (the Aronga Mana) was initially made on behalf of the Apai Mataiapo, the Ui Mataiapo of Arai Te Tonga, under Application 132/3 but was later amended to be on behalf of the Aronga Mana.

13. The original application of 29 July 2013 number 132/13 was made to succeed and administer the affairs of the Makea Nui Ariki title and asserted that the named Applicants included the heads of the ten major family lineages at Arai Te Tonga descended from the time before the first Makea Nui Ariki namely:

Apai Mataiapo	for Ngati Apai
Araiti Mataiapo	for Ngati Araiti
Taraare Mataiapo	for Ngati Taraare
Vakapora Mataiapo	for Ngati Vakapora
Uirangi Mataiapo	for Ngati Uirangi
Tamaiva Mataiapo	for Ngati Tamaiva
Tepuretu Mataiapo	for Ngati Tepuretu
Teava Mataiapo	for Ngati Teava
Pi Mataiapo	for Ngati Pi
Kamoe Mataiapo	for Ngati Kamoe

14. The Application sought "orders declaring them as interim "caretakers" or "Trustees" for the Makea Nui Ariki Title since Ngati Makea were "in disarray" and the "Ui Mataiapo of Arai Te Tonga would assist Ngati Makea to resolve their differences". This application always faced an insuperable barrier since in Makea Nui the Mataiapos have never had a say in appointing the Ariki as they are not part of the Kopu Ariki.

15. The Application of 29 July 2013 did not challenge the jurisdiction of the Court but instead said inter alia in para 19 that "the Ui Mataiapo of Arai Te Tonga can assist the Court to resolve further issues in respect of Makea Nui Ariki Title and office".

16. It was not explained in the submissions to the High Court of 5 September 2013 what was the relevant "ancient custom and usage of the Natives of the Cook Islands" which would be relied upon to support the Application for the role of caretaker.

17. In submissions before Isaac J Mr Framheim advised that there had been a meeting between the Ui Mataiapo of Arai Te Tonga with Dame Margaret Makea Karika Ariki and Makea Vakatini Akiri on 27 August 2013 attended by ten others namely:

Apai Mataiapo	for Ngati Apai
Araiti Mataiapo	for Ngati Araiti
Taraare Mataiapo	for Ngati Taraare
Vakapora Mataiapo	for Ngati Vakapora
Uirangi Mataiapo	for Ngati Uirangi
Tamaiva Mataiapo	for Ngati Tamaiva
Tepuretu Mataiapo	for Ngati Tepuretu
Teava Mataiapo	for Ngati Teava
Pi Mataiapo	for Ngati Pi
Kamoe Mataiapo	for Ngati Kamoe

18. Isaac J was advised that at that meeting Dame Margaret and eleven others had agreed to support the objections filed by the Ui Mataiapo in Application 132/13**.** It was asserted to the High Court by Mr William Framheim for the persons he represented that the objections filed by Ui Mataiapo and the Supplementary Submissions lodged in support of those objections were henceforth to be regarded as the objections on the Aronga Mana of Te Au O Tonga.[2]

19. In the hearing the following week before Issac J on 5 September 2013 Mr Framheim in his oral submissions asserted that "the twelve persons constituted the Aronga Mana of Te Au O Te Tonga, or at least a majority" and that they sought to become the caretakers or trustees of the Makea Nui Ariki Title only in the event that the other three

[2] The other persons at that meeting, in addition to Dame Margaret and Makea Vakatini Akiri were Apai Mataiapo, Araiti Mataiapo, Taraare Mataiapo, Vakapora Mataiapo, Uirangi Mataiapo, Tamaiva Mataiapo, Tepuretu Mataiapo, Teava Mataiapo, Pi Mataiapo, Kamoe Mataiapo.

applications that had been filed were to be unsuccessful. In its written submissions, paragraph 7, it was said that:

> "It will assist the Court to determine whether it (ie, the Court) is a competent institution that can decide this matter or whether the Court will see fit in handing the matter over to the Aronga Mana who have the expertise and constitutional mandate to remedy this matter …"

20. This apparent change of description of the twelve First Respondents was allowed, subject to conditions, in the interlocutory phase of this appeal by Savage J in a Minute of 14 October 2014. The conditions were that the Notice of Appeal must identify as parties the twelve persons seeking to appeal who claimed to constitute the Aronga Mana and Mr Framheim must file an authority signed by those twelve persons authorising him to pursue the appeal. Mr Framheim filed the requested authorisation but failed to list the twelve persons in the intituling to that appeal in 8/14.[3] In the submissions made in the leave application in the Court below in 8/14 it was stated in paragraph 1 that the Aronga Mana was individually identified as now set out in the intituling of this appeal.

21. As noted earlier, the original application in the High Court did not challenge the jurisdiction of the Court. However, in its submissions of 5 September 2013, and as noted by Isaac J in paragraph 28 of his judgment, it was submitted that:

> "14. Ancient Custom is a system different to the judiciary system …
> 15. The Applicant is seeking the Court to apply res judicata to the objection submitted by the Ui Mataiapo.
> (1) the Court has no jurisdiction to and cannot apply res judicata to the objection.
> (2) the Court must determine this matter according to the ancient custom and usage of the Natives of the Cook Islands.
> (3) Res judicata is not an ancient custom and usage of the Natives of the Cook Islands.
> (4) Ancient Custom is a system different to the judiciary system."

[3] This Court has now corrected that failure and listed the twelve persons as parties.

22. As noted earlier, it sought to have the title vested in it as caretaker in order to assist the resolution of the dispute. In respect of the Kopu Ariki, it did not agree that it is restricted to the four families which Court cases have recognised over the years.

Ms Susan Love de Miguel

23. Ms Susan Love de Miguel, the respondent in this appeal, opposes all four applications on the grounds that the primogeniture rule is to be applied.

The Issues

24. The issues which arise for determination on this appeal are:

(a) Do the Courts have jurisdiction to determine the issues noted in paragraphs (b) – (g) below in view of Article 66A(4) of the Cook Islands Constitution?

(b) Does the primogeniture rule apply when considering eligibility for appointment as Ariki of Makea Nui?

(c) If so what is the primogeniture rule and what, if any, are the exceptions to it?

(d) What is the role of the Kopu Ariki in the appointment of Makea Nui Ariki?

(e) Who are the members of the Kopu Ariki of Makea Nui?

(f) What role, if any, does the Aronga Mana have in the appointment of Makea Nui Ariki?

(g) Have the Fourth Appellants established that they are the Aronga Mana of the Te Au O Te Tonga.

(h) What role, if any, does an established Aronga Mana have in the appointment of the Makea Nui Ariki.

(i) Are the Aronga Mana entitled to be appointed as caretakers of the Makea Nui Ariki title.

(j) Is Mrs MacQuarie, subject to the completion of the investiture, entitled to be appointed Makea Nui Ariki?

The Judgment below

25. In 1995, Dillon and McHugh JJ in the Makea Nui Ariki Title ("the 1995 case") considered applications by three applicants including Mrs Mere MacQuarie, the third appellant in the current appeal and an applicant in the Court below. She submitted that the customary rule of primogeniture had moved to include a wider class but the submission was not accepted by the two judges. Isaac J in the case below summed up the finding in the 1995 case as follows:

> "Primogeniture was found to be the applicable custom, as held in all Court cases involving the Makea Nui Ariki Title from 1923, by the Native Appellate Court in 1948 and by the Land Court in all subsequent decisions."

26. In 1999, Smith J, in Makea Nui Ariki (1999) ("the 1999 case"), considered two further applications, although one was subsequently withdrawn. He found, as did the judges in 1995, that the applications did not come within the requirements of the primogeniture rule and thus the applications were dismissed.

27. After considering the provisions of the Cook Islands Act 1915, Isaac J noted that the section did not give the Court jurisdiction to appoint the Ariki and its role is limited to answering questions as to the right of the person to hold such office. His Honour referred to two previous Native Appellate Court cases which had adopted this principle. The principle had not been altered over time. It was also accepted in both the 1995 case and the 1999 case.

28. After reviewing several previous Court decisions, which will be referred to below, his Honour stated:

> "It is clear that since 1923 the Courts have regarded eligibility for appointment to the Makea Nui Ariki Title as being governed by the custom of primogeniture."

The judge observed that he was bound by precedent to apply this principle when determining a person's right to hold the title.

29. The judge did note three occasions where the primogeniture rule was not followed in appointing a successor to the Makea Nui Ariki Title. On these occasions alternative agreements were agreed by the Kopu Ariki. These occasions were where the Ariki, while alive, had made an arrangement which was endorsed by the Kopu Ariki, where the person had left the tribe, and where the person was unsuitable.

30. The judge then applied "*the established binding precedent of the primogeniture rule*", noted that there had been no agreement reached by the Kopu Ariki, and then dismissed all the applications before him.

31. As to the application by Fourth Appellants to be appointed caretaker he ruled that no custom existed which would allow the Fourth Appellants to be appointed as caretakers of the Title. The ruling was as follows:

> "[75] The Aronga Mana state that they only seek title if all the other applications are unsuccessful, although they object to Ellena Tavioni's application on the basis that she did not comply with Maori custom. However, the Aronga Mana/Ui Mataipo have noted themselves that they are not members of the Kopu Ariki. They do not have the requisite support from the Kopu Ariki. They are therefore not eligible for selection and would not comply with the primogeniture rule. Further, title cannot be vested in a corporate body. This would also go against established Maori custom. This application must therefore fail."

The Jurisdictional Issues concerning Article 66A of the Cook Islands Constitution – Submissions of Counsel

32. During the hearing in this Court, certain additional jurisdictional issues were raised by the Fourth Appellants which had not been put before the High Court. They included constitutional issues about the jurisdiction of the Courts in relation to traditional Cook Islands custom. The usual rule about receiving fresh argument on appeal is that the Court of Appeal may entertain such an argument if the point is open on the pleadings and the evidence and there is no need for further evidence: See *Savill*

v Chase Holdings [1989] 3 NZLR 257, 307. However, in *Apple & Pear Board v Apple Fields Ltd* [1989] 3 NZLR 158, 166, 175 the New Zealand Court of Appeal stated that parties cannot waive the operation of a statute and jurisdictional issues can be raised at any time. That principle must apply a fortiori to constitutional questions.

33. It was therefore necessary to ask the parties to make submissions on these issues. Accordingly in the President's Minute of 9 June, 2015 the Court requested the parties to address the following two points which had been raised on behalf of the Aronga Mana.

a. Whether the effect of Article 66A of the Constitution is to provide the Aronga Mana are the sole and final judge of "matters relating to and concerning custom" to the exclusion of the Courts; and

b. Whether Article 66A of the Constitution overruled section 409(f) of the Cook Islands Act 1915 (the "Principal Act") and that therefore the Court is without jurisdiction in relation to all matters concerning customary titles with the effect that only the Aronga Mana could determine the matter before the Court.

34. Article 66A of the Constitution as inserted by section 7 of the Constitution Amendment Act (No.17) 1994-95 (the "Amending Act") provides:

> "(1) In addition to its power to make laws pursuant to Article 39, Parliament may make laws recognising or giving effect to custom and usage.
>
> (2) In exercising its powers pursuant to this Article, Parliament shall have particular regard to the customs, traditions, usages and values of the indigenous people of the Cook Islands.
>
> (3) Until such time as an Act otherwise provides, custom and usage shall have effect as part of the law of the Cook Islands, provided that this subclause shall not apply to any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision of this Constitution or of any enactment.
>
> (4) For the purposes of this Constitution, the opinion or decision of the Aronga Mana of the island or vaka to which a

> custom, tradition, usage or value relates, as to matters relating to and concerning custom, tradition, usage or the existence, extent or application of custom shall be final and conclusive and shall not be questioned in any court of law."

35. As to Article 66A various views were expressed by counsel in subsequent written submissions and this Court's views on the two questions set out above are recorded below.

36. The President's further Minute of 12 June 2015 required the parties to address the following points as to the House of Arikis Act, 1966 Laws of Cook Islands, Volume 4, page 681;

    1) Whether the Act is still in force and;
    2) Whether any provisions of that Act including s 13 are directly or indirectly relevant to the issues in this case.

37. As to the House of Arikis Act 1966 in their subsequent written submissions Counsel were agreed that it was still in force but no provisions of that Act were directly or indirectly relevant to the issues in this case. Therefore there is no need to pursue this matter further.

38. It is appropriate to record first the submissions of the Fourth Appellants, the Aronga Mana of Te Au O Te Tonga since their submissions led to the need to consider these issues.

Fourth Appellants (Aronga Mana)

39. The Fourth Appellants submitted that Article 66A gives the Aronga Mana jurisdiction to determine matters of custom and that the Court cannot make any orders involving custom without the consent or directions of the Aronga Mana. The Fourth Appellants cited several Hansard passages to support its contention and canvassed several factors that it submitted showed that the Courts actually *never* had the power to determine custom. It further contended that s 409(f) does not entitled the Court to specifically determine questions of custom, but only whether a native chief is *lawfully* holding office – this goes to law rather than custom. The Fourth Appellants cited Isaac J in another case (Application 324/14) where he held "it is not for the Court to determine custom but the Court must follow custom". The Fourth Appellants also pointed to Article 48(2), which states that the Land Court shall have jurisdiction conferred on it by enactments – as jurisdiction has not been conferred on the Court in respect of custom, the Fourth Appellants say the Court cannot determine custom.

40. After examining the legal situation as to customary law and chiefly titles in Tuvalu and Samoa, the Fourth Appellants contended that in the absence of a unique customary law court under Article 66A(4), the customary law of the Cook Islands relating to chiefly titles must be left to the customary authorities themselves. The Fourth Appellants pointed to the Samoan jurisdiction and its Land and Native Titles Court, which does possess jurisdiction to review the decision of a customary authority but as a matter of principle only does so in extreme cases. Moreover, any judicial examination of a title appointment goes only to whether the appointing body is properly constituted, not the merits of its decision.

First Appellants (Mr Hunt and Ms Browne)

41. The First Appellants contended that the words "For the purposes of this Constitution" in Article 66A(4) limit the Aronga Mana's power to determine custom, tradition etc. to the provisions of the Constitution addressing custom: Articles 48 and 66A. The First Appellants

endorsed the Second Appellant's submission that Article 66A does not void s409(f). They also rejected the Fourth Appellants' submission that given Article 66A(4), the Court under s 409(f) can no longer consider custom. Thus, in the First Appellants' submission, the answer to both of the Court's questions (set out in paragraphs 33(a) and 4(b) above) is "no". The Court may proceed as always under s 409(f).

Second Appellant (Ms Tavioni)

42. The Second Appellant submitted that the words "For the purposes of this Constitution" in Article 66A(4) mean that the Aronga Mana's opinion does not bear on *ordinary* legislation, i.e. s 409(f), and that in any event, Article 77 preserved the effect of s 409(f). Rather Article 66A(4) provides a "safe harbour" to Parliament in that no law ostensibly concerning custom will be successfully challenged on the ground that Parliament did not have regard to custom if such law is based on the opinion of the Aronga Mana as to that custom. Thus, Article 66A(4), by implication, opens the door to legislation being declared unconstitutional if Parliament did not follow the opinion of an unanimous identified Aronga Mana whose membership was undisputed. Further to this, Article 66A(4) provided that the Aronga Mana can give binding advice on matters of custom where no statute vests this power in the Court – this related to Article 66A(3) in that "*until such time as an Act otherwise provides*, custom and usage shall have effect as part of the law of the Cook Islands". This reading of the provision as regulating the relationship between the Aronga Mana and Parliament without ousting the jurisdiction of the Court, the Second Appellant submitted, is also consistent with the approach taken by other Pacific nations. The Second Appellant also contended that the words "For the purposes of the Constitution" related Article 66A back to the power of Parliament to make laws – the article merely provides that the opinion or decision of the Aronga Mana to parliament given as a prerequisite to the passage of legislation affecting custom cannot be determined in any Court.

43. Further, the Second Appellant submitted that if Article 66A(4) ousted the Court's jurisdiction, and there was no agreement as to who constitutes the Aronga Mana, there will be no person able to resolve the

issue currently before the Court – it could not have been Parliament's intention to create a situation where there is an "irreconcilable impasse" on such an important matter. Moreover, the fact that the same Amendment Act of 1994-1995 amended Article 48 to oust the Court's jurisdiction explicitly in regard to determining chiefly titles and land ownership on certain islands, shows that, if it had wanted to, Parliament could simply have made the provision apply to *all* chiefly titles. That is, by implication, the Court's jurisdiction to determine chiefly titles on other islands remains.

44. The Second Appellant rejected the Fourth Appellants' contentions and said that in the 324/14 case, Isaac J merely reiterated the Court's practice of stating that it does not determine custom – rather, it declares what is custom on the basis of the evidence presented to it.

Third Appellant (Mrs MacQuarie)

45. The Third Appellant agreed that Article 66A(4) does not absolutely oust the Court's jurisdiction as to custom and that the Court retains a supervisory jurisdiction under the fundamental rights and freedoms provisions of the Constitution. The Third Appellant contended that when enacted, replacing 67 Cook Islands Act 1915, s 409(f) was only concerned with whether an *already appointed* Ariki was *lawfully holding* office – the section applies only once an appointment has been made. However, counsel argued that in recent times the issue has become the satisfactoriness of a potential candidate to accede to a title and the inability of the Kopu Ariki to decide on a successor. In such cases, the Third Appellant submitted, the Aronga Mana is the sole determiner of custom where there is competition for a title – if there is an impasse the support of the Aronga Mana should be sufficient to satisfy the Court as to the appointment in the ordinary course barring any obvious deficiency.

46. Thus, the Third Appellant submitted, Article 66A(4) is oriented toward questions arising prior to an appointment being made and the Aronga Mana can express a binding opinion as to which custom or tradition applies in the event that the Kopu Ariki has reached an impasse as to

who should be appointed the native chief. The Third Appellant also submitted that by contrasting Article 66A with Article 48, which states that "… jurisdiction or power [or an Aronga Mana] shall be final and binding on all persons affected thereby and shall not be questioned in any court of law", Article 66A is subject to the Court's supervisory jurisdiction in relation to fundamental rights and freedoms. It contended that when disputes come before the Court, the Court ought to assume all procedures have been complied with – the Court's function is to determine whether the individual is lawfully holding office: to provide an overriding supervision of the appointment if necessary.

First Respondent (Ms De Miguel)

47. The First Respondent generally agreed with the submissions of the Second Appellant.

The Crown

48. Because of the constitutional issues that had been raised the Court requested assistance from the Crown Law Office. Counsel for the Crown submitted that Article 66A does not remove the Court's jurisdiction over matters of custom and that s 409 of the Cook Islands Act 1915 continues to authorise the Court to hear evidence of custom and to determine whether that evidence meets the constitutional tests for judicial application. In regard to the Fourth Appellants' contention that the Court cannot intervene without the consent of the Aronga Mana, the Crown contended that paragraph 26 of the Fourth Appellants' submissions appeared to admit that Article 66A(4) cannot limit Article 66A(3).

49. Rather, to determine the true construction of Article 66A(3) and Article 66A(4), the Court should read into them a distinction between the *evidentiary basis for and identification* of custom on one hand, and *judicial application* of custom on the other. Thus, while Article 66A(4) allocates the identification of particular customs to the Aronga Mana, whose opinion is declared conclusive, the question whether such customs are received and judicially applied by the Cooks Islands courts

remains with the Court to be decided under the applicable common law tests.

50. Accordingly, the jurisdiction of the Court in respect of custom is not "ousted" by Article 66A, but *modified as to the evidentiary basis* on which it is exercised. The effect of Article 66A(4) makes the evidence of the Aronga Mana conclusive if expressed, but it remains under Article 66A(3) for the Court to determine whether the custom so found is inconsistent with a provision of the Constitution or of any other enactment. The Crown contended that this interpretation aligned with the International Covenant on Civil and Political Rights (ICCPR) Privy Council authority and the Parliamentary debates regarding the 1995 Amendment Act as recorded in Hansard. The Crown furthered its argument by analogy with the 1990 Constitution of Fiji.

Court's Analysis - Summary

51. In summary the view of the Court is that of the various competing interpretations put forward by the parties, it is the Crown's submissions which express the true interpretation of Article 66A. In short, the effect of Article 66A(4), in this Court's opinion, is that if a properly constituted Aronga Mana makes a relevant ruling or finding as to a point of custom or usage in their respective area/vaka, then ***as a matter of evidence*** that opinion must be treated as final and conclusive by the Court – and the Court is unable to go behind it.

52. Thus, if the Aronga Mana in a local area/vaka (such as Te Ao o Tonga) has made a finding on a point of custom as to the appointment of an Ariki or other chiefly title in that area (such as the Makea Nui title), then the Court's role – whether or not it was broader before the enactment of Article 66A – must now be taken as limited to determining: (a) whether the asserted custom is consistent with Cook Islands statutory enactments and/or the Constitution; and (b) if so consistent, whether the customary rules have been complied with in the appointment of the relevant chiefly title.

53. This position can only apply prospectively after the enactment of Article 66A, and this limitation lessens any possible concern about voiding past decisions of the Court *per incuriam*. Moreover, and importantly, as an evidentiary matter Article 66A(4) can only apply where an Aronga Mana (if such a body exists in the relevant vaka) has reached an "*opinion or decision*" for the purposes of Article 66A(4). In the present case, as noted below, there was no evidence that a properly constituted Aronga Mana had given an opinion on the appropriate custom. Accordingly, the Court remains free in the present case to determine both (a) the appropriate custom to be followed in appointing the Makea Nui; and (b) whether that custom so determined has been complied with.

The true interpretation of Article 66A(4)

54. In interpreting the meaning of Article 66A(4), the key point is that the wording of the constitutional provision (necessarily the starting point for a statutory interpretation inquiry) is relatively clear and unambiguous:

> *For the purposes of this Constitution,* ***the opinion or decision of the Aronga Mana*** *of the island or vaka to which custom, tradition, usage or value relates,* ***as to matters relating to and concerning custom****, tradition, usage or the existence, extent or application of custom* ***shall be final and conclusive and shall not be questioned in any court of law****.*[4]

55. In practice, when viewed as a matter of evidence, this proposition is less radical than it may at first appear. In every case the Court must, of course, determine custom on the basis of the evidence presented to it: the Court cannot simply make up custom out of thin air. The customary law has always had to be proved as if analogous to foreign law since in both cases the Court cannot otherwise cope with bodies of law unknown to the Court. Thus, for example, in the New Zealand case *Te Weehi v Regional Fisheries Officer*[5] the customary fisheries rules in issue were provided in evidence by Mr B A Nepia, a Senior Lecturer in Maori

[4] Emphasis added.
[5] [1986] 1 NZLR 80.

Studies at Canterbury University and Mr W J Karetai a respected local Ngai Tahu Kaumatua.[6] Article 66A(4) takes the matter further by providing that where the evidence before the Court includes an opinion or decision of the relevant Aronga Mana as to the applicable custom or usage, that opinion must be treated as "*final and conclusive*" by the Court. This matter is discussed further below.

56. Reading Article 66A as a whole, it is clear that the intention of Parliament in inserting Article 66A in 1995 was to provide for greater recognition and protection of custom and usage in the Cook Islands – or, as the Crown put it, "*to acknowledge the worth and dignity of traditional Cook Islands custom*". Indeed, the effect of related Article 66A(3) is that custom and usage shall take ***precedence*** in the Cook Islands, unless expressly ousted by statutory law, or else inconsistent with the Constitution. Thus the idea that the people themselves (collectively, through their relevant Aronga Mana) would determine the custom to be followed pursuant to Article 66A(4) (unless otherwise ousted by statute or the Constitution) is entirely consistent with the elevation of customary law under the related sub-articles of Article 66A. In this respect, it is appropriate to recall the statements of the Prime Minister during the second reading of the 1995 amending bill:[7]

"The fourth section Mr Speaker relates to our custom. The Cook Islands Act 1915 allows the High Court to include in their considerations the traditional rules of our country. This Bill enables our customs to be recognised by the Constitution Act of this country and not by any ordinary Act that we have. A special provision should be enacted in this Honourable House through our Constitution to make a legislation that recognises our customs and traditions. We all know that each individual islands [sic] *have their own customs. Those customs Mr Speaker are good, however they tend to be overruled by modern day Courts. What we are trying to do in this Bill Mr Speaker, is protect our customs through over* [sic] *constitution. For example, we do not want modern day laws*

---

[6] See *Ian Karika* 324/14 per Isaac J: "*It is not for the Court to determine the custom but the Court must follow custom*".

[7] See Cook Islands Parliamentary Debates, 31 March 1995, 1944–1945 (Prime Minister Sir G A Henry) (emphasis added).

to be forced upon the islands of Pukapuka, if they are not appropriate for that island.

This Amendment Mr Speaker is providing the members of the House the opportunity to keep our customs alive for the coming generations. […]"

57. There is, admittedly, some ambiguity introduced into Article 66A(4) by the inclusion of the phrase "*For the purposes of this Constitution*" at its beginning. Considering, however, that the Constitution does now concern, *inter alia*, the application of custom and usage in the Cook Islands (especially Article 66A(3), which stipulates the general application of custom and usage throughout the Cook Islands), we do not consider that this phrase can be relied upon to "read down" the application of Article 66A(4). If Parliament's intention was to somehow limit the otherwise very plain language of Article 66A(4), it would surely have done so expressly and clearly.

58. The Second Appellants have argued that Article 66A(4) must be read down to apply only to the other sub-articles of Article 66A. The Fourth Appellants are right, however, to note that the language of Article 66A as a whole demonstrates that Article 66A(4) cannot be read to apply only to the other provisions of Article 66A. Importantly, the contrasting prefatory wording of Article 66A(2) ("*In exercising its powers* ***pursuant to this Article***") shows that Parliament understood it needed to use a much more specific phrase where it intended that purpose.

59. The Second Appellants' primary argument is that Article 66A(4) applies only to Article 66A(1), as a "safe harbour" for Parliament when legislating under Article 66A(1). According to the Second Appellants it "*ensures that no law passed by Parliament concerning custom can be challenged on the grounds that Parliament did not have regard to custom if such law was based on the opinion of the Aronga Mana as to that custom*". In other words, the Second Appellants argue that:

[*S*]*ub articles 66A (1), (2) and (4) are limited in application. They provide* [that] *the opinion or decision of the Aronga Mana to Parliament given*

as a prerequisite to the passage of legislation affecting custom cannot be questioned in any Court.

60. This argument is superficially appealing, but it finds no support in the language of Article 66A(4). Nor does it really make any sense, when carefully considered, because if, as a constitutional matter, the opinion of the Aronga Mana cannot be challenged in Court once it is presented to Parliament (as even the Second Appellants accept), how can it be correct that the very same opinion of the Aronga Mana ***can*** subsequently be challenged in Court pursuant to a mere statutory provision, when Parliament has already accepted it as "*final and conclusive*" evidence as to relevant custom? Either an opinion is "*final and conclusive*" or it is not (particularly if Parliament has legislated in reliance on that opinion). The opinion presented to Parliament would plainly not be "*final and conclusive*" if it was susceptible to later review by the Court acting under s 409(f) of the Cook Islands Act 1915.

61. There is, moreover, nothing in the language of Article 66A to suggest that Article 66A(4) was intended to be applicable only to Parliament, and was not intended, as the Second Appellants assert, to be "*aimed at the judiciary*". If Parliament ***had*** intended that Article 66A(4) would apply only to qualify Article 66A(1), and that the Aronga Mana was permitted to express its "*final and conclusive*" opinion only to Parliament, then it would have said so. It would not merely have stated that Article 66A(4) applies "*For the purposes of this Constitution*".

62. In any event, and in that context, given that Article 66A(4) is *itself* a provision of the Constitution, and is *itself* specifically concerned with the constitutionally-mandated mechanism for determining the custom and usage of the Cook Islands, any attempt to read down the application of Article 66A(4) on the basis of the wording "*For the purposes of this Constitution*" with which it begins would inevitably be inherently circular.

63. Rather, the correct interpretation to be given to Article 66A(4) is that espoused by the Crown in its submissions: that Article 66A(4) is to be interpreted in accordance with the distinction between, on the one hand, the binding status of evidence regarding custom given by the Aronga

Mana and, on the other, the Court's jurisdiction (as affirmed by Article 66A(3)) to apply that custom in a way that is consistent with the Constitution and other statutory enactments.

64. Thus, in practice, if the relevant Aronga Mana gives satisfactory evidence as to its properly formulated opinion on the precise content of local custom or usage, then as an evidentiary matter that evidence must, pursuant to Article 66A(4), be treated by the Court as "*final and conclusive*". However, the Court must still, if called upon to do so, determine whether that custom is consistent with the Constitution or "*any enactment*". If it is not, then notwithstanding the binding evidentiary submission of the Aronga Mana, the relevant statute or provision of the Constitution will prevail pursuant to Article 66A(3).

65. This interpretation would not, moreover, mean that the Court is unable to exercise its traditional function under s 409(f) of the Cook Islands Act 1915 to determine whether a person has properly been appointed to a customary title.[8] It would simply mean that, as an evidentiary matter, if evidence is given of an opinion or decision by the Aronga Mana as to the custom or usage to be followed in the appointment of a chief or other native title, that submission must be treated as "*final and conclusive*". Whether the relevant custom has been properly ***complied with*** in the appointment of the chief or other native title would still be an important question for the Court to determine under s 409(f). We consider therefore that no conflict arises between Article 66A(4) and s 409(f).[9]

66. This distinction is essentially the same as the distinction between "*identification*" and "*judicial application*" on which the Crown's submissions are based:

[8] Section 409(f), it will be recalled, empowers the Court to "*hear and determine any question as to the right of any person to hold office as an Ariki or other Native chief of any island*".

[9] To the extent that there may be any conflict between Article 66A(4) and a broadly-interpreted s409(f), as a constitutional provision, the more specific provision ***and*** the provision later in time, Article 66A(4) undoubtedly prevails, if necessary, to narrow the previous scope of s 409(f). The Second Appellants cannot be right that Article 77 of the Constitution means that statutory provisions will prevail over constitutional provisions.

"15. Article 66(4) of the Constitution allocates the identification and specification of particular customs to the Aronga Mana, whose opinion is declared conclusive[.] [*T*]*he question whether such customs are received and judicially applied by the High Court of the Cook Islands remains one for that Court in accordance with the common law tests as restated in Article 66A.*

[…]

16. The Aronga Mana may declare its opinion concerning a custom, but if for example the custom as so identified is then found by the High Court to be inconsistent with a fundamental freedom in the Constitution, then the High Court would be bound to decline to apply the custom, or to apply it only in a form modified so as to abate the inconsistency. Accordingly, the jurisdiction of the High Court in respect of custom is not "ousted" by Article 66A, but only modified as to the evidentiary basis on which it is exercised."

67. Such an approach, the Crown submits (and this Court agrees) has the effect of leaving "*intact the judicial role in the application of custom, whilst deferring to the Aronga Mana's role in identifying the custom to be applied*".

68. This interpretation is also supported by the Second Appellants:

"It is also clear [that] *the Court's jurisdiction at section 409(f) is restricted to determining whether the right of any person holding office as an Ariki or other Native Chief of any island is lawful*.

[…]

When considering the construction of section 409(f) of the principal Act, the words "is lawfully holding office" must [apply] *in the context to law rather than custom."*

69. On this point, in contrast, the Second Appellants' submissions are again superficially appealing but ultimately not convincing: they attempt to prove too much. The Second Appellants refer to Article 48(3) of the Constitution (enacted at the same time as Article 66A), which ousts the Court's jurisdiction to determine chiefly titles in three of the islands (Mangaia, Mitiaro and Pukapuka). This provision, they submit, by implication preserves the Court's power to determine chiefly titles in the other islands, including Te Ao o Tonga. That is undoubtedly true. There is, as noted above, no question that the Court retains the general power under s 409(f) to determine whether a person has been properly appointed in accordance with relevant custom.

70. Article 48 does not, however, impliedly preserve the right of the Court to ***determine custom*** in Te Au O Tonga in the face of a contrary opinion from the Aronga Mana. Article 48 says nothing about the determination of custom: that is addressed by Article 66A(4). On its plain terms, Article 48 can only be read to have impliedly preserved in Te Au O Tonga what it expressly ousted in three other islands: the jurisdiction of the Court to determine whether a chief has been appointed in accordance with established custom – not what the content of that custom is.

Application in the present case

71. Finally, however, a further important point must be noted: as an evidential matter, the opinion of the Aronga Mana can only be binding when such an opinion has actually been properly formulated and expressed. The "*final and conclusive*" force of the Aronga Mana's opinion under Article 66A(4) as to custom presupposes the existence of such an opinion. If there is no evidence that an Aronga Mana has actually expressed an opinion on the relevant principle of custom or usage, then it remains open to the Court to determine the applicable custom itself.

72. As the Second Appellants observed, the Constitution does not define what is meant by an "Aronga Mana", or how it is to be constituted, or who is to determine or verify its composition – or indeed by what mechanism it is to express its opinion or decision as to custom (does it

have to be unanimous? by majority? what about dissents? does it need to be a written opinion? etc). One needs to go to ordinary statues to find definitions of Aronga Mana. These statutory definitions are found in the Rarotonga Local Government Act 1988 and the Environment Act 2013 and have been quoted earlier in this judgment. They are very general in nature and as noted earlier, do not deal with important procedural matters relating to the establishment and procedural operation of the Aronga Mana.

73. It is a matter of regret that the Cook Islands Parliament has never addressed these important issues when introducing Article 66A into the Constitution which is, of course, the overarching foundation of Cook Islands law. There are ample procedural precedents in the House of Ariki's Act 1966 which could have been readily modified and utilised in drafting suitable provisions relating to the Aronga Mana. As has been pointed out by Counsel, there are other procedural means for determining chiefly title amongst the Pacific Island legal systems. Samoa, for example, has a Land and Native Titles Court with jurisdiction over matai titles and customary land, both of which are held in accordance with Samoan custom and usage. The Land and Native Titles Court has exclusive jurisdiction over, among other things, all matters relating to Samoan titles. The Samoan Land and Titles Act 1981 outlines that court's functions, as well as the procedures to be followed when considering matai title. Tuvalu, another example, has the Falekaupule Act 1997, which governs the area of authority of each Kaupule and, specifically, outlines procedures for electing members of each Kaupule and the Pule o Kaupule.

74. The provisions of Article 66A(4) of the Constitution and the statutory provisions noted in paragraph 72 above suggest that there is a Rarotongan Aronga Mana, as well as a separate Aronga Mana for the vakas in Rarotanga. This Court is not satisfied that the Fourth Appellants have established on evidence the custom of who comprises the appropriate Aronga Mana, or that they are the appropriate Aronga Mana to advise the Court on the custom of appointing the Makea Nui Ariki. They did not adduce evidence as to the composition of the appropriate Aronga Mana or that the correct body had formed an

opinion on the matter. Thus, we consider, the Court is able to say in the present case that in the absence of any clear and validly enunciated opinion or decision on custom in Te Au o Tonga from any verifiably established Aronga Mana, as opposed to submissions presented by Mr Framheim on behalf of the twelve Fourth Respondents the Court retains the residual power to determine the applicable custom itself. Accordingly, notwithstanding Article 66A(4), in the present case the Court may continue onwards and determine how the Makea Nui ought to be appointed.

75. Moreover, again because no formal document purporting to represent the official opinion of the Aronga Mana of Te Au o Tonga on any customs relating to the appointment of the Makea Nui has been presented to the Court, the Court can defer for another occasion any problematic questions as to how, or by whom, the composition or deliberations of an Aronga Mana ought to be regulated and determined.[10]

The Application of the Primogeniture Rule

76. The appellants do not all agree on the definition of the primogeniture rule. At this stage it is not necessary to define it. Without accepting the accuracy of the statement, the meaning which Courts in recent cases have accepted is as stated by Ostler J in 1941 when he said:

> "The native custom has been clearly proved that the eldest child has the right to succeed if suitable, and it is only if unsuitable that the Kopu Ariki have any right to pass him or her over and confer the title on another member of the family."

[10] Assuming for the moment that the 12 individuals named as Fourth Respondents are the Aronga Mana of Te Au O Te Tonga an examination of the Minutes of their meetings produced in evidence in this case does not reveal any resolution asserting or defining customs relevant to this case. As to custom concerning the Primogeniture rule it may be noted that Isaac J questioned Mr Framheim about the Primogeniture rule in the course of Mr Framheim's arguments. Mr Framheim was asked whether he agreed that under ancient custom normally the eldest son, if properly equipped and prepared and possesses the necessary skills would inherit the title. Issac J asked Mr Framheim whether he accepted that as being the custom Mr Framheim's answer was "one of them yeah": see Transcript of Evidence before Isaac J, Case on Appeal, Volume One, Part Two, Book B at p16, lines 2-9.

77. All four appellants submit that the primogeniture rule is not applicable. On behalf of the second appellant, Ms Tavioni, Ms Edwards submitted that:

> "Primogeniture is not the custom which determines who is to succeed to the Makea Nui Ariki Title. It is one factor which the Kopu Ariki takes into account in electing its next representative."

78. The basis for this submission is that primogeniture has not been the determinative factor in the majority of the cases concerning succession to the title. A rule of primogeniture is said to have arisen as a result of a misinterpretation of the evidence and findings made in the judgments concerning the title. As this is a submission, which other appellants agreed with, namely that the High Court erred in its 1995 decision, Smith J erred in the 1999 decision and the Court below erred in following those decisions, it is necessary to consider the history of appointments to the title.

79. A starting point is the judgment of Ayson CJ in *Re Rangi Makea Title* (the 1923 case).[11] In it he traced the history of the title since the arrival of Christianity in 1823. In reviewing the history of the title in the 100 years to 1923, the Chief Judge rejected evidence that had been accepted in previous Native Land Court hearings. In some cases he held that the evidence was clearly wrong and it is obvious that there was conflicting evidence as to the custom of appointing an Ariki on the death of an Ariki.

80. It was submitted that nowhere in the judgment does the Chief Judge refer to the primogeniture custom. The background was that when Tinirau died in 1826, he was succeeded by his son Pori. When Pori died in 1839, the next four Arikis in succession were all children of Pori, namely Davida (died 1845), Tevaerua (died 1857), Daniela (died 1866) and Apera (died 1871). The reason given for this order of succession was that the four children were children of Pori's first wife, Takau, who as compensation for being sent away, requested that all of her children should in turn hold the title. A fifth child did not take the title because

[11] (1923) Native Land Court, 29 September 1923

that child joined another tribe. Evidently Pori, who had two wives, was pressured by the Missionaries to get rid of one of his wives and sent Takau away.

81. On Apera's death in 1871 the title went to Takau, the daughter and only child of Davida. There is no mention of the reason for the title reverting to a child of Davida or that it passed because of the primogeniture rule. As Apera had issue, it may have reverted to Davida's daughter because the arrangement made by Pori provided that it was to revert to his first child's first child on the death of his children. It is also possible that it reverted under the primogeniture rule.

82. When Takau died in 1911, the title went to Rangi, a son of Apera, in accordance with Takau's will. Takau had previously sent a letter to the Resident Commission saying she wanted her cousin Rangi, as the only other surviving member of the family, to take the title. In so doing she was bypassing a living grandson of Daniela and passing over Daniela's descendants. The reason given for bypassing Daniela's family may have been because that family had left the tribe.

83. When Rangi died the matter came before Ayson CJ in the 1923 case. Rangi had by will indicated that he wished Tinirau to succeed him. This was done in the presence of Rangatira and Mataiapos without their opposition. After his death eight Mataiapos challenged the appointment of Tinirau and wanted the title to go to Ngoroio, one of Davida's grandsons. The issue before Ayson CJ was whether Tinirau or Ngoroio was the proper person to hold the title.

84. Under the law as it existed in 1923, it was not possible to pass an Ariki title by will. The Chief Judge noted that there was considerable conflict of opinion as to the relative rights and powers of the Ariki himself, his Kopu Ariki and the Rangatiras and Mataiapos regarding the true mode of electing a new Ariki. He held that what had been called a will was in reality only an expression of the Ariki's wishes regarding the title made in the presence of certain necessary witnesses who had a right to confirm or dispute the same at the time and which if agreed to, would become a binding arrangement according to native custom and as a matter of honour, one to be carried out in due course after the Ariki's

death. He determined in regard to the Makea Nui title that the wish of the ruling Ariki should be fully considered in regard to succession, provided that his choice of successor "*is from the right Ariki line, and is a wise one according to all the circumstances of the case*." In the present appeal, more than one appellant challenges this finding.

85. As there had not been any objection taken at the time the will was made, the Chief Judge determined that as Rangi had expressed his wishes and had died without knowledge of any objection to those wishes thinking that his wishes would be carried out, it was a matter of honour that effect should be given to the arrangement. He further held that if those wishes had not been expressed, the question of succession in the case of the Makea Nui Title should be settled by the Rangatira of the Kopu Ariki and the Mataiapos and priests. Failing a settlement, the Court would give consideration to various matters which he considered coincided as nearly as possible with the true ancient customs and also with present day conditions.

86. The matters which the Chief Judge said a court should take into consideration were:

(a) The wishes of the Rangatiras of the Kopu Ariki.

(b) The wishes of the Mataiapos and priests.

(c) The respective genealogies of the rival claimants.

(d) The new Ariki must be a recognised member of the Ariki family.

(e) The mental condition and moral character of reliable claimants.

(f) Any other facts and circumstances which the Court considers should be taken into account.

It is noted that this statement does not expressly say the primogeniture rule applies.

87. The Chief Judge's finding will be discussed further when considering the 1940 judgment of the same judge.

88. Succession was again considered by the Chief Judge after Tinirau died in 1939. In Makea Nui Tinirau Title (1940) Ayson CJ in the Native Land Court (the 1940 case) considered the claim of Tinirau's two daughters Takau and Teremoana. Tinirau did not have sons. In a subsequent case in 1948 some of the orders made by Ayson CJ were stated by the Native Land Court to be without jurisdiction. However, the Chief Judge did determine after receiving both oral and documentary evidence that:

> "A custom of the Makea is that the eldest surviving child of the deceased Ariki, or in default of issue, the elder of the next branch, whether male or female, (the custom having been altered in Rarotonga in Christian times) should succeed."

As the elder child, Takau, was entitled to hold the office, however her entitlement was subject to her being fit to succeed. This was an application of the primogeniture rule, but qualified as to the fitness of the elder child.

89. Ayson CJ's judgment, which on the face of it was carefully reasoned, went on appeal to the New Zealand Supreme Court. In that appeal Ostler J upheld the decision (*Re Makea Nui Tinirau Ariki* appeal 1941) (the NZ Supreme Court case). It was submitted in the appeal before this Court that both Ayson CJ and Ostler J erred in their findings. As this Court considers these two cases are pivotal to the appeal, they are analysed later.

90. The issue came before the Native Appeal Court again in 1948 (*Re Makea Nui Takau*) (the 1948 case) on an appeal from the Native Land Court when the issue was Takau's successor. In addition to determining that some of Ayson CJ's orders of 1948 were without jurisdiction, the Court addressed the custom which applied in appointing a successor. It called as a witness the priest who officiated at the meeting held after Takau's death to deal with the election of her successor. The priests produced the minutes of the meeting and the Appellate Court, which comprised three judges, determined that the minutes proved without any doubt that Takau's successor, which was

her sister, Teremoana, was elected under ancient custom to be the Makea Nui Ariki.

91. The Appellate Court said:

> "During the hearing of the appeal, the conductors for the parties in their arguments referred the Court to various authorities on the question of the ancient customs and usages governing different aspects of the selection and appointment of an Ariki. It was not necessary for this Court to traverse these authorities in this judgment, but the Court considers that it is desirable to place on record its opinion as to the preference, if any, given to the senior line of the Ariki family. After considering the various authorities to which the Court has been referred, it is of the opinion that the custom generally adopted has been to elect the Ariki from the senior line of the Ariki family unless there is no member of that line who is considered suitable to hold the office."

92. It was the submission of the second appellant in this Court that this is an acknowledgement that there is not a rigid rule. The Court did not suggest that the only people who can be elected are from the senior line or that the primogeniture rule must be applied. It referred to a "*custom generally adopted*" and imposed a condition of "*suitability*". It also referred "*to the preference, if any …"*.

93. In the 1995 cases, McHugh and Dillon JJ found that in all of the Court cases involving the Makea Nui Ariki title from 1923 up to 1948 the Courts recognised and adopted the primogeniture rule as Maori customary law governing eligibility for the Makea Nui Ariki title. They accepted that the three exceptions to the rule confirm that the primogeniture rule can be set aside in cases of agreements entered into by the Ariki in his or her lifetime with endorsement by the Kopu Ariki; or when the person in line has left the tribe; or in cases of unsuitability.

94. In coming to their findings, the two judges cited Ostler J in the NZ Supreme Court case, where he said:

> "The native custom has been clearly proved that the eldest child has the right to succeed if suitable, and it is only if unsuitable that the Kopu Ariki has any right to pass him or her over and give further title on another member of the family."

95. All four appellants in the current case challenge the finding in the Court below that the primogeniture rule applies. In summary, the submissions

include that the primogeniture rule was not a customary law and Ayson CJ erred when making the finding in 1923 as he had no evidence on which to make the finding, or alternatively, he misinterpreted the evidence; reliance on statements by historian Ron Crocombe (*Land Tenure in the Cook Islands 1961*) where he stated that recorded genealogies mostly show descent as being from father to son but this was not always in fact the case; most of the cases referred to do not mention the primogeniture rule; in many cases a son did succeed to the Makea Nui Ariki title but it is not apparent that the son was the eldest son; the cases indicate so many exceptions that there cannot be a rigid rule; custom is not immutable and changes with circumstances; if the primogeniture rule is applied rigidly, the Kopu Ariki is deprived of its role; and historical charts and records of those who are holders of the original Makea Ariki title and then the new Makea Nui title do not reflect the primogeniture rule and they show agnates of the predecessor succeed to the title before the successors from the next generation.

96. The Fourth Appellants also take a different view of history. As an example, their position is that until Rangi Makea was appointed in 1923, the custom of appointment and investiture of the title was always carried out by the Ui Mataiapo. Further, in the 1923 case Ayson CJ accepted foreign concepts and changed the appointment process. The system prior to 1921 was said to be similar to the Salic law system, based on agnate appointments.

97. This Court in some instances is being asked to make decisions it does not have jurisdiction to make. The First Appellant submits that a large number of decisions are not in accordance with local custom. They support this submission by quotes from the late Professor Ron Crocombe in Land Tenure in the Cook Islands 1961, the writings of Walter Gudgeon in The London Mission; its policies and particularities (an unpublished manuscript), evidence given by W Browne and others in the 1940 case, and the evidence in earlier cases. As an example they do not accept that Makea Pini, who died before Christianity arrived, was a son of the previous Ariki which is the conventional view. Rather their position is that he was installed as Makea Nui Ariki by seven

Mataiapos for their own purposes. They say he had no royal blood in him.

98. It is relevant to observe comments made by Ayson CJ in the 1940 case where he noted:

> "It is also desired to point out that the Court's findings may, in some respects, differ from tradition and history, but it must be remembered that the Court is bound to a very large extent upon sworn evidence (which is to be found in the various Minute Books), rather than by statements made at various times by persons who were not on oath and who were probably, in some cases interested in giving a particular version for their own purposes."
>
> …
>
> "The experience of the Court is that statements which deal with tradition and history should be accepted only with caution and the authority for such statements and their origins should be most carefully examined. Many witnesses have made statements to the Court which have dealt with ancient history, which have not been challenged on account of the fact that there was no-one in the position to say whether such statements were correct or not, but the same witnesses dealing with modern times have, in some cases, failed to give correct evidence and genealogies especially where their statements are open to challenge by other witnesses or by the Court."
>
> …
>
> The failings of human memories should also be taken into account by the Court."

99. There is some evidence which appears to support the submissions referred to in the previous paragraphs (92 – 93) and some other submissions contrary to previous findings of the Courts. However, in those cases there was also conflicting evidence. The previous judgments, particularly those in both the 1940 case and the NZ Supreme Court case are detailed and reasoned. This Court did not hear the witnesses on which those decisions were based and has no ability to assess the weight to be given to the evidence in those cases. It should therefore only come to a different view if it is satisfied that the previous judgments were clearly wrong. Further, an Appellate Court should normally decline to review the evidence for a third time if there are concurrent judgments of two courts on a pure question of fact: see the Privy Council decision of *Devin v Roy* [1946] AC 508.

100. Before this Court departs from several decisions of the High Court and the previous Native Land Court, it must be satisfied that there are cogent reasons for so doing. This is particularly so where neither the Court below or this Court heard the evidence in those previous cases and where in the present appeal the appellants in effect seek to impugn the judgments given in those cases and where, if one submission presented to us is correct, every Ariki over a period of more than 100 years was not entitled to hold the title.

101. Further, custom is not immutable. This is confirmed by the fact that it appears that only since the arrival of the missionaries in 1823 have women been eligible to succeed to the title of Ariki. It appears that the missionaries altered custom.

102. Moreover, custom in one tribe may differ from custom in another tribe. The following statements of Sir Thaddeus McCarthy in *Re Ariki Kainuku Title* (1991) (the Kainuku Title case), are relevant:

> "The indigenous Polynesian peoples of the Pacific have a rich history of customs which have managed their lives from the commencement of their recited history and still continue to do so. These customs should not be seen as invariably monolithic, immutable, and demanding rigid compliance in detail. Rather they present a picture of evolving social living which varied in practice to meet the changing attitudes of different times and separate groups.
>
> ...
>
> The picture reveals, too, an emphasis, certainly in more recent years, on the rights of individuals and democratic voices in the selection of tribal hierarchies and over their administration. In the Cook Islands this picture emerges most plainly. The customs are of special social importance. Not surprisingly, their operations are debated keenly, often with much feeling, indeed animosity, and even between members of the same tribal unit. Especially is that so in relation to appointments to chiefly office.
>
> …
>
> The dominant purpose of the Maori custom governing the appointment of tribal chiefs in Rarotonga is to ensure that the appointment is not simply a matter of descent or autocratic choice; but its application varies in practice or form, as I have previously remarked is commonly seen in Pacific customs … Nevertheless, it is beyond question in my mind that the spirit of the custom has always been apparent and is that the

> selection and appointment of an Ariki is the right and responsibility in each instance of the Kopu Ariki."

103. The Court has read all the cases relating to Makea Nui Ariki title from 1923 to 1995. It accepts that in some of those cases the decision did not appear to recognise and adopt the primogeniture rule. The statement by McHugh and Dillon JJ that in all the cases from 1923 to 1948 the courts recognised and adopted the rule does not appear to be grounded on the written decisions in some of the cases. Therefore, it is necessary to briefly review those cases.

104. The first three Ariki who succeeded after 1823, when Christianity arrived, were sons of the predecessor but there was no evidence that they were the eldest children of the predecessors. The next four Ariki were appointed as a result of an arrangement. Takau, who succeeded in 1947, was the eldest child of the predecessor but her selection was approved by the Kopu Ariki "*subject to suitability*". Teremoana appointed in 1948 was according to the 1948 Native Appeal Court decision enacted under ancient custom. She was not elected under the primogeniture rule.

105. The judgment upon which subsequent judgments appear to have been based was the decision in the 1940 case by Ayson CJ confirmed in 1941 by Ostler J in the NZ Supreme Court. Previously in the 1923 case the Chief Judge had given judgment confirming Tinirau as the Airki because of the express wishes of the predecessor Rangi which had not been objected to. In that judgment he set out the criteria which a court would apply if there had not been a settlement. The criteria included the respective genealogies of the rival claimants but did not specifically refer to the primogeniture rule as being the overriding consideration.

106. As noted above, the judgment in the 1940 case which was confirmed in the NZ Supreme Court, held that the custom of the Makea Nui is that the eldest surviving child of the deceased Ariki, whether male or female, is entitled to be the Ariki. In default of issue, the older of the next branch succeeds. This is a refinement of the criteria set out in the judgment in the 1923 case.

107. The appellants urged this Court to depart from that decision. Before analysing the judgments of Ayson CJ and Ostler J, it is relevant to summarise the reasons why this Court is being urged to depart from their decisions.

108. The first reason, as already noted, is that the history of appointment of the Makea Nui Ariki does not necessarily suggest that the primogeniture rule applies. In some cases it clearly was a factor. However, as noted there were several Ariki appointed who do not appear to have been appointed according to the primogeniture rule. The stated exceptions to the rule cast doubt on whether or not it is a rule.

109. Secondly, some of the cases relied upon by Ayson CJ did not relate to the appointment of the Makea Nui Ariki. It does not necessarily follow that what is the custom in one part of the Cook Islands is the custom in the others.

110. Thirdly, as noted by Sir Thaddeus McCarthy custom changes. In his judgment in the *Kainuku* Title Case he drew attention to the emphasis then being placed on the rights of individuals and democratic voices in the selection of tribal hierarchies and over their administration especially in relation to appointments to chiefly office. He noted custom was not immutable. Modern thinking would suggest that the first born of the current Ariki may not be the most appropriate person to be the next Ariki.

111. It is now necessary to consider whether these arguments are sufficient for this Court to come to a conclusion which differs from the decisions which led to Makea Takau becoming the Ariki on the death of Tinirau. (The decision in the 1940 case and the NZ Supreme Court.) The principles set down in this case have been followed in the 1995 case and the 1999 case.

112. The 1940 judgment of Ayson CJ, considered the application of Takau, the oldest child of the previous Ariki Tinirau to be the Ariki. In paragraph 98 above the Chief Judge's comments on accepting certain evidence with caution have been noted. He based his decision, namely that the

primogeniture rule applied, unless the person was an unsatisfactory candidate, on several sources.

113. The Chief Judge recorded what had been said by various people affecting the Makea Nui Ariki title. These included:

(a) The writings of Dr P H Buck in 1934. He dealt with various areas where the primogeniture rule applied. In one work he made the following statements:

> "The principle of seniority was so strongly developed in childhood and maintained through adult life that the leader of the family in succession to the father was the eldest son, seniority was maintained through the collaterals, and the successive eldest sons of eldest sons were elevated naturally to the position of group leadership. Every district occupied by a number of families had its senior family which automatically supplied the District Chief through primogeniture. …"
>
> …
>
> "Although the title descended by inheritance on the senior male line, breaks occurred through lack of male heirs, when the title went to a junior. Incapable leadership was also a factor in interrupting direct succession."
>
> …
>
> "Primogeniture, or seniority in the male line governs succession to rank and title in the Cook Islands and in the society islands …"
>
> …
>
> "In Polynesian society, the family was ruled by the senior male, who was succeeded by his eldest son …"

This Court notes that the evidence suggests that at some stage after Christianity arrived, the rule changed to provide for the eldest child rather than the eldest son being entitled to succeed. In his writings Buck was referring to past history.

(b) Ayson CJ noted that he had read various works on the native custom of the ancient Polynesians and had also consulted Tregear's "Maori Comparative Dictionary". The dictionary gave

the meaning of Ariki "as the first born, a male or female, in a family of note: hence chief, priest".

(c) Reference was made to the judgment in the 1923 case which set out the criteria to be followed if the parties fail to reach a settlement. He repeated this criteria (the criteria is set out in paragraph 86 above). As the parties have failed to reach agreement in the 1940 case, he determined that he would apply native custom.

(d) The Chief Judge did not accept the suggestion of Mr Browne that the reason for the deceased Ariki Tinirau not making a will was because he knew that native custom was that the Kopu Ariki selected the successor. The judge thought that Tinirau probably knew that the Court had held, on evidence adduced, that the true native custom was to select the senior line for succession to the Airki title. Of particular note he said that Tinirau knew that the Court had held in the *Manavaroa Mataiapo* and *Tinomana Ariki* cases that the senior line ought to succeed. In the *Manavaroa* case, Mr Browne had actually said that the elder son was the rightful person. In that case, the deceased Ariki Tinirau had also been called as a witness and had stated that "*the eldest has a right to it – always the ancient custom*". He had also given evidence that if there was no issue, the eldest in the next line in seniority was entitled; that in ancient times the title would not go to a woman as this was to keep the land in the family; since missionary times a woman being senior can hold the title; if the senior member was under age, it was a question that that person was old enough and experienced enough to hold the title (there being no minimum age); and that Tinirau thought that the custom applied to the whole of Rarotonga.

(e) In the case of *Tinomana Ariki*, he noted that the parties clearly stated and understood what the old custom was and the case resolved itself into the question of who was the senior when the Gospel was brought to Rarotonga. Tinirau also gave evidence

in this case and made similar statements to those made in the *Manavaroa* case.

(f) In the *Tinomana Ariki* case there was an extract from an address given by Colonel Gudgeon to the people of Arorangi which was printed in the Cook Islands Gazette on 6 August 1909. In that address he said:

> "You Mataiapos assume that you have a right to select the Tinomana Ariki, a right that you certainly have not had for the last 100 years, and you deny the right of the Ariki family to select the elder born of that family."

The judge referred to witnesses who had given evidence that the agent custom of "Mua Tangata" was that the eldest line must succeed. Based on this evidence the Court held that the elder of the senior line should succeed but must be suitable.

(g) The Chief Judge having determined what he believed was the true custom of succession held that there was indisputable evidence that gave a lawful title to the deceased Tinirau. The judge noted evidence that the genealogy was not correct but determined that there was no need to hold its genealogy was right or that it was wrong as there was ample evidence before the Court on which to found a completely valid title whether the title was right in its inception or whether it was wrong. He determined that four generations gave a title and noted that Judge Gudgeon had held that 25 years sometimes gives a title. It would have been unsafe to attempt to re-open the title at this stage.

114. On the face of it, the decision in the 1940 case was a considered decision by the Chief Judge based on evidence before him and on historical documents. He determined that the primogeniture rule applied with a qualification that it was necessary for the Ariki to measure up as to fitness taking present day conditions and all circumstances into account. He stated:

> "The Kopu Ariki should decide the question of succession according to Native custom and if the Kopu Ariki should depart from what the Court holds as the true native custom applicable in the case, the Court must decide in accordance with such custom."

115. The Chief Judge's views were upheld by Ostler J in the NZ Supreme Court decision. In that decision he said:

> "… in my opinion, both the history of the way in which the title has descended, as I have already stated it, and the judgment of the Court in the *Tinirau* case clearly established that although it is the native custom that the Kopu Ariki should select the new Ariki, it is also well established native custom that the eldest child of the last Ariki has the right to be elected unless he or she by reason of character or mental or physical incapacity is unfit for the office. Not only in far back heathen times, but in the last eleven holders of the title which I have specified, in the great majority of the cases the title descended from the holder to his eldest child. The exceptions to the rule in the last eleven cases are explainable by special circumstances. They are merely exceptions to the rule."

116. Ostler J did not permit the parties to produce fresh evidence. He determined it on the pleadings, evidence and judgment set out in the record. He noted that this was appropriate in a case where the main question in issue is one as to native custom and usage. He stated:

> "The learned judge who heard the case in the Court below has presided in the Native Land Court of the Cook Islands for a period of over 20 years. During that long time not only has he come to know the people of the islands intimately, and especially the inhabitants of Rarotonga, but in his work as a Judge he must have acquired an extensive knowledge of native customs. Before deciding this case he heard evidence on the custom in question, and the appellant had the right and the opportunity of calling any evidence he desired on that question. The decision was given upon the evidence which was called. The evidence was given in open Court before an audience which was interested in the question, and many of whom were world versed in the native lore. The very atmosphere in which that evidence was given would serve as a check on the witnesses. After the Court presided over by a Judge of such experience has decided a point of native custom on the evidence called before it, it would be most unjust to allow the appellant to introduce fresh evidence in this Court, evidence given by an interested party without any such check on it such as would be created in the mind of the witness by the knowledge that it was given before an audience who would be able to test the correctness of his evidence and before a Court far less qualified to weigh such evidence, in order to prove that the decision was erroneous."

117. Ostler J's judgment is also considered and detailed. He described the history of the Makea Nui Ariki and the hierarchical structure of tribes in the Cook Islands. He stated the Kopu Ariki meet and appoint a successor when an Ariki dies; noted that according to tradition there were 29 previous Ariki of the Makea Nui in heathen times and that in the great majority of those cases, the title descended to the eldest child; noted that since the coming of the gospel, females were eligible (although he also stated that there appeared to have been female Arikis in heathen times); considered and analysed the status of Arikis appointed since the death of Pini who died in heathen times; noted that Tinirau's succession in 1921 had been disputed by Ngoroyo who would have been entitled to have been Ariki under the primogeniture rule but the Court had held in 1933 that he was disqualified because he had been adopted into the Karika family and had been given Karika land. He then noted the judgment in the 1923 case and adopted the principles stated in paragraph 86 above.

118. When adopting the primogeniture rule, Ostler J stated that there had been exceptions to the rule which were explainable by special circumstances. The judge also noted that a large body of evidence that the primogeniture rule applied in the Cook Islands could, if necessary, be obtained from the books of missionaries and others who had lived for a considerable time in the Cook Islands and had become experts on the question of native customs and usage. Dr Buck was one of these experts.

The Central Issue

119. The issue before this Court is whether the primogeniture rule is the custom of Makea Nui as determined by the Native Land Court in the High Court decisions since 1923 or whether the submissions of the appellants are correct and it is a factor to be taken into account but not a rigid rule.

120. A submission of the appellants is that there are so many exceptions to the rule that it cannot be a rigid rule. Previous decisions have suggested three exceptions, although two of those exceptions may in reality be a subset of the general exception of suitability which has been

recognised in some decisions. The first exception is an arrangement, usually to comply with the wishes of the last deceased Ariki. This Court does not accept that if the Kopu Ariki agrees to an arrangement to vary the rule for a particular reason or purpose that the rule is undermined. There appears, so far as this Court can tell, that there have been valid reasons for the arrangements made in the past.

121. Suitability to perform the task of an Ariki has been seen as a necessary requirement to hold the title. The custom is said to be that the person must be able to properly perform the role of the Ariki. This does not undermine the rule. A person who has left the tribe and joined another one, may well be unfit to be an Ariki as may be someone of tender age or lack of mental capacity. These are merely examples of unsuitability.

122. The Court has come to the view that there are no grounds to depart from the decisions of CJ Ayson or Ostler J. Nor does it accept that in some instances there has been no application of the primogeniture rule because the decisions do not state that that was a factor. It appears to have been accepted that in most of those cases the eldest child was appointed. The evidence is insufficient to find that the rule was not applied in those cases.

123. The succession of Ariki up until the death of Makea Teremoana in 1994 have been accepted and they have fulfilled the role of Ariki. Like Ayson CJ in the Tinomana Ariki case this Court does not see it necessary to rewrite genealogies. Title should not be reopened at this time.

124. In the light of the comments of Sir Thaddeus McCarthy (see paragraph 102 above), the suitability test may exclude persons who might not have been excluded in the past. The demands on an Ariki in the modern day society may differ from those in earlier times. However, suitability is a matter for the Kopu Ariki.

125. It is therefore this Court's decision that the primogeniture rule applies to the appointment of the Makea Nui Ariki title subject to the eligible person being suitable for appointment. The term "suitable for appointment" is discussed below.

The Primogeniture Rule

126. The appellants did not expressly address the meaning of the primogeniture rule because they all submitted it had no application or that it had been varied from the original rule. The Court is obliged to proffer a definition. There was a change in the rule after the coming of the Missionaries. While previously the person entitled was the eldest son, the custom now is that the person entitled is the eldest child. The basic rule as stated in the 1994 case is:

> "The custom is that the eldest surviving child of the deceased Ariki, or in default of issue, the eldest of the next branch, whether male or female, should succeed."

The definition excludes other than the eldest of the senior line. Members of inferior lines do not come within the rule.

127. In cases where there has been an arrangement to depart from the primogeniture rule, succession reverts to the senior line when the arrangement terminates. Thus when Apera died in 1871 the title went to Takau who was the eldest child of Davida and not to Rangi who was the eldest child of Apira. Davida had taken title in 1839 on the death of Pori as Davida was the eldest of the senior line. Rangi did subsequently become the Ariki on Takau's death because there was no other claimant who took precedence under the primogeniture rule.

128. There have been exceptions made to the application of this rule. The cases note that the rule has not always been followed in the Cook Islands because of arrangements between the parties concerned; usurpation by a line more powerful than the true Ariki; unfitness for office; conquest; the settling of new land; and the lack of male heirs when the entitlement went to males which in those circumstances meant that the title went to junior lines.

129. As far as the Makea Nui title is concerned, the courts have recognised three exceptions to the rule, namely an arrangement to comply with the wishes of the last deceased Ariki; suitability to perform the role; and whether the person has left the tribe. These exceptions may lead to

uncertainty and in view of the primacy of the primogeniture rule, should not be used to defeat the purpose of the rule. Each succession will depend on its own circumstances but the application of the rule requires that there be compelling reasons to appoint an Ariki who is not entitled to be appointed under the primogeniture rule.

130. An arrangement noted in the various judgments occurred on the death of the Pori in 1839. Although the judgment in the 1923 case gives a possible reason for the arrangement, there is no evidence before the Court which establishes whether the arrangement was agreed or implied and in either case who was involved in accepting the arrangement. Four children of the deceased Ariki benefitted from the arrangement and on the death of the fourth, the title went back to Takau the eldest child of the eldest of the four children. Thus the title went back to the senior line.

131. In the decision of the 1995 case the Court found that the application of the primogeniture rule had determined the succession in more than half of the thirteen title successions and that the balance had been made pursuant to arrangements. He treated all the exceptions as arrangements. It held that the Kopu Ariki must apply the primogeniture rule unless the Kopu Ariki had entered into an arrangement which varies that rule.

132. The Court's statement may have been too general. The use of "arrangements" to describe the three exceptions in appointing the Makea Nui Ariki is a doubtful use of the term. Two of the three exceptions were not in the nature of arrangements. Specifically the three exceptions have been:

(a) A departure from the primogeniture rule requested by the deceased Ariki and approved by the Kopu Ariki in the manner mentioned below;

(b) Suitability to hold the title. The meaning of "suitability" is discussed below; and

(c) A person who has left the tribe and joined another. Thus for this reason the eldest child, of Rangi, did not succeed on Rangi's death in 1921.

133. Before a person is entitled to be Ariki to be denied that right by the Kopu Ariki, fair process must be followed and the unsuitability of the candidate must arise from serious misconduct or disability. Fair process requires notice of the allegation of unsuitability to be given to the candidate, evidence to be submitted and a proper opportunity given to respond.

134. As noted in the cases, a Court will need to be completely satisfied that sufficient cause has been established before it determines that a person entitled under the primogeniture rule is unsuitable to hold office. In the judgment in the 1995 case references were made to various criteria which may go to suitability. They were sound character, adultery if proven beyond doubt, Akateitei (arrogant or overbearing behaviour), leaving the country with intent to stay away, insanity and murder. This Court expresses a word of caution. As Sir Thaddeus McCarthy noted custom should not be seen as immutable. Rather they present a picture of evolving social living and change from time to time to meet the changing attitudes of different times. Matters which were relevant in 1940 may no longer be so relevant and what may have disqualified a candidate 80 years ago may not disqualify that candidate today.

135. In summary, while the person entitled to be the Ariki may be passed over because the person is unsuitable, such a decision is not likely to find favour with the Court unless after fair process it has been established that some serious misconduct or disability does make the person unsuited for the title.

The Role of the Kopu Ariki

136. There is little dispute that the Kopu Ariki elects the Ariki. In doing so it is required by custom to apply the primogeniture rule unless one of the three exceptions referred to above apply.

137. The election decision must be by clear majority of the members of the Kopu Ariki after all members are given the opportunity to vote. As suggested by earlier Court decisions, if there is not a clear majority in favour of the candidate, it is better to keep talking rather than having the divisive position which has arisen since 1994 with the Makea Nui Ariki's position. It is to be hoped that this decision will clarify for the benefit of the Kopu Ariki its options.

138. The election of an Ariki selected by the Kopu Ariki can be challenged in the High Court if the primogeniture rule has not been applied or if the reason for departing from it does not fall within the exceptions referred to above.

The Composition of the Kopu Ariki

139. In the 1999 case, Smith J adopted the definition given by McCarthy J in a 1991 Appeal Court. That definition is:

> "In my view the answer is again reasonably clear. The term embraces all in a tribe who are the descendant of a particular tribal ancestor who again according to the Rarotonga practice within the Kairuku tribe at least was the Ariki living at the time when Christianity was brought to the islands by the first missionary, John Williams in 1823. In this present case, Ayson CJ, stated: 'the Court will not go back to heathen times. Four generations gives a title …'"

140. Smith J then said:

> "In this case both parties have agreed as to who are the members of the Kopu Ariki who have the right to attend on the selection of the new Ariki. They are the members of four families. This decision, accords the apparent acceptance that it is those descendants from Makea Apera namely Rangi Makea, Upokotohoa, Tataraka, and Mere. The Court in 1995 raised the question of the entitlement of Rupe to be included, but left that for the Kopu Ariki to decide itself. Apart from a unilateral move on the part of the Nooroa Matua to include Rupe in the Kopu Ariki nothing appears to have been done in respect to that."

141. Another way of expressing the position which gives the same result is to say that the Kopu Ariki is comprised of the members of the families who have descended either from Tinirau, who died in 1826 or Pori, who died in 1839. While Pori had children older than Apera, who all died

before Apera, none of those children or issue was alive when Apera died in 1971.

142. In the NZ Supreme Court judgment, Ostler J noted that in some tribes ancient custom gave the Mataiapos the right to attend and give their votes in the selection. This was not so with the Makea Nui tribe which had no Mataiapos until little more than 100 years ago. Consequently, the Mataiapo of that tribe had no voice in the election. The Rangatira's right to vote arises not as a result of the Rangatira title but by virtue of their membership in the Kopu Ariki as family descendants.

143. The first appellant sought a declaration that the family was part of the Kopu Ariki. Isaac J declined to make this declaration. The basis of the application was that when Ostler J in the NZ Supreme Court case defined the Kopu Ariki as the descendants of Apera he erred and based his decision on incorrect evidence. It is noted that Ostler J provided a genealogical table showing the descendants of Apera on which he based his decision. He also noted that both sides of the case agreed that the Kopu Ariki consisted solely of the survivors whose names appeared in the title.

144. The first appellants submitted that Ostler J had only looked back 150 years when if he had looked back 700 years their families would have been included. They seek a voice on the Kopu Ariki. Originally Mr Hunt had sought to be appointed Ariki but offered to withdraw that application.

145. Isaac J noted that three judgments of the Court had confirmed the four family positions. These were the NZ Supreme Court decision and the decisions in the 1995 and 1999 cases. In the 1995 case, the judgment said that the issue of whether the Rupe family should be as a fifth family part of the Kopu Ariki was not able to be resolved on the evidence before it. It did note that on the face of the genealogical table the Rupes' descendants were common descendants from a common ancestor and unless a satisfactory explanation was forthcoming, that family would appear to be part of the Kopu Ariki. The Court concluded "that is a matter that people must settle or have resolved". In the 1995 case

judgment, Smith J noted that nothing appeared to have been done in respect of that suggestion.

146. On the basis of this background, Isaac J concluded that the composition of the Kopu Ariki was not a matter that the Court had jurisdiction to decide.

147. This Court is satisfied that the evidence before Isaac J was insufficient for him to make any of the orders sought particularly in view of the earlier Court decisions. The four family proposition originates from at least 1941 and although there have been challenges to it since that date, it has not been overruled. On the face of the family tree, the Rupe family as issue of Pini who died in heathen times forms part of the Kopu Ariki if the common ancestor can be an Ariki who died prior to the Missionaries arriving. However previous Courts with a genealogical table in front of them, have only been prepared to include the descendants of Pori whose descendants are also the only descendants of Apera. It appears that the Courts have adopted the same decision as McCarthy J did in the *Kairuku* case and have not considered descendants who died before 1823.

148. Another reason for the previous decisions may be that the Makea Nui tribes split from the Makea tribe and the common ancestor is the first Ariki of the Makea Nui tribe. This would exclude the Rupe family.

149. The first appellants base their submissions on evidence in previous cases (some of which was not accepted in those cases), unpublished manuscripts, newspaper articles some of which relate to other tribes and statements of customs from counsel. There is no direct evidence of a genealogical link between the ancestor who lived 700 years ago and Pori who died in 1839 nor is there evidence that the custom of Makea Nui would include other than the four families who have been judicially accepted as part of the Makea Nui. The evidence before Isaac J was not of the quality which would in effect have allowed him to set aside a decision made by Ostler J in 1940 on the basis that the evidence before him was incorrect. It follows that the position as stated in the 1990 case defines the composition of Kopu Ariki.

The Appellants' Cases

150. It follows from the above findings that the first appellants' appeal is to be dismissed. Neither the evidence before the High Court nor the submissions made in that Court support what would in effect be an overturning of previous decisions given after relevant evidence was considered.

151. The second appellant's appeal is also dismissed. Isaac J did not err when determining that the primogeniture rule is the applicable custom which determines succession to the Makea Nui Ariki title. The primary declarations sought by the second appellant are inconsistent with the finding of the Court. Some of the other declarations sought by the second appellant are incorporated in the declarations made below.

152. The third appellant's appeal will also be dismissed. She relies on an arrangement and says she was duly elected by the Kopu Ariki pursuant to such an arrangement. The arrangement alleged does not fit squarely within the arrangement exception referred to above. The type of arrangement envisaged above is one to implement the wishes of the deceased Ariki. While not wishing to exclude the possibility that there may be other types of arrangements which may be relevant, the precursor to the selection under any alternative type arrangement must be adequate consideration of the person entitled under the primogeniture rule. This has not occurred in respect of the third appellant's application. Further the evidence relied upon does not satisfy this Court that there was any type of arrangement which could satisfy native custom. There was not adequate notice of meetings, no evidence of custom being discussed or adopted at meetings that were held, voting was not in accordance with the custom and no evidence that a majority vote in her favour had been properly obtained.

153. The Fourth Appellants' position is that they are the Aronga Mana in accordance with the provisions of s 66A(4) of the constitution and that in the circumstances that have arisen they should be appointed caretaker of the title. As noted earlier the term Aronga Mana is not defined in the Constitution but refers to the Aronga Mana of "the island

or vaka to which a custom … relates …". This suggests that there are several Aronga Manas in the Cook Islands. As noted earlier, there are at least two statutory definitions of the term Aronga Mana and they are restated here for convenience. The definition in the Rarotonga Local Government Act 1988 defines Aronga Mana as:

> "'Aronga Mana' includes those persons invested with the title in accordance with the native custom and usage of that part of Rarotonga from which that title is derived and which titles is recognised by such native custom and usage as entitling the holder to be a member of the Aronga Mana of Rarotonga, in the Koutu-Nui of the Cook Islands."

A similar definition appears in the Environment Act 2003, the difference being that rather than referring to the Aronga Mana of Rarotonga, it refers to the Aronga Mana of the Cook Islands.

154. In the Court of Appeal, the written submissions in 8/14 were headed "Submissions of the Aronga Mana 8/2014". However, those submissions were signed by Mr Framheim himself. It was asserted that the Fourth Appellants were the Aronga Mana O Te-Au-o-Tonga. Mr Framheim individually identified the members as the Arikis of Makea Karika and Makea Vakatini together with ten Mataiapos. Other parties raised doubts as to the status of the Fourth Appellants. As noted earlier, there was not produced to the Court by the Fourth Appellants any formal opinion or statement as to custom by the 12 named persons who claimed to be the Aronga Mana.

155. In the circumstances this Court is of the opinion that there has been no opinion as to custom in respect of the Makea Nui Ariki given to it by the Aronga Mana.

156. As to the application of the Fourth Appellants to be appointed caretakers of the Makea Nui Ariki title the Court upholds the ruling of Isaac J that the application cannot succeed. They are not members of the Kopu Ariki nor do they have the support of the Kopu Ariki. The Court has no power to appoint them as caretakers of the title.

The First Respondent

157. The first respondent, Susan Love de Miguel, objected to the application in the High Court. She did so on behalf of other family members and the objection was on the basis that the primogeniture rule applied and none of the applicants was eligible.

158. Unfortunately, the first respondent did not take as an active part in the appeal hearing as did the other appellants. She is the daughter of Mokoroa, now deceased, who was the eldest child of Ariki Takau who died in 1947. Takau succeeded Tinirau, who died in 1939. She was appointed subject to her deciding to reside in the Cook Islands permanently. Ayson CJ, in the 1940 case decision, determined that Takau and her sister Teremoana should jointly take charge of the title until Takau decided whether she would live in New Zealand or the Cook Islands.

159. The 1948 case considered the position which arose on Takau's death in 1947. The judgments stated that as Takau did not communicate to the Court her decision as to where she was to live, the title went to Teremoana and she was to hold office until Mokoroa, the eldest child of Takau, attained the age of 21 years. Mokoroa was then 18 years old. The judgment said:

> "Teremoana will thus hold office in the first instance for a period of 3 years and she will continue to hold office until Mokoroa can show she is ready to take over the duties of Makea Nui Ariki."

160. Two observations arise from this judgment. First, for whatever reason Mokoroa never assumed office and Teremoana continued as an Ariki until her death in 1994. Secondly, the judgment was an application of the primogeniture rule in that the proposed reversion to Mokoroa at the end of Teremoana's term was to return the title to the eldest child of the senior line, namely the eldest child of Takau.

161. It is for the Kopu Ariki to select the new Makea Nui Ariki. The above analysis demonstrates that the application of the primogeniture rule gives a first right to be considered for the position to the eldest surviving

child in Mokoroa. That child can only be denied the right, if living within Rarotonga, and still part of the Kopu Ariki if the child is unsuitable according to the stringent tests referred to above.

Lack of Expert Evidence in this Case

162. It is appropriate to record that in the Court below there was no independent expert evidence as to customary law concerning Ariki Titles and related matters. Mr Holmes, Counsel for the First Appellant was permitted by Isaac J to produce to the Court Draft Chapters ("the Draft Chapters") from a book jointly authored by Mr Holmes and the late Professor Ron Crocombe entitled "Southern Cook Islands Customary Law, History and Society". Those Draft Chapters were handed up to the Judge and were received into the Record of the High Court in the sense that they were contained in the bundle of documents supplied to the High Court by Ms Caroline Browne. Mr Holmes who is counsel for the objector, Caroline Browne, now the First Appellant along with Mr Stanley Hunt, made submissions on the Draft Chapters in the course of his closing submissions to Isaac J.

163. Before this Court Ms Edwards, Counsel for the Second Appellant objected to these materials being received by the Court on the grounds that the Draft Chapters of Mr Holmes' book consisted of his own personal opinions based on research he has undertaken over a period of time. Mr Holmes was not called as a witness and the Draft Chapters were not formally produced through him. There had been no opportunity to test the opinions reached whether through cross examination of Mr Holmes, or the calling of expert witnesses. She also submitted that Mr Holmes could not be both counsel and witness in a case and Mr Holmes should not be permitted to give "evidence" from the bar in the Court of Appeal.

164. In the course of its ruling on the 2nd of April 2015 this Court said:

> "[10] The draft chapters were received in evidence without objection from any opposing counsel or the Learned Judge. To the extent that there was no accompanying expert evidence to support the introduction of the draft chapters which contained

historical material being deployed to overturn long-standing authority regarding the primogeniture rule it might be thought that the reception of the chapters was irregular. However, informal reception of evidence is a part of the practice of the Land Division of the Cook Islands and also the New Zealand Maori Land Court. These Courts take a generous approach to evidence reception.

[11] There is a similar provision in the Cook Islands Evidence Act 1968 Sections 3 and 4 confer upon the Court the power to admit and/or reject evidence:

> "3. Discretionary power of admitting evidence – Subject to the provisions of this Act, a Court may in any proceeding admit and receive such evidence as it thinks fit, and accept and act on such evidence as it thinks sufficient, whether such evidence is or is not admissible or sufficient at common law."

[13] To the extent that the Second Appellant seeks the removal of the draft chapters from the record of the Lower Court hearing in the Case on Appeal that application is dismissed.

[14] The question of the weight to be given, if any, to the Draft Chapters in the Court of Appeal is reserved for further argument. To the extent that the material in the Draft Chapters is said to contain evidence of custom, the Court of Appeal may, in due course, need to consider submissions from counsel relating to the traditional evidentiary approach to receiving customary law. In the nineteenth century, the Privy Council's approach was to treat indigenous customary laws as analogous to foreign law. In other words:

> "… such law that is not known to the Courts and cannot simply be taken judicial notice of, but it is cognisable by the Courts if sufficiently proved and enforceable provided certain basic requirements have been met."

[15] Professor Richard Boast refers in his leading text *Maori Land Law* to the leading authority of the Privy Council, the 1916 decision *Angu v Attah* (unreported), where it was stated:

> "As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs, have by frequent proof, become so notorious that the Courts will take judicial notice of them."

[16] In New Zealand, Maori customary law is regarded as analogous to foreign law and has to be proved by expert evidence. As a prerequisite to any legal recognition of custom, the Court must establish the existence of the custom alleged. This requires proof of that custom by expert evidence. Despite some uncertainty over the means and standard of proof necessary, it appears that the New Zealand courts have required proof by way of appropriately qualified experts."

165. In procedural rulings this Court ruled that the Chapters could be part of the Case on Appeal since Isaac J was entitled to receive the materials

and allow them to be referred to as part of Mr Holmes' submissions. This was because of the provisions on Section 3 of the Cook Islands Evidence Act which allows a Court to receive such evidence as it thinks fit whether such evidence is or is not admissible at common law.

166. The Court of Appeal having allowed the material to be introduced does not feel the need to comment on it except to say that the position remains that the opinions expressed in this work did not qualify as independent expert evidence since the authors of the book were not called as independent experts and questioned as to their expertise and experience.

167. In the event the Court has not found it necessary to refer to the Draft Chapters in preparing and delivering this Judgment.

Result

168. All appeals are dismissed.

169. The following declarations are made:

(a) The primogeniture rule, by custom, applies to the appointment of the Makea Nui Ariki.

(b) The primogeniture rule is that "the eldest surviving child of the deceased Ariki, or in default of issue, the eldest of the next branch succeeds".

(c) The exceptions to the primogeniture rule are:

(i) There exists an arrangement requested by the deceased Ariki and approved by the Kopu Ariki before the Ariki's death;

(ii) The person is unsuitable to be the Ariki;

(iii) The person otherwise entitled has left the tribe and/or is living abroad.

(d) The Kopu Ariki appoints the Makea Nui Ariki but its selection, including a decision on suitability or unsuitability, is reviewable by the High Court if it fails to follow custom.

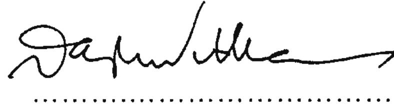
(e) The members of the Kopu Ariki are the descendants of Makea Apera, namely the members of the families descending from Rangi, Upokotohoa, Tataraka and Mere.

(f) In terms of custom relating to the Makea Nui Ariki title, the Aronga Mana have no right to be appointed as caretakers and the Court has no power to make such an appointment.

Costs

170. Costs are reserved. If a party wishes to apply for costs that party is to file a written memorandum within 21 days and the other party or parties from whom costs are claimed then have 14 further days to reply to the application.

DATED this 19th day of February 2016



....

David Williams P

....

Sir Ian Barker JA

....

Barry Paterson JA