IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION)

APPLICATION NO. 8/2015

IN THE MATTER	of Section 390A of the Cook Islands Act 1915 (NZ)
AND	
IN THE MATTER	of the lands known as **TE TAORA 128D, TUTAKIMOA 14E, AVARUA 190A1, AVARUA 190A2, TAPATEA 107B1, TAPATEA 107B2, TAPATEA 223, PARAKO 134, AVARUA**
AND	
IN THE MATTER	of an Application to cancel or amend a Succession Order dated 11 September 1996
BETWEEN	**TUAPIKEPIKE PORETI SAMUEL** Applicant
AND	**SUCCESSORS TO EMMA MOETAUA**[1] Respondents

Date of Application:	9 July 2015
Date of Referral to Land Division:	8 June 2016
Date of Hearing:	10 October 2019
Date of Land Division Report:	2 April 2020
Appearances:	Mr B Mason for Applicant Mrs T Browne for Respondents
Date of Provisional Judgment:	8 September 2020
Date of this Judgment:	11 May 2021

JUDGMENT OF HUGH WILLIAMS, CJ

[0108.dss]

[1] Being the 19 successors to Emma Moetaua in the succession order of 11 September 1996, and their successors, as listed in the memorandum from Mrs Browne, counsel for the respondents, dated 2 September 2020.

[1]: For the reasons appearing in this judgment and the report of Savage, J of 2 April 2020, there will be Orders under s 390A of the Cook Islands Act 1915 (NZ):

(a) That the Succession Orders made on 11 September 1996 in Land Application 217/95 be cancelled in relation to the lands Emma Moetaua received from her adopted family, being those listed in the intituling to this application; and

(b) That the part of Land Application 217/95 which relates to those lands be reheard for evidence to be given as to the Native custom relevant to those lands seen in the family and factual circumstances of those involved; and

[2]: That s 390A 9/15 continue to be adjourned *sine die* pending completion of Land Application 217/95 with leave being granted to the parties to bring the same on for hearing when appropriate.

Application and Procedural

[1] On 9 July 2015 Tuapikepike Poreti Samuel, the abovenamed applicant, applied under s 390A of the Cook Islands Act 1915 (NZ)[2] for an order cancelling or amending a succession order made on 11 September 1966 in Land Application 217/95 on the lands listed in the intituling to the interest of Emma Moetaua, those succeeding being Taupini John Teariki, Oteniera John Teariki, Tereemi[3] John Teariki, Rimatutoko Terai John Teariki, John John Teariki, and Vaiora John Teariki[4].

[2] The grounds of the application included that the succession to Emma Moetaua was not in accordance with Native custom as required by ss 446 and 465 of the Cook Islands Act 1915; the land should have been succeeded to in accordance with Native custom following Emma Moetaua's death without issue; and those who succeeded were not connected by blood to the source of the lands as required by Native custom, custom which

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2 With the application also relying on ss 446 and 465.
3 Also Tereni & Tereimi: v MB 99/77.
4 See fn 1.

should have led the land reverting to the source of the land or next of kin, not the next of kin of a non-blood adopted child.

[3] On 21 July 2015, Mrs Browne, counsel for the "landowners"[5], filed a notice of opposition relying on earlier decisions concerning this much-litigated succession.

[4] Following referral to the Land Division on 8 June 2016 under s 390A(3), this application was heard by Savage J on 10 October 2019[6] and, following receipt of final submissions, the Judge reported to the Chief Justice on 2 April 2020 recommending cancellation of that part of the succession order made on 11 September 1966 in 217/95 as related to the "lands Emma [Moetaua] received from her adopted family" and its rehearing so evidence of appropriate Native custom could be adduced. Savage, J's report is incorporated herein together with the documents listed in its paragraphs [65](b)-(e).

[5] In accordance with s 390A(8), as the order under challenge was made more than five years before the filing of this application, before part of 217/1995[7] could be ordered to be reheard it was necessary that the consent of the Queen's Representative be obtained to the orders proposed. The Queen's Representative's consent was sought on 2 April 2020 (NZT) and was given by His Excellency on 10 February 2021[8] with no conditions being imposed.

[6] Receipt of the report also led to the delivery of a "provisional" judgment on 8 September 2020, and that, in its turn, led to a query as to its status.

[7] Minute (No.2)[9] dealt with the issue of the "provisional" Judgment in the following way:

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5 See fn 1.

6 With Mr Mason and Mrs Carr apparently both appearing for the applicant.

7 In 217/95 Emma Moetaua sought Succession Orders to 19 parcels of land, including the 8 in the intituling. One of the other 11 was deleted during the hearing (MB 99/76), the application re Tutakimoa 14E was consented to and the subsequent litigation only related to the 8 parcels in the above intituling: MB 99, MB 28/156,162 and LAC 21, p1. Only the Register of Title for Tutakimoa 14E showing the succession to those listed in [1] was in evidence in this case but there was evidence that the ROTs for the remaining lands showed the same succession.

8 Received by Chief Justice on 25 March 2021.

9 Issued 7 October 2020.

> [7] On 1 October 2020 Mrs Browne, counsel for the respondents, wrote querying whether the "20 working days for appeal starts from [1 October 2020] unless a "provisional judgment" is not a "judgment" in terms of the Article 60(4)".
>
> [8] Judgments which contain an indicated possible order and which require the consent of the Queen's Representative because their subject matter brings them within s 390A(8) are described as "provisional," for lack of a more apt term, because they do no more than indicate the Chief Justice's then view of the appropriate outcome of the s 390A application and give His Excellency the necessary background on which his consent is sought. They are also described as "provisional" because His Excellency may decline consent or amend the "provisional judgment" in some way.
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> [9] If His Excellency consents, whether conditionally or unconditionally, the "provisional judgment" is then perfected and a final judgment delivered. Though, out of respect for the Queen's Representative's involvement, the ultimate order will always be the same as that indicated in the "provisional judgment", the way in which the final judgment is worded may vary from the "provisional judgment" as a result of the iterative process by which judgments reach their final form.
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> [10] It is the judgment delivered following completion of the Queen's Representative consent process and the receipt of His Excellency's consent which, if it contains orders, are "orders" or "final orders" within the meaning of s 390A(2).
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> [11] It is accordingly the delivery of that final judgment which concludes the s 390A application in the High Court to that point and the time for appeal therefore runs from delivery of that final judgment.

Savage J's report

[8] After reviewing the contrasting stances of the parties, Savage J noted that the "succession of Emma Moetaua to her adopted mother Tuokura Maeva has been the subject of well-known decisions before the Courts"[10] starting in 1968 and continuing down to 2007 through a number of regularly-cited cases before both the High Court and the Court of Appeal[11].

[9] After reviewing the earlier litigation, noting the primacy of Native custom under ss 446 and 465 and Article 66A of the Constitution of the Cook Islands[12], Savage J went on

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10 At [4], [11].

11 The case references appear in Savage J's report to which were appended three earlier decisions and the transcript of the 11 March 1996 hearing.

12 As considered in *Browne v. Munokoa*, CICA CA 1/16, 14 February 2017, a decision confirmed in the Privy Council.

to note the sources of custom (in the absence of an opinion from a duly constituted Aronga Mana) as found in the House of Ariki Papers of 1970 and 1977, the Koutu Nui Paper of 1977 and the Commission of Inquiry Into Lands Report of 1996. Savage J then summarised the situation[13]:

> [35] Both parties accepted the findings of the Courts in 1968, that the adoption of Emma Moetaua had matured, and she was entitled to succeed to her adopted mother without restriction. However, the present case is concerned with quite different circumstances, where the adopted child subsequently dies without issue, effectively bringing an end to the family line. The question is whether the adopted child's natural next of kin should be entitled to succeed to lands, regardless of the fact they were received from the adopted family, or whether such lands should return to their source for the appropriate successors to then be determined.

[10] The Judge then discussed Native custom as it applies to natural children, noted that[14]:

> "It appears well-recognised custom therefore, that where natural children die without issue, the lands return to the source from which they came. If that person is deceased, the lands go to the next of kin of that source, excluding those who have left the family or tribe."

and concluded[15] that:

> "where a person dies without issue, their lands revert to their source, regardless of whether they are adopted".

[11] The Judge then recounted the essentials of the factual background to 217/95 and this application noting that, despite the extensive litigation concerning the succession under challenge in this matter "what is most remarkable … is that none of those decisions have addressed the central issue regarding the custom where an adopted child dies without issue"[16].

[12] In considering the custom of reversion of lands to the source, the Judge's report comments[17]:

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13 At [35], [27].
14 At [43].
15 At [48].
16 At [55].
17 At [57].

> [57] The respondents' argument, that the custom of reversion of lands to the source does not apply as Emma Moetaua had natural next of kin, may well be misconceived. If we consider how the custom operates, we can see that its application is not altered where the person is adopted. For example, where a person dies without issue but leaves brothers and sisters, in applying the custom of reversion to source, their interests in the land can be succeeded to by their brothers and sisters. At a detailed level, that person's interests return to their source (likely their parent) and the successors are then determined by reference to that source. Naturally, if that parent has other children, the interests are then available to those other children. Therefore, while in practice the interests are succeeded to by the deceased's siblings, that is only because of their connection to the source of the land. For an adopted person who dies without issue, the lands would also return to the source. If that source is their adopted parent, the successors would then be determined by reference to that source. Accordingly, if the adopted person (not of the blood) has natural siblings or next of kin, they will not have a connection to the source of the land and would not be entitled to succeed. To put it another way, where an adoption has matured, the adopted child is accepted as part of the kin group.

[13] The Judge's conclusion from that careful consideration was that "the Native custom to be applied where a person dies without issue is reversion to the source of the land"[18] but that, in the present case, it appears the "Order in issue here was not supported by any evidence before that court as to Native custom"[19].

[14] He therefore recommended that the 11 September 1966 order be partially cancelled, "in relation to those lands Emma received from her adopted family,"[20] and further recommended that the "matter be set down for a rehearing so that the parties and their successors be required to squarely address Native custom with the appropriate evidence"[21].

[15] The provisional Judgment then said:

> "Savage J's careful analysis of the background of, and the authorities related to, this much-debated succession is perceptive and persuasive, and the present Chief Justice is minded to accept the recommendation that the order of 11 September 1996 in 217/1995 be cancelled. Strictly, as that order will leave that portion of application 217/1995 which related to the lands described in the intituling to this application undecided, it is unnecessary to order a rehearing of that aspect of 217/1995 but, out of an abundance of caution, there will be an

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18 At [60].
19 At [61].
20 At [62].
21 At [63].

order that, as Savage J recommended, that portion of 217/1995 be reheard, solely for evidence as to the relevant Native custom to be given[22]."

Discussion and Decision

[16] The application was brought, as noted, pursuant to s 390A which relevantly reads:

> (1) Where through any mistake, error, or omission whether of fact or of law however arising, and whether of the party applying to amend or not, the Land [Division] or the Land Appellate Court[23] by its order has in effect done or left undone something which it did not actually intend to do or leave undone, or something which it would not but for that mistake, error, or omission have done or left undone, or where the Land [Division] or the Land Appellate Court has decided any point of law erroneously, the Chief [Justice] may, upon the application in writing of any person alleging that he is affected by the mistake, error, omission, or erroneous decision in point of law, make such order in the matter for the purpose of remedying the same or the effect of the same respectively as the nature of the case may require; and for any such purpose may, if he deems it necessary or expedient, amend, vary, or cancel any order made by the Land [Division] or the Land Appellate Court, or revoke any decision or intended decision of either of those Courts.
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> (2) Any order made by the Chief [Justice] upon any such proceedings amending, varying, or cancelling any prior order shall be subject to appeal in the same manner as any final order of the Land [Division] but there shall be no appeal against the refusal to make any such order.
>
> (3) The Chief [Justice] may refer any such application to the Land [Division] for inquiry and report, and he may act upon that report or otherwise deal with the application without holding formal sittings or hearing the parties in open Court.
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> …
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> (8) This section shall extend and apply (with the exception hereinafter mentioned) to orders, whether made before or after the commencement of this section, save that in all cases where an order is dated more than 5 years previously to the receipt of the application under this section the Chief [Justice] shall first obtain the consent of the [Queen's Representative] before making any order hereunder. The Chief [Justice] shall nevertheless

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22 Although, given 24 years have passed since the order, it is accepted that it may be necessary for updating evidence to be given. Further, it is for the parties to application 217/1995 to decide what action, if any, should be taken with the balance of the application.

23 Disestablished in favour of the Court of Appeal by the Constitution Amendment (No 9) Act 1980-1.

> have full power without that consent to dismiss any such application or to refer it to the Land [Division] for inquiry and report.
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> …
>
> (10) This section shall not apply to any order made upon investigation of title or partition save with regard to the relative interests defined thereunder, but the provisions of this subsection shall not prevent the making of any necessary consequential amendments with regard to partition orders.

[17] Though not all of what follows is directly applicable to this application – though the presumptions and the reluctance to alter long-standing decisions certainly are – a recounting of the correct approach to applications under s 390A is always of assistance.

[18] The jurisdiction created by s 390A can be problematic, procedurally and substantively, but, in an effort to codify and clarify the operation of the section a paper was prepared[24] which contained the following passages:

> [4] The jurisdiction conferred by s 390A is an important one. It is similar to that conferred on the Chief Judge of the Maori Land Court in New Zealand by s 45 Te Ture Whenua Maori Act 1993 (NZ) in relation to which the singularity of the jurisdictions is emphasised in the following passage:
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> > It is important to note that the jurisdiction provided to the Chief Justice in the Cook Islands by s 390A Cook Islands Act 1915 and that provided to the Chief Justice of the Maori Land Court in New Zealand by s 45 Te Ture Whenua Maori Act 1993 are not provided to the general Courts. In fact they are unique to these two jurisdictions.
> >
> > Unlike the general courts there is no time limit to question an order of the Court and at times the Chief Justice is required to cancel vary or amend an order of many years' standing.
> >
> > The reasoning behind these provisions is simply that both the Land Division of the Cook Islands Court and the Maori Land Court of New Zealand are titles courts. They are Courts that establish who are the rightful title owners and the interests of those persons in the land. The s 390A jurisdiction enables the Chief Justice to ensure the integrity of title to land in the Cook Islands exists and can be relied on by the present owners and their successors.

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[24] Discussion Paper: 5 November 2019. Based, though slightly updated and amended, on *Teariki v. Sanderson*, CA 1/11, 19 October 2011 and numerous decisions since.

[5] The wide-ranging and largely unlimited nature of the s 390A jurisdiction has been recognized by the Court of Appeal in the following passage[25]:

> "Section 390A is a very distinctive and important provision fashioned especially to provide an inexpensive and expeditious way to address alleged judicial error in land matters. It is obvious from the wide scope of s 390A that it was designed to allow for reconsideration and reversal if found appropriate of <u>any order</u> of the Land Division."

[6] Whether the two adjectives used by the Court of Appeal remain appropriate may be open to doubt since extensive – and therefore expensive? – research by all parties is a feature of most s 390A applications, and the necessity to comply with the numerous steps required by the section means it is common for applications take many years to conclude. But the Court of Appeal was correct to emphasise the almost unique nature of the jurisdiction.

[7] Though the passage conflates the three main steps required by s 390A in deciding whether to make orders under the section, – (a) refers to the initial consideration, (b) to the second and (c) to the third[26] – the approach adopted by Chief Justices to applications over the years under s 390A has been [27]:

(a) The application is considered by the Chief Justice immediately on filing. Some of the matters which the Applicant must address include:

i. There must be an arguable case, or the Applicant must establish a prima facie case, that there was a mistake, error or omission in the judgment complained of which requires the Court to remedy.

ii. If there is any delay in filing the application, an explanation as to the delay.

iii. If there is an application to introduce new evidence – as there normally is – the Applicant must satisfy the Chief Justice why it was not tendered at the hearing that gave rise to the judgment, an unusual requirement given the orders under challenge were often made many years before.

iv. The Respondent is given an opportunity to respond to the application, and the Chief Justice considers any further evidence supplied.

v. If the Applicant fails to provide a satisfactory excuse for the delay in filing the application and if the Chief Justice is satisfied that the Applicant has failed to establish a prima facie

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25 *Teariki v. Sanderson*, at [42]-[45], [51], p2. Underlining in original. Section 390A gives the CJ power to make any order whether of fact or law however and whenever arising, including succession orders, orders revoking the same under s 450, and even appellate decisions.

26 Et v at [14] cited at [11] below.

27 Cited in *Teariki v. Sanderson*, at [31], p14-15, despite some duplications and slightly amended.

> case the application is dismissed at the outset. To avoid possible intrusion on persons' property rights – or claimed rights – this is an unusual result at this stage.
>
> (b) If the Applicant is able to establish a prima facie case, and the Chief Justice is satisfied with the explanation as to the delay in filing the application, the Chief Justice normally refers the application to a Justice of the Land Division for inquiry and report pursuant to 390A(3). On such references [full] hearings are often held "involving new evidence, additional argument and another considered appraisal of all aspects of the case"[28].
>
> (c) Thereafter, on considering the report, the Chief Justice decides whether to adopt the report and recommendation of the Land Division or what other order may be appropriate.

[8] A limitation on the jurisdiction is that the approach to adjudicating on each stage of a s 390A application is that they are not to be regarded as applications for rehearing, the equivalent of an appeal or justified because the losing party disagrees with the recommendation in a Land Division report. They are substantive applications to be dealt with in accordance with the following principles:

> The burden of proof rests on the applicant to prove that there was a mistake, error or omission in relation to the order in question which satisfies the grounds in s 390A. It is well-established from previous cases that this burden is not easily satisfied. Discharging that burden must also satisfy the following criteria.
>
> (i) The Chief Justice needs to review the evidence given at the original hearing and weigh it against the evidence produced by the applicant (and any evidence in opposition) at any s 390A hearing;
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> (ii) The principle of *Ommia Praesumuntur Rite Esse Acta* (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies. Therefore, in the absence of a patent defect in the order, there is a presumption that the order made was correct;
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> (iii) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct;
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> (iv) The burden of proof is on the applicant to rebut the two presumptions above.
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> It is also worth noting that s 390A stands in direct contrast to the well-established principle of finality and certainty of decisions. As such, the

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28 *Teariki v. Sanderson,* at [51], p22.

> power to amend orders should only be exercised in exceptional circumstances as:
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> > These principles … make it clear that the general intent of the legislation is that orders of the Court should be binding and conclusive on all parties and that the applications to the Chief Justice are made only in exceptional circumstances where the applicant can show a clear mistake or error in the original order which the Chief Justice deems necessary or expedient to remedy[29].
>
> Also, s 390A(8) requires the consent of the Queen's Representative before making an order when the application has been filed over five years after the making of the order complained of. This reinforces the need for certainty and the conclusive nature of orders, especially those affecting title[30].

[19] That approach has since been glossed in the following two passages[31].

[20] The first is a consideration of what Parliament may have intended to achieve by enacting the referral and reporting provisions in s 390A(3):

> [27] The first purpose must been to free Chief Justices from the necessity to hold the frequently lengthy and complex hearings the numerous s 390A applications require, delegate that power to Land Division Judges steeped in the intricacies of Cook Islands and Maori land law, and thus gain the double advantage of one person not having to hear every s 390A application and obtaining access to the expertise of the Land Division Judges.
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> [28] The second purpose, consequent on the first, is that, although the ultimate decision on any s 390A application is for the Chief Justice alone, appropriate weight should be accorded the reports of such experienced Judges – particularly where they have reached views on credibility after hearing witnesses – so their conclusions and recommendations are likely to be adopted by Chief Justices unless parties can point to errors in their reports which vitiate their findings.

[21] In summary:

> [12] For the reasons set out above, applicants face considerable barriers to the success of applications under s 390A given the onus of proof and the applicable presumptions discussed in the authorities. To those hurdles … must be added the fact that conclusions and recommendations reached by a Judge who is intimately familiar with the types of issues for decision and who has had the opportunity of

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29 An observation fortified by the fact that decisions dismissing (or refusing: s 390A(2)) applications under the section, and so confirming the *status quo ante*, are unappealable.

30 Et v fn [16].

31 *Hosking v. Marearai*, Judgment (No.3), 8 July 2020, at [12] & [14].

> seeing, hearing and evaluating the credibility and reliability of witnesses and reaching a recommendation following full submissions of the parties' legal representatives are well-known as being hard to overcome.
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> …
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> [14] There is no doubt that s 390A is a difficult measure procedurally for all those involved; applicants, opponents, Land Division Judges, Chief Justices and, where appropriate, the Queen's Representative. One of the reasons is that the section fails to set out clearly what should happen at the several stages of the application; prior to applying; once the application is filed, especially if it is opposed; what indicia are relevant to a decision to dismiss the application or refer it to the Land Division for enquiry and report; what factors impinge on the Land Division's consideration of referred applications; and how Land Division recommendations should be actioned, especially if further action is recommended. The factors relevant to the manner in which applications for the Queen's Representative consent in qualifying applications should be considered and acted upon also do not clearly appear from the section.

[22] Applying those principles, though without pre-judging the outcome of the recommended rehearing, Savage J's detailed consideration of the issues surrounding adoption generally, and the adoption of Emma Moetaua in particular, strongly suggest the Judge's recommendation should be adopted, especially as perusal of the evidence in 217/95 shows an emphasis on relationships but almost nothing about the custom relevant to the application.

[23] Indeed, in the 3 October 1957 appellate decision in *re Moeau deceased* [32], the Court, after making the comments to which Savage J referred, noted[33] that "when the applications for succession to Moeau were heard in the Native Land Court, no evidence of custom relating to the adopted children was tendered but at the rehearing [there was] a brief outline of custom" referring to Judge Ayson's Notes on Adoptions[34].

[24] Further, as Savage J noted, in the 29 May 1968 decision in *Succession to Tuokura Maeva, Deceased* [35] the judgment contains a scholarly historical narrative – some decisions in which were rejected as lacking legal authority[36] – and a review of the evidence in the case before Chief Judge Morgan which, after referring to some "rumours," held[37]

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32 3 October 1957, Appeals 196, 197, 199, 200, AMB2, p 392.
33 Para 5.
34 MB 22/319.
35 MB 28/156.
36 Para 13, p3.
37 Para 19, p4.

"However, rumours are not proof and the evidence … of Emma falls far short of the proof the court requires to establish that blood relationship does, in fact, exist. The court must, therefore, and will, treat Emma as an adopted child not related by blood to her foster parent." and then passed to a consideration of whom of the members of the foster parent's family would be entitled to succeed if no adoption had taken place[38], before reaching the following conclusion:

> "In the present case, the evidence clearly shows the wishes of the foster parent, there is no family from Tairiterangi to consult, the adopted child has not been cast out and the objection by the Ariki has been disallowed. It is doubtful if the next of kin of Tuokura are related closely enough to raise a valid objection to the applicant's claims but in any case they have not done so.
>
> Eight succession orders will therefore be made in favour of Emma Moetaua."

[25] On appeal[39] to the Land Appellate Court, an appeal by Makea Nui Teremoana Ariki[40], the Court held, in relation to the legislative direction to apply Native custom, that

> "the difficulty is to determine what is the Native custom applicable in any particular circumstances. No evidence has been produced in this appeal, or in the application for succession, from which the Court can adduce a relevant set of rules relating to adoption. Authorities agree that rights acquired by adoption have always been a matter of contention. What is claimed to be Native custom varies from island to island, from village to village and even from family to family. There are also different kinds of an adoption and adoptions pass through various degrees.
>
> But this Court for the purposes of this decision does not need to express its opinion as to what is the complete Native custom in relation to adoption although it is sure that, for the guidance and help of all persons concerned, some authoritative statement in the matter is highly desirable. It would appear that at this stage the legislature is the only body which can make that statement".

and then, in dismissing the appeal, said "in order to succeed the appellant must convince this Court that a legally adopted child has no right at all in any circumstances to unconditional succession and this the appellant has not done".

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38 Para 34, p6.

39 Relating to all the lands in the intituling in 390A 8/15 except Tutakimoa 14E which, as noted, was unopposed.

40 Land Appellate Court, Appeal 150. 215/75-8? Undated but clearly post 29.5.68, said by Savage J to be delivered in 1968, p2.

[26] Further to the citations from the *Emma Moetaua* litigation itself, it is to be noted that the Privy Council, in *Browne v. Munokoa* [41] observed of custom that:

> "16. … In England, custom is a derogation from the ordinary law of the land. But Native custom concerning land tenure and succession to land in the Cook Islands is not a derogation from the law of the land. Subject to statute, it is the law of the land. … The need for evidence in these circumstances is not conceptual or legal, but purely practical. The custom has not been codified. It is not necessarily uniform across the different islands and tribes …
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> 17. … The relevant customary law was, however, often obscure, locally variable, changeable over time, and open to dispute. In theory, the Land Court merely ascertained the custom. It did not create it. …
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> …
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> 28. The result is that the following points of customary law may be regarded as settled, so far as the case law goes:
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> (1) The view of customary law on the succession rights of adopted children has stabilised around the account of Cook Islands custom by Chief Judge Morgan in the first *Emma* case. Subsequent disputes on the points covered by that decision have commonly been resolved by reference to it.
>
> (2) There is no objection in principle to the succession of a non-blood adoptee to the lands of his adoptive parents.
>
> (3) The mere fact of adoption, however, is not enough to confer succession rights on an adopted child who is not of the blood. Unless land has been lawfully set aside for the adopted child, the adoption must be "completed" or "matured"."

[27] From all of that, it is apparent that, surprising as it may seem after such a lengthy period, despite the frequency with which the *Emma Moetaua* decisions have been cited, despite Art 66A(3) of the Constitution making custom and usage part of the law and despite s 446 of the Cook Islands Act 1915 (NZ) requiring "succession to be determined in accordance with Native custom, so far as such custom extends," in relation to this application to cancel or amend the succession orders to the lands described in the intituling to the interests of Emma Moetaua, the review of the evidence in 217/95 and the *Emma Moetaua* cases shows that Savage J was correct in his view that there was no, or insufficient, evidence in the *Emma Moetaua* decisions themselves and in 217/95 to satisfy the

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41 [2018] UKPC 18, at 16, 17 and 28. Emphasis in original. See also *Short v. Whittaker*, CA 3/03, 2 October 2003, especially at [26].

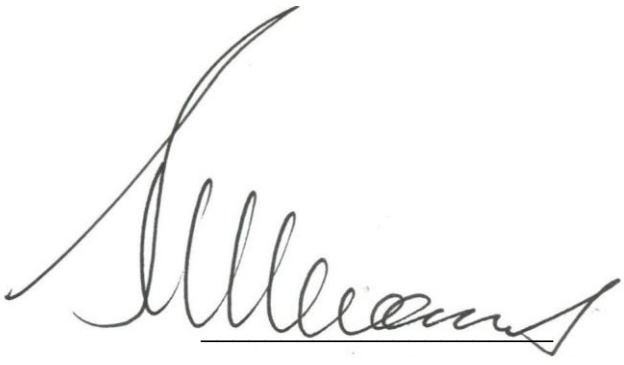
requirement for proof of the whatever may have been the custom applicable to the lands Emma Moetaua inherited from her adopted family.

[28] Accordingly Savage J was correct in recommending that the 11 September 1996 be cancelled in relation to the lands Emma Moetaua received from her adopted family with that part of 217/95 being set down for rehearing so the parties and their successors can "squarely address Native custom with the appropriate evidence". That evidence, when given at the rehearing, must not only meet the criteria for the custom at the time, but the judicial observations as to custom which have been delivered since.

[29] There will be orders accordingly as detailed on page 2 of this Judgment.

S 390A 9/15

[30] On 9 July 2015 the present applicant filed a second application under s 390A seeking an order confirming a conveyance made on 27 March 1972 in proceedings involving the Cook Islands Government Property Corporation and Westpac Banking Corporation. Those appearing in that matter have suggested that it awaits the outcome of this application. It will continue to be adjourned *sine die* but, 8/15 now being complete, leave is granted to those involved to bring 9/15 on for hearing if thought appropriate.



Hugh Williams, CJ