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

APPLICATION NO. 3/17

IN THE MATTER	of Section 390A of the Cook Islands Act 1915
AND IN THE MATTER	of the lands known as **TIRAONGO 117, ENUAKURA 4, NGATI TIARE 91 & 92, TE KOU 126A, AUMARU 180A4, TAKAREU 186B, PAKIMATO 203, AVARUA**[1]
AND IN THE MATTER	of an application to rehear a Succession Order made on 19 August 1970 to the interest of Aitu
BETWEEN	**DANIEL NGAWAKA MITCHELL**[2] Applicant
AND	**MATA MEREANA AITU and MAVIS AITU PARI** as successors to **AITU**[3] Respondents

Date of Application:	8 June 2017
Date of Land Division Report:	25 June 2020 (NZT)
Appearances:	Ms M Houra for Applicant Mrs T Browne for Respondents
Minute (No's 1-3):	14 February 2018; 27 March 2018; 29 June 2020
Date of Judgment:	9 September 2020

JUDGMENT OF HUGH WILLIAMS, CJ

1. **For the reasons set out herein, this application is dismissed.**
2. **Costs are to be dealt with in accordance with the timetable in [49].**

Solicitors: Rasmussen Law PC (*sed vide fn 8)*
Browne Harvey & Associates, Rarotonga

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1 *Sed vide*, at [7],[8] hereof.
2 Also known, according to Ms Houra, as Teaea Mitchell Ngawaka.
3 Mata being adopted on 5 May 1909 and Mavis, her daughter, being adopted on 6 August 1952, per Coxhead J report, at [13].

Application

[1] On 8 June 2017 Mr Mitchell, the applicant, acting pursuant to a suggestion from Isaac, J made on 25 May 2017, issued this application under s 390A of the Cook Islands Act 1915 (NZ)[4] seeking an order cancelling the Succession Order made on 19 August 1970 "to Aitu" – not her successors – in the lands listed in the intituling on the grounds, first, that the order was made in error and that the "adopted children who succeeded to Aitu" on that day were not related by blood to the source of the land, Te Ora, and, secondly, that the Court erred in that hearing as it did not consider the Native custom applicable to the succession rights of non-blood related adopted children.

Procedural

[2] By minute (No.2)[5] the application was referred to the Land Division for inquiry and a report[6], but, although that reference was directed to be inoperative, for some reason the reference proceeded, Coxhead J heard the inquiry on 18 July 2019 and reported to the Chief Justice on 25 June 2020 (NZT), recommending, for the reasons later discussed, that the application be dismissed.

[3] Minute (No.3)[7] circulated the report, advised the parties the Chief Justice was minded to accept Coxhead J's recommendation and sought submissions on the limited issues described in the minute. Ms Houra, counsel for the applicant[8], filed full submissions on 4 August 2020. Included was a request that an opinion Ms Houra obtained from Mr Peter McKenzie, QC, of Wellington, New Zealand be read as part of her submissions.

[4] Mrs Browne, counsel for the respondents, did not avail herself of the opportunity to respond by filing further submissions.

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4 "The Act".
5 Issued on 27 March 2018.
6 Confirmed on 29 October 2018.
7 Issued on 29 June 2020.
8 The application was filed by Mrs Tere Carr but without any notice of address for service. Ms Henry took over acting for the applicant in 2018 though filed no notice of change of solicitor or any address for service. She withdrew as counsel for the applicant on 20 March 2019. Ms Houra appeared for the applicant at the hearing on 18 July 2019 – she having been admitted that day for that purpose – and, in her submissions, named Mr Rasmussen as her instructing solicitor. No notice of change of solicitor or any up to date address for service has been filed by Mr Rasmussen.

Coxhead J's report

[5] Coxhead J began his report by saying[9]:

> "In many Polynesian societies, adoption in accordance with the law or on a customary basis is common. Issues of contention often arise where adopted children, either legal or customary, make application to succeed to land interests of their adopted parent. These types of applications frequently raise questions of law and applicable Native custom."

[6] The Judge then reviewed the procedural history of the matter, recounted his refusal of Ms Houra's application for adjournment on the grounds that[10]:

> "… the House of Ariki were contemplating lobbying the government for legislative change, which would affect the present case and other similar cases where the Native custom concerning adopted children not related by blood was at issue".

and then passed to a consideration of the factual background.

[7] The report then noted that, of the seven parcels of land listed in the intituling, Aitu was still an owner in Te Kou 126A[11] and the applicant and his family were not owners in Enuakura 4, Aumaru 180A4 and Pakimato 203[12].

[8] In view of the applicant's concession, those parcels require removal from this application. To lessen the chances of possible future complications, that will be accomplished by deleting them from the application It therefore concerns only Ngati Tiare 91 & 92, Tiraongo 117, and Takareu 186B.

[9] The Judge then reviewed the parties' cases, the reference by Mrs Browne to the leading authorities – later considered – and the relevant provisions of s 390A before posing as the first issue for consideration: "Are the respondents adopted children related by blood?"

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9 At [1].
10 At [9].
11 Though, in Application 8131, the respondents succeeded to Aitu's interest in Te Kou 126A on 19 August 1970.
12 In Applications 8111 & 8113, the respondents succeeded to Aitu's interests in Kaititera 195F and Kauarikirangi 62 on 19 August 1970, but these parcels were not included in Mr Mitchell's application.

[10] The Judge further reviewed the evidence, including Mr Mitchell's acknowledgment that the respondents had a blood connection to some, but not all, of the lands in the 1970 orders[13] and the respondents' contention that the application was barred by s 390A(10),[14] before passing to consider the full submissions filed for the applicant by Ms Henry.

[11] At the conclusion of his review of the evidence on the first issue, the Judge said[15]:

> "Based on the evidence provided, I accept that the source of these lands is either Ngati Te Ora or Aitu on her Ngati Tiare side. To be considered as adopted children related by blood in the present case, the respondents would need to show they are related by blood to Aitu through her Ngati Tiare side."

and then passed to the evidence bearing on that question to conclude[16]:

> "The respondents have not claimed a connection to Ngati Tiare, only to Aitu. It is clear to me from the evidence that the respondents do not have any blood connection to Ngati Tiare and therefore no connection to the source of the relevant lands. Accordingly, in the context of this application, the respondents could not be considered adopted children related by blood."

[12] Then, after considering, almost as an aside, whether what Mr Mitchell sought was legally possible, the Judge said[17]:

> "I agree with the respondents on this point. Aitu was an original owner when title was determined and the freehold order made on 29 March 1949. Section 390A(10) provides that s 390A shall not apply to any order made upon investigation of title and the Chief Justice would be unable to unwind that order. However, if necessary, the Court would still be able to determine the next of kin of Aitu for succession purposes.
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> If the respondents cannot be considered adopted children related by blood, the next question to determine is whether they will nevertheless be entitled to succeed as adopted children not related by blood."

and then proceeded to consider that question.

[13] The report recounted the parties' respective submissions on that point, including Mr Mitchell's evidence that "adopted children not related by blood cannot ever succeed to

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13 At [33].
14 At [39].
15 At [46].
16 At [49].
17 At [51], [52].

ancestral lands"[18]. The report reviewed the authorities on whether an adoption has "matured"[19] and the impact of custom, Mrs Browne's legal submissions, ss 446 and 465 of the Act making Native custom determinative and then passed to a consideration of that question, principally by citing the leading decision in *Emma Moetaua*[20], both at first instance and as upheld on appeal. The Judge then passed to a consideration of the Privy Council's decision in *Browne v. Munokoa*[21], including the Board noting the parties in that case relied on decisions of the Land Court and Court of Appeal and House of Ariki papers as the main sources of evidence of custom. The report cited the tabulation as to the points of customary law in *Browne v. Munokoa*[22], adopted the principles in those decisions and concluded[23]:

> [68] Both counsel referred to leading authorities regarding the Native custom of succession and particularly succession by adopted children not related by blood. Both counsel agreed that those decisions provided that adopted children who were not related by blood could in fact succeed to their adopted parents but that this depended on whether the adoption had matured. While at hearing the applicant suggested the Native custom for these lands was that adopted children without a blood connection could never succeed to ancestral lands, no evidence was provided of that custom in practice. In the absence of such evidence, I rely on the general principles which were accepted by both counsel.
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> [69] In the present case therefore, the respondents could have succeeded to Aitu as adopted children if the Court accepted that their adoptions had matured. As noted, maturity would have involved acceptance, not only by Aitu but also her near family, that the respondents were to be treated in the same way as natural children for the purposes of succession. The near family comprises those who would be entitled to succeed in the absence of the adoptions, however the view of more distant family members could be more or less significant depending of several factors, including how closely related they are to Aitu and how closely they were involved in the family's life. I note that neither party provided specific evidence regarding whether the adoptions had matured. In particular, the applicant did not argue that the respondents' adoptions had not matured and did not point to any evidence showing they were not accepted by the near family or that they had been cast out. I also note that documents contained in the respondents' bundle show that Mata was actively involved in proceedings concerning the Te Ora Rangatira title, and that the adoptions and lack of blood relationship were raised as issues on appeal against the respondents' succession to Aitu in other lands and were ultimately

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18 At [53], Transcript, p10.
19 At [54].
20 *Moetaua – Succession to Tuokura Maeva* 29 May 1968; MB 28/156-162, Morgan, CJ. & AMB 215/75-8, usually referred to as the *Emma Moetaua* decisions.
21 *Browne v. Munokoa*, [2018]; UKPC 18.
22 At [28], ff.
23 At [68]-[70].

> dismissed. No objections were raised regarding the present land interests at the succession hearing on 19 August 1970.
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> [70] Based on these circumstances, it seems likely that the respondents would be entitled to succeed to Aitu as her adopted children.

[14] The report then discussed the remaining question as to whether there was an error, as required by s 390A, in that the 1970 Court did not expressly apply Native custom, concluding:

> [77] The Court minutes from the succession to Aitu on 19 August 1970 are very brief[24]. They list the relevant land interests and show a short papa'anga for Aitu, which records that she had no issue but legally adopted the respondents. The minutes conclude by noting that there were no objections and awarding the lands to the respondents as Aitu's successors. The minutes contain no reference to the relevant legislation or Native custom and do not record whether any such evidence was put before the Court. If any case authority was relied upon, that too was not recorded. Although there is much attraction in the argument that it is inconceivable that the Judge would not have been aware of the principles set out in *Emma Moetaua* decision given it had been so recently released, on the face of the minutes there is nothing to indicate whether the Judge directed his mind to the relevant principles and applied those in coming to his decision.
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> [78] However, the issue for the applicant is that he has failed to demonstrate that the succession orders were erroneous. As I have noted above, the only factor likely to have affected the respondents' ability to succeed to Aitu would be if the Court considered the adoptions had not matured. The applicant made no suggestion that the adoptions had not matured and has not pointed to any evidence in support of such a proposition. There were also no objections recorded at the succession hearing. In my view, given that the respondents could receive Aitu's interests as adopted children not related by blood under Native custom and did in fact receive those interests, it is not clear that the orders were in fact in error.
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> [79] In addition, I note that the applicant's family appears to be some distance removed from Aitu and it is not clear how closely involved they would have been with Aitu's family and whether they would be the next of kin entitled to receive Aitu's interests if it was determined that the adopted children could not succeed. It is also relevant that their objections are being made now, well after Aitu's death and therefore would not affect whether the adoptions had matured prior to Aitu's death.
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> [80] Finally, I refer to the report of Justice Isaac, adopted by the Chief Justice in *Tuake v Toeta*, which set out the principles that are applied by the Chief Judge of the Maori Land Court of New Zealand in exercising a similar jurisdiction to that of s 390A. Included in those principles are two presumptions that are relevant in the

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[24] A copy of the Court's actual minute of the succession order made on 19 August 1970 was included as part of the report

> present case. Firstly, that in the absence of a patent defect in the order, there is a presumption that the order made was correct and, secondly, that 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. On those points, it is significant that the succession orders have remained unchallenged for 50 years.
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> **Conclusion and recommendation**
> [81] On the balance of probabilities, I find that, while it is not entirely clear whether the Court in 1970 considered or applied the relevant Native custom, the applicant has not provided sufficient evidence to conclude that the session orders were erroneous, such as to attract an amendment under s 390A of the Cook Islands Act 1915.
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> [82] I therefore recommend that the application be dismissed.

Submissions

[15] In accordance with now established practice, Coxhead J's report was circulated to the parties. They were given the opportunity to make submissions.

[16] Ms Houra's submissions summarised the issues she desired to address as[25]:

> [5] These reply submissions address the treatment of legal issues raised in Coxhead J's Report dated 25 June 2020, and in particular address the questions:
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> (a) whether there was sufficient basis for concluding that the adoptions had matured?
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> (b) whether presumptions formed in the Report and relied upon by the Court were appropriate to fill an evidential gap?
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> (c) the significance of the absence of any consideration of the Principles in *Emma Moetaua* in 1970 and Finality in litigation – general considerations.

and then proceeded to discuss each.

[17] As to whether there was a basis for concluding the adoptions had matured, Ms Houra submitted the passages in the report on that topic failed to provide a proper basis for the conclusion that the "applicant has failed to demonstrate that the succession orders were erroneous", in particular the conclusion that there was no evidence in 1970 to show

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25 At [5].

the Court took steps to inquire into relative Native custom or that *Emma Moetaua* was before the Court, or its principles applied, when the succession orders were made, going on to submit that[26] "it is further doubtful whether the principle of Maturity meets the intention of the provisions set out in the legislation", suggesting the view as to whether an adoption had matured was a new interpretation of Native custom and that Coxhead J[27] "departed from a full investigation of historic ancestral law and custom, follows a view that rests more on European views of human rights" and that[28] "an incorrect interpretation of the Native Custom is sacrilege". It is to be observed that aspects of those submissions appear to run counter to the law as enunciated in the authorities.

[18] Ms Houra then passed to the question whether the presumptions relied on by Coxhead, J were appropriate to fill what she described as a "big gap in his judgment"[29] and said she "would not have agreed that those principles should be applied in the present case or as to the application of any presumptions."

[19] She then turned to what she submitted was the absence of any consideration of the principles of *Emma Moetaua* in the 19 August 1970 decision having regard to the desirability of finality of litigation, suggesting the respondents' stance was an attempt to introduce new material as to maturity of an adoption under customary law.

[20] After drawing attention to what she submitted were a number of factual and legal errors[30] she concluded[31]:

> [18] There are a number of difficulties with the Report of Coxhead J, such that Williams CJ, with respect, erred by adopting that Report as being correct:
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> a) The learned Judge held at paragraph [78] that it is not clear that the succession orders were in fact in error, but at para [81] finds that the Applicant has not provided sufficient evidence to conclude that the succession orders were erroneous.
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> b) At para [75] Coxhead J disputes whether the court was aware in 1970 or directed its mind to the principles on maturity of adoptions, but the

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26 At [9].
27 At [11].
28 At [12].
29 At [13]. Both Ms Houra and Mr McKenzie described Coxhead, J's report as a judgment. Such reports are not judgments. They are reports to the Chief Justice, who issues the judgment in any s 390A application, dealing with such reports as considered appropriate and in accordance with the requirements of s 390A.
30 At [18].
31 At [19].

learned Judge nonetheless concluded in paragraph [81], as pointed out above, that the succession order were not erroneous so as to attract an amendment under s 390A of the Cook Islands Act.

c) The learned Judge holds at paragraph [72] that there is no evidence recorded to show that the Court took the necessary steps to inquire into the relevant native custom. In the context of this case that is a very serious omission, which it is submitted which the Court should not have attempted to redress in the Report.

d) At paragraph [80] the learned Judge considers that there are presumptions that operate in favour of the Applicant and the application of these presumptions in that way enabled him to hold at paragraph [81] that the Applicant had not provided sufficient evidence to conclude that the succession orders were erroneous. It should be noted that the implicit reason behind this finding is that the Applicant had not provided sufficient evidence to support the contention that the adoptions in this case had not matured. Surely that burden fell on the Respondent, who had raised this doctrine and not on the Applicant. The Report's conclusion accordingly is that the adopted children succeeded to the relevant estates, so that the orders could not be challenged as being erroneous.

[19] The absence of any consideration in 1970 of the maturity of adoptions principle or the case of *Emma Moetaua* in 1970 is significant for the determination of this case. It means that the Respondents are seeking to introduce a new issue which determines the case, and the new facts to support it, into their opposition to the Applicant's application. To allow that material to be now advanced is contrary to the principle of the finality of judgments. To fail to recognise this, it is submitted with respect, taints the learned Judge's Report.

[21] As mentioned, Ms Houra also relied on an opinion from Mr Peter McKenzie, QC[32]. It is unnecessary to detail Mr McKenzie's opinion to any great extent because Ms Houra repeated most of Mr McKenzie's views in her submissions but the following is relevant:

4. The respects in which the judgment is thin and contradictory in relation to these findings is set out in the following paragraphs:

Para [72]. The Court holds that there is no evidence recorded to show that the Court took the necessary steps to inquire into the relevant native custom.

Paras [74] and [75] Coxhead J disputes that the **Emma Moetaua** case was before the Court or that the Court was aware in 1970, or directed its mind then, to the principles enunciated in that case [maturing of an adoption]. In para [77] Coxhead J goes so far as to say that the Minutes from the succession of Aitu in 1970 are very brief, and on the face of the minutes there is nothing to indicate

[32] As far as is known, Mr McKenzie has not been admitted to practice in the Cook Islands, but his views are deserving of consideration nonetheless.

> whether the Judge directed his mind to the relevant principles and applied those in coming to his decision. It must follow that the same principles put forward in the Privy Council decision were not before the Court in 1970 either.
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> 5. Coxhead J tries to plug the big gap in his judgment by referring to what he called "general principles" relied on by both counsel. These are the presumptions he refers to paragraphs [69] and [70]. Is Coxhead J correct in asserting that both counsel agreed in this respect? It would be surprising if there was agreement on the way the presumptions should be applied in this case so as to override contrary factual findings. The learned judge has used the presumptions to create a presumption in favour of the one party whose case he has already found is not supported by the evidence! Presumptions are always displaced by evidence.
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> Unfortunately, and with great respect, Williams CJ did not in his judgment appreciate the very limited extent to which Coxhead J had found that there was evidence to support the respondents.

Discussion and decision

[22] As an introduction to a consideration of the issues in this case some general observations as to adoption in the Cook Islands and the wording of s 390A are pertinent.

[23] As Coxhead J's introduction said, adoption in Polynesia, generally and in the Cook Islands specifically, is a familiar feature of family life. Adoptions may be informal or, less frequently, formal. They may involve adoptive parents and children of the blood and not of the blood. Succession or inheritance by adopted children to the land interests of both their natural parents and their adoptive parents not infrequently gives rise to contention and litigation, often raising disputed factual issues, differing questions of law and contrasting views as to the applicable Native custom in the individual case.

[24] Those issues have, not infrequently, involved the Courts, particularly relying on the often-cited decisions in *Emma Moetaua* and *Browne v. Munukoa.*

[25] As a number of decisions have noted – and as is one of Mr Mitchell's grounds of application – ss 456-459 of the Act deal with the issue of adoption and succession, each requiring matters to be determined by Native custom.

[26] In this case, Ms Houra sought an adjournment on behalf of the Koutu Nui for it to consider the possibility of legislative intervention in light of the 16 July 2018 decision of

the Privy Council in *Browne v. Munokoa*, a decision delivered almost exactly a year before the hearing of Mr Mitchell's application.

[27] What custom was, and might be, has been, as noted in a number of decisions, discussed in, amongst other sources, the Koutu Nui report on Lands and Traditional Titles issued in April 1977 and the March 1997 Special Select Committee Report of the Commission of Inquiry into Land but, again as noted in a number of cases, no legislative initiative has resulted.

[28] Some of the decisions dealing with the issue include *Short v. Whitaker*[33], *Teariki v. Strickland*[34] as well as the *Emma Moetaua* decisions, but the customary law on the topic was summarized by the Privy Council in *Browne v. Munokoa*[35] and the relevant provisions, both of the *Emma Moetaua* decisions and *Browne v. Munokoa,* appear in Coxhead J's report. It is to be adopted and incorporated as part of this judgment so further recitation is unnecessary.

[29] Importantly as far as this case is concerned, and as the statutory provisions provide, custom, not being universal, requires to be proved[36]. As the Privy Council said in *Browne v. Munokoa*[37] in a general passage before it focused more directly on adoptions:

> "… 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 <u>is</u> the law of the land. Courts in principle take judicial notice of their own law. 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. Judges are not indigenous. For all these reasons, the court may find it difficult to take judicial notice of some points of customary law. But it is clear from the material before the Board that while custom may be and sometimes is proved by evidence, the judges of the Land Court and the Court of Appeal have acquired considerable experience of Native custom. That experience is partly personal; and it is partly vicarious, through the records of the Land Court itself, which contain a substantial body of information about land holdings and successions derived from both contested and uncontested applications. This has enabled the court to treat customs as notorious in circumstances where it would not have been appropriate to do so in England.

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33 *Short v. Whitaker*, CA 3/2003, 2 October 2003.
34 *Teariki v. Strickland*, CA 7/06, 13 November 2007.
35 At [28].
36 Lack of the requisite proof was a reason for the decisions in *Emma Moetaua* MB 28/159, AMB p2.
37 At [16] and [17].

> 17. There is a further consideration to which the Board attaches importance. Whereas in England custom is a body of special rules deemed by a legal fiction to be of immemorial antiquity, the customary land law of the Cook Islands is not immutable. In particular, custom regarding land tenure is bound to develop with changing norms of social life regarding the composition and social role of the family. These norms have plainly undergone considerable change in the islands since the first arrival of Christian missionaries in the Cook Islands in the 1820s and colonial administrators and judges in the 1890s. The role of the courts has been particularly significant. The New Zealand legislation of 1901 and 1915 conferred on the Land Court the right to create absolute freehold titles over land which had previously been conceived to be owned for collective purposes and subject to more limited rights of occupation. The persons in whose favour these titles were created were those found to be the owners under customary law. As Chief Judge Morgan observed in *In re Succession to Edward Goodman, Timoteo Marokaa and Ta* (1955) [Minute Book 22/385], this in practice has generally meant the persons found to be entitled by custom to occupy and use the land. 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. In practice, however, the position has been more complex. By statute, the owner of a parcel of land is whoever the Land Court declares it to be, subject to the possibility of judicial revocation. The rights which the declared owner possesses as owner are those provided for by statute. The decisions of the court on disputable points of customary law, especially when they follow a broadly consistent pattern, are bound to influence perceptions of what the custom is, and therefore what applications are contested and on what grounds. For these reasons, the Board considers that the starting point must be the decisions of the Land Court over the period of rather more than a century during which it has existed. They are fortified in this view by the consideration that some stability and consistency in the matter of land title and inheritance is indispensable, and this cannot be achieved if the decisions of the courts on the relevant law are treated as if they were mere one-off findings of fact, apt to be reopened every time that the same issue arises in another case."

[30] Turning to statute, while s 390A is not unique – the Chief Judge of the New Zealand Maori Land Court, a Court working with a similar system of land tenure, has similar powers under the Te Ture Whenua Maori/Maori Land Act 1993 – but it is, in the true sense of the word, an extraordinary jurisdiction: one "out of the usual or regular course or order … additional to, over and above what is usual"[38].

[31] That was the view of the Court of Appeal in *Teariki v. Sanderson*, reached after an analysis of, among other matters, the wording of s 390A:

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38 *Oxford English Dictionary*, 2nd Ed., Well V5, p614.

> "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 is designed to allow for reconsideration and reversal if found appropriate of any order of the Land Division"[39].

[32] Though the Court of Appeal's description of the s 390A jurisdiction as "inexpensive and expeditious" may no longer be accurate in an area where applications are usually preceded by lengthy investigation of, often inadequate, records and s 390A applications frequently take years to conclude – the jurisdiction is certainly "very distinctive".

[33] The terms of the section relevant to this application which demonstrate its breadth read:

> **390A Amendment of orders after title ascertained**
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> (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 Court or the Land Appellate Court 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 Court or the Land Appellate Court has decided any point of law erroneously, the Chief Judge 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 Court or the Land Appellate Court, or revoke any decision or intended decision of either of those Courts.
>
> (2) Any order made by the Chief Judge 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 Court but there shall be no appeal against the refusal to make any such order.
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> (3) The Chief Judge may refer any such application to the Land Court 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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> …
>
> (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

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39 *Teariki v. Sanderson*, at [45], p20.

> previously to the receipt of the application under this section the Chief Judge shall first obtain the consent of the High Commissioner before making any order hereunder. The Chief Judge shall nevertheless have full power without that consent to dismiss any such application or to refer it to the Land Court for inquiry and report.
>
> …
>
> (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.

[34] Despite the fact that s 390A was enacted by the Cook Islands Amendment Act 1950 (NZ), over the 70 years of its existence there has been little intensive analysis of its provisions and the procedure applicable to determination of applications under it, though, in *Teariki v. Sanderson,*[40] the Court of Appeal described the "established process adopted by successive Chief Justices in dealing with s 390A applications" as involving the following steps[41]:

> (a) The application is considered by the Chief Justice immediately on filing. Some of the matters which the Chief Justice requires the Applicant to address include:
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> 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.
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> ii. If there is any delay in filing the application, an explanation as to the delay.
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> iii. If there is an application to introduce new evidence, the Applicant must satisfy the Chief Justice why it was not tendered at the hearing that gave rise to the judgment.
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> iv. The Respondent is given an opportunity to respond to the application, and the Chief Justice considers any further evidence supplied.
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> 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 case the application is dismissed at the outset. To avoid possible intrusion on persons' property rights this is an unusual result at this stage.

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40 *Teariki v. Sanderson*, CA 1/11; 19 October 2011, at [31].

41 The cited passage is as appears in a detailed analysis of the problems the section posed in a Discussion Paper prepared for a November 2019 meeting with land practitioners and has been slightly amended from *Teariki v. Sanderson.* Not all of the Paper is relevant to this application.

> (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".
>
> (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.

[35] Section 390A gives little direction as to how applications under the section should be processed procedurally. Though not prescribed, the provisions of the Code of Civil Procedure are followed to the extent applicable, but it is mainly by dint of the presumptions and procedural safeguards engrafted onto the section by precedent that a form of code for processing applications under the section has emerged. The approach which should be – and is – applied to s 390A applications is cited repeatedly – almost invariably – in judgments such as *Teariki v. Sanderson* and since[42] and in submissions. It is sufficient for present purposes to regard the following as governing all applications under the section:

> 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 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.
> >
> > The approach to be taken to applications pursuant to s 390A is:
> >
> > (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;
> >
> > (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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42 *Tuake v. Toeta – Raupa Section 87E3B Arorangi* cited by Coxhead, J at [80] is only one example among many. This citation is from the latest iteration of the principles appearing in *Hosking v. Marearai (No.3)* s 390A 7/2016, 8 July 2020.

(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;

(iv) 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;

(v) The burden of proof is on the applicant to rebut the two presumptions above

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 power to amend orders should only be exercised in exceptional circumstances such as:

> These principles in my view 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 Judge deems necessary or expedient to remedy.

Also, the Cook Islands' jurisdiction 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 order complained of. This reinforces the need for certainty and the conclusive nature of orders, especially those affecting title.

…

To those principles needs to be added consideration as to what Parliament intended to achieve by enacting the referral and report provisions in s 390A(3).

The answer appears to be twofold.

The first purpose must have 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.

The second purpose, and 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.

[36] Turning to Coxhead J's report against that background, the passages earlier cited show that the Judge, after hearing the evidence, reached his conclusion that the respondents were not adopted children related by blood. In relation to whether they were nonetheless entitled to succeed as adopted children not related by blood, the Judge considered the relevant statutory provisions, the *Emma Moetaua* cases and *Browne v. Munokoa* to reach the view, earlier cited, that the respondents were entitled to succeed to Aitu as her adopted children, though not blood-related. Having correctly identified the legal principles relevant to the decision, the major case law and evaluating those against the evidence heard and the recognised procedure, there is no justifiable basis to depart from the Judge's conclusion.

[37] He then turned to the question of whether there was an error sufficient to engage s 390A in that the Court did not expressly apply Native custom in 1970, again discussed the evidence and the relevant case law – in particular the *Emma Moetaua* cases and *Browne v. Munukoa* – to reach his conclusion, also earlier cited.

[38] While Coxhead J concluded that the records did not clearly record whether the 1970 Court applied the relevant Native custom, he concluded that Mr Mitchell had not provided evidence to the contrary, thus invoking the presumptions in the established procedure set out in *Teariki v. Sanderson*, and many decisions delivered since. These were quoted previously.

[39] Although the recommendation is sound as a matter of fact, law and procedure, it is open to the inference that Coxhead J was more cautious than necessary in saying "there is much attraction in the argument that it is inconceivable that the Judge would not have been aware of the principles set out in the *Emma Moetaua* decision given it had been so recently released" mainly because no mention of the case is in the minute.

[40] A firmer conclusion may have been available. *Emma Moetaua* was a major decision by the highly-experienced Chief Judge of the day dealing with the vexed, and often litigated, issue of the law on adoptions in the Cook Islands; the decision had been delivered only about two years before the orders now under challenge and had been upheld on appeal thus binding the Court on 19 August 1970. Further, the application for the succession order of 19 August 1970 was unopposed, so a minute of the order was necessary but no reasoned judgment was called for. As the Privy Council observed, "the Judges of

the Land Court … have acquired considerable experience of Native custom" so, in those circumstances, the fact that the principles derivable from the *Emma Moetaua* decisions were not expressly set out would seem much more likely to be merely a matter of convenience or contemporary procedure, not that they were absent from the Judge's mind, entirely overlooked and not applied. In addition, at the time, the only records of hearings were in shorthand, later converted into the Minute Books, so it is not difficult to take the view that what now remains available records the result but not necessarily the route by which it was arrived at.

[41] So, on the first of the two grounds on which his application was based, Mr Mitchell was successful in showing the respondents were not related by blood, but unsuccessful on the evidence on the question as to whether they were entitled to succeed as non-blood related adopted children.

[42] In relation to the second pleaded ground that the Court in 1970 did not consider Native custom, not only does Coxhead J's report conclude, on the balance of probabilities, that the Court likely did apply Native custom as then formulated, though not expressed as such, but, more cogently, that Mr Mitchell failed to discharge the onus on him to adduce evidence of the applicable Native custom when, as the authorities make plain, there was an onus on him to adduce evidence of such custom –"obscure, locally variable and changeable over time" as the Privy Council held custom to be – on which Coxhead J could act.

[43] In that regard, Mr Mitchell's affidavits set out his belief as to Native custom, namely that adoptees not of the blood can never succeed to ancestral lands, a belief he formed "through a series of discussions with my Aronga Mana and the wider family and based on the knowledge that I had acquired from my parents"[43]. He adhered to that view despite being referred to precedent which contradicted it, saying "I disagree with the understanding that I've been taught and led to believe"[44]. That makes clear that his view of custom was mistaken, but he adhered to it and he, the sole witness, gave no additional evidence as to the applicable Native custom in 1970.

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43 Transcript, p9.
44 Transcript, p10.

[44] That notwithstanding, the Judge carefully traversed the evidence, including Mr Mitchell's acceptance that the adoptions were not shown not to have matured, and the submissions before him, including the full submissions filed on the applicant's behalf by Ms Henry. That founded his conclusion that there was no evidence adduced of the applicable Native custom and thus Mr Mitchell's second ground of his application was not made out.

[45] Ms Houra's submissions were to the effect that the applicant was not bound by the presumptions to which Coxhead J referred and suggested[45] there was an evidential onus on the respondents to put evidence of Native custom before the Court.

[46] The former contention gives no weight to the procedure and presumptions now accepted as prescribing the correct approach to the determination of s 390A applications. As to the latter, the authorities make plain that there is no onus such as that for which Ms Houra contended. The reverse is the case. How to prove issues applicants need to prove which are wholly or largely within the knowledge of an opposite party is a well-known difficulty in litigation, but, equally, well-known procedural means are available to overcome that hurdle.

[47] The short point is that, if Mr Mitchell wished, as his application said he did, to rely on appropriate Native custom to support his application, or to show that such custom was not complied with on 19 August 1970, it was for him to ensure evidence of the then applicable Native custom was before the Court conducting the inquiry, and, in circumstances where broad evidence of Native custom was absent and the only evidence of Native custom before Coxhead J was erroneous, it is no surprise that the Judge reached the conclusions he did and made the recommendation included in his report. He was left with no evidence of substance as to the applicable custom, or its non-application – on which he might have found for the applicant.

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45 [18](d) of her submissions, at [21] *supra.*

Conclusion

[48] In all of those circumstances, Coxhead J's recommendations are accepted, his report is adopted and is to form part of this judgment. The application is dismissed.

[49] If costs are sought, memoranda may be filed with that from the respondents being due in – having regard to the present pandemic – 30 working days from delivery of this judgment and with those from the applicant being due within a further 10 working days.

Hugh Williams, CJ