IN THE COURT OF APPEAL OF SAMOA

Vavae Fuimaono & Anor v Public Trustee & Ors [2018] 17

Case name:	Vavae Fuimaono & Ors v Public Trustee & Ors
Citation:	[2018] WSCA 17
Decision date:	27 August 2018
Parties:	**VAVAE FUIMAONO & LUCIA ELISAPETA,** Executrices and Trustees of the estate of **GAFATASI MIKA FUIMAONO** (Appellants) v **PUBLIC TRUSTEE** as administrator of the estate of **TEARIKI APAI** (First Respondent); **PUBLIC TRUSTEE** as administrator of the estate of **PATU AFAESE HUNTER** (Second Respondent); **THE HEIRS OF LILLI AND TIRESA**, sisters of **TEARIKI** (Second Respondents)
Hearing date(s):	10 April 2018. Further submissions 10, 24 & 30 May 2018
File number(s):	CA05/17
Jurisdiction:	CIVIL
Place of delivery:	Court of Appeal of Samoa, Mulinuu
Judge(s):	Honourable Justice Fisher Honourable Justice Panckhurst Honourable Justice Hansen
On appeal from:	Supreme Court of Samoa, Mulinuu
Order:	**In accordance with the three judgments in this Court, the appeal is dismissed with costs in the sum of $1,250 to the first respondent, $1,250 to the second respondent and $7,500 to the third respondents.**
Representation:	JAD Needham SC and SJ Chapple for the Appellants S Leung-Wai for the First and Second Respondents M H Betham for the Third Respondents
Catchwords:	*dispute concerning land – descendancy – circumstantial evidence case*
Words and phrases:	*appeal dismissed with costs awarded to respondents*
Legislation cited:	*Evidence Act 2015* ss. 9(1); 12(1)

Cases cited:	Berkley Peerage Case (1811) 4 Camp 401, 416. Re Simpson [1984] 1 NZLR 738 (CA); International Finance Trust Co Ltd v New South Wales Crimes Commission (2009) 240 CLR 319 at 382; Kerslake v Attorney General, Supreme Court of Samoa, Sapolu CJ, 23 December 2014; Rae v International Insurance Brokers (Nelson & Marlborough) Ltd [1998] 3 NZLR 190 (CA); Rangatira Ltd v Commissioner of Inland Revenue [1997] 1 NZLR 129 (Privy Council); The Scale of Justice: Probability and Proof in Legal Fact-finding" by Hodgson J (1995) ALJ 741 – 750;
Summary of decision:	

CA05/17

IN THE COURT OF APPEAL OF SAMOA
HELD AT MULINUU

BETWEEN: VAVAE FUIMAONO Widow and **LUCIA ELISAPETA FUIMAONO** both of New South Wales, Australia and lately of Ululoloa, Executrices and Trustees of the estate of **GAFATASI MIKA FUIMAONO**, Deceased
Appellants

AND: THE PUBLIC TRUSTEE as the Administrator of the Estate of **TEARIKI (also known as TEALIKI) APAI (deceased)**
First Respondent

AND: THE PUBLIC TRUSTEE as the Administrator of the Estate of **PATU AFAESE HUNTER** (deceased)
Second Respondent

AND: THE HEIRS OF LILLI AND TIRESA being the sisters of **TEARIKI**
Second Respondent

Coram: Fisher, Panckhurst and Hansen JJ

Counsel: JAD Needham SC and SJ Chapple for the Appellants
S Leung Wai for the First and Second Respondents
M H Betham for the Third Respondents

Hearing: 10 April 2018
Further submissions: 10, 24 and 30 May 2018
Judgment: 27 August 2018

JUDGMENT OF FISHER JA

1. I have had the advantage of reading the principal judgment of Panckhurst JA in draft. I gratefully adopt his necessarily lengthy account of the facts. I agree with his conclusion and add only three comments.

2. The first is that that in matters of Samoan history and culture, visiting appellate judges will continue to rely heavily on the expertise of local Samoan judges. We would require compelling reasons before departing from their views.

3. The second concerns judicial notice. A judge may not take judicial notice of contestable matters or sources unless the parties are first given the opportunity to comment on them.

4. The third concerns the proper approach to assessing probabilities. This aspect has caused us considerable difficulty in the present case.

5. The dispute concerns land in Apia originally owned by Teariki Apai ("Apai"). The sole issue is whether the appellants were Apai's descendants. The onus is on the appellants to show that they were.

6. Apai died in 1942. Unsurprisingly, the appellants were unable to produce any direct evidence that they were his descendants. They had to argue that the surrounding circumstances made it more probable than not that they were. In the language of lawyers, they had to rely on circumstantial evidence.

7. The old analogy for circumstantial evidence involves the strands of a rope. Each strand considered individually might be insufficient to support the weight of the ultimate fact on which a plaintiff relies. But acting together, the strands can sometimes be enough to make the ultimate fact more probable than not (the standard required in a civil case).

8. A circumstantial evidence case requires two steps. The first is to consider each strand individually. Each item of evidence is considered to see whether it is relevant, that is to say makes the plaintiff's case more likely or less likely. If an item is relevant, it is also necessary to assess the weight that should be attached to it. The weight to be attached to a single item of evidence can be described as its "probative value". Probative value is the extent to which an individual item of evidence increases or decreases the probability that the ultimate factual proposition is true.

9. Once each item of evidence has been individually assessed in that way, the Court must move to the second step. The second step is to consider what happens when all the strands of the rope are pulling together. Only one assessment is permissible at this stage. The question is whether, considered in its totality, the evidence makes the plaintiff's ultimate factual proposition more probable than not. The onus of proof applies to that question alone.

10. In the present case there was only one ultimate question: considering all the evidence in its totality, is it more probable than not that the appellants were descendants of Apai (the "appellant descendancy from Apai" issue).

11. In the Supreme Court, the task of deciding the appellant descendancy from Apai issue was made unnecessarily difficult by attempting to divide it into two. One

subsidiary issue was thought to be whether the appellants had shown that they were descendants of a man conveniently referred to as "Keliki" (the "tracing to Keliki" issue). The other was thought to be whether the man known as "Keliki" was also the man referred to here as "Apai" (the "two Teariki" issue). The trial Judge said "yes" to the first question and "no" to the second.

12. The problem with that approach was that it isolated the ultimate issue ("appellant descendancy from Apai") from some of the uncertainties that had to be overcome en route to the "tracing to Keliki" conclusion. By dividing the case in that way, the trial judge fell into the trap of allocating 100 per cent certainty to the "tracing to Keliki" part of the assessment by the time he came to consider the "two Teariki" part.

13. The reason this is important in the present case is that in isolation it is not easy to accept the trial judge's conclusion on the "two Teariki" issue. It would require acceptance of the remarkable coincidence that two different men from Rarotonga named "Teariki", of broadly similar age, travelled to Samoa at broadly the same time, had a wife or female partner there, abandoned that woman and any children involved, and left Samoa again for good at the end of the nineteenth century.

14. But that was never the issue. The only issue was appellant descendancy from Apai. Each item of evidence had to be considered individually in order to decide whether it made that proposition more probable, *or less probable*. Once each item had been individually assessed in that way, it was necessary to stand back and consider their overall effect.

15. There would be no point in my repeating the many items of evidence traversed in Panckhurst J's judgment. It is enough to say that they are not confined to the items traversed in relation to the "two Teariki" issue. They include the provenance of the family books and church records, the reliability of the family oral history, and the failure of the appellants and their forebearers to take action over a period of many decades. Each item of evidence had its own limitations. Some went further and were inconsistent with the appellants' case.

16. The only way one can assess all of that evidence in the round is to exercise a robust value judgment. There is much to be said for each side. But the onus of proof lay on the appellants. On balance I am not persuaded that the appellants were descended from Teariki Apai.

17. In accordance with the three judgments in this Court, the appeal is dismissed with costs in the sum of $1,250 to the first respondent, $1,250 to the second respondent and $7,500 to the third respondents.

JUDGMENT OF PANCKHURST JA

Introduction:

18. This case concerns an inheritance dispute over land in Apia previously owned by Teariki Apai (hereafter Teariki). Teariki was the firstborn son of a Raratongan man and his Samoan wife. His father spent a good part of his life in Samoa living in Apia where Teariki and his siblings were raised. In about 1894 Teariki, aged about 40 years, left Samoa to live in Rarotonga. A little over a year later his father

died in Samoa. Under his will the Apia land passed to Teariki. In Teariki's absence the Third Respondents, who are descendants of two of his sisters, Lilli and Tiresa, occupied and have enjoyed the use of the land ever since.

19. But, in 2009 this proceeding was commenced by the appellants (hereafter claimants) on behalf of descendants of the Fuimaono family of Falefa. Their claim of entitlement to the land is based on the contention that Teariki married Faaluaumeke Fuimaono (Faaluaumeke) and that the couple had a son born at about the time Teariki went to Rarotonga in 1894. If the contention is established the son's descendants should have taken the Apia land when Teariki died in 1942. The case was heard in the Supreme Court in November 2016. The trial judge, Nelson J, held that it was not proved to the required standard that Teariki, the land owner, was the father of Faaluaumeke's son. In addition, Nelson J upheld defence of laches (unreasonable delay) and acquiescence given the time lapse and happenings over the 60 years from Teariki's death to the initiation of the claim.

20. This appeal is against Nelson J's judgment but is confined to the genealogy question for reasons I will explain shortly. The sole and decisive fact in issue at trial was whether Teariki was the father of Valeriano Lafoia (Lafoia), the only child of Faaluaumeke. Teariki died intestate and it is common ground that descendants of a natural child have a superior right to succession to his land. But Nelson J's decision means of course that the descendants of Lilli and Tiresa remain entitled to the land.

The Apai Family:

21. Teariki's father was also named Teariki Apai, so I shall refer to him as Apai to avoid confusion. He was born in Rarotonga to a family of high standing, successive generations of which have held the significant Apai Raropua Mataiapo Tutara title. Apai's life details are incomplete, which is perhaps unsurprising given the times in which he lived.

22. According to a great-great-great nephew,[1] Apai went to Samoa where he married Siene Tamapua (Siene) on 27 June 1861. The composition of their family is somewhat uncertain. In his will dated 17 May 1892 Apai left his land in Apia to Teariki if he survived Apai, failing which to his son, David or his third son, Paaga. Only if none of Apai's sons, or their children, survived him were his two daughters to benefit.

23. Apai died some time before 19 January 1898. On that day the Chief Justice of Samoa made a land declaration in favour of Teariki "son of Apai late of Vaiala in Apia, Samoa, deceased". In contrast to his father's will, however, Teariki when interviewed by the Resident Commissioner of Rarotonga in June 1925[2] said that he came from a family of five, two boys and three girls. He said that he knew nothing of a brother named Paaga and added that only his sisters, Lilli and Tiresa, had issue.

[1] Witness: Teke'u Framhein JP (Framhein)

[2] The Resident Commissioner interviewed Teariki in order to respond to a letter from the Public Trustee in Samoa asking whether Teariki was still alive and whether he had children.

24. Some details of Teariki's life history are likewise in doubt. Framhein,[3] the great-great-great nephew of Apai, provided affidavit and in-court evidence about Teariki. Framhein's mother (Pepe) was the daughter of Lole also known as Rore (Lole) a "feeding child" who Teariki cared for in Rarotonga after he left Samoa in about 1894. In Polynesian society, adoption of infants among kin is commonplace, and in the Cook Islands the term "feeding child" describes an informal adoption of this kind. Lole was the daughter of Tiresa, Teariki's sister and according to Framhein became Teariki's feeding child because "he has no children of his own". Framhein understood that Lole travelled to Rarotonga with Teariki. However, in 1925 Teariki gave a different account to the Resident Commissioner of Rarotonga, who reported this in a letter to the Public Trustee in Apia.

> "Teleka (also known as Tiresa) came to Rarotonga and brought Rore, returning home to Samoa leaving Rore, whom Teariki states he adopted from infancy according to Native Custom, but the adoption is not registered in accordance with Cook Islands Law."

Similarly, Framhein's mother Pepe became Teariki's feeding child after Lole gave birth to her in Rarotonga in 1908. This meant that Framhein had a close childhood relationship with Teariki, his great-great uncle.

25. He provided evidence of Teariki's relationships with his two feeding children, as well as some details of a more personal nature. Teariki died in Rarotonga in 1942. His death certificate records his age as "about 84 years". The claimants adduced affidavit evidence from a New Zealand solicitor who located a baptism entry in the records of the London Missionary Society at Avarua, Rarotonga, for "Teariki Tetohorangi, son of Apai", dated 29 March 1852. Unfortunately, the document was not show to Framhein in the Supreme Court. It suggests Teariki died aged 90 years but this is at odds with Framhein's evidence. He said Apai left Rarotonga for Samoa in about 1848 and married Siene on 27 June 1861 in Samoa where their family was born. This evidence was not challenged in cross-examination. Nelson J placed no reliance on the baptism entry. I too doubt its relevance.

26. I shall turn to some further pertinent details of Teariki's life in due course, but the outline above was the essential background available in considering the key question: did the evidence establish that Teariki was the father of Faaluaumeke's son Lafoia. Before I assess that evidence, I shall refer briefly to the administration of Teariki's estate.

Administration of Teariki's Estate:

27. Following Teariki's death in Rarotonga in August 1942 there was a lull of sixteen years before the Public Trustee of Samoa exercised an election to administer and was appointed the administrator of the estate on 8 September 1958. During that time descendants of Lilli and Tiresa (both of whom died before Teariki) continued to occupy the Apia land as they had from when Apai died. There was sporadic correspondence to and from the Public Trustee concerning Teariki and his land in the 1920s and thereafter, including an exchange with the Resident Commissioner of Rarotonga asking if Teariki was still alive and whether he had children who had survived him.

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[3] Now aged 85 years

28. The Apia land comprised three areas covering a total area in excess of 12 acres. These areas are known as:

Lelepa (in Vaiala)

Lefoka (Apia Park)

Tuvao (Matautu-uta)

All three areas are located to the east of Apia Harbour and are in reasonable proximity to one another. Ms Needham clarified before us that the claimants seek title to only that land still held by the Public Trustee as administrator of Teariki's estate. The undistributed land comprises 3/5th of Lelepa, an area less than one acre, and approximately 6 acres of Tuvao. Lelepa is adjacent to Vaiala beach, while Tuvao is more to the south and hence closer to central Apia.

29. An impression of the course of the administration is evident from the following milestones:

August 1958 – statutory declarations of family history were provided to the Public Trustee showing that three of Lilli's five children, and two of Tiresa's three children, survived Teariki

8 September 1958 – Public Trustee appointed administrator of the estate.

1959 – Consistent with the family history declarations the Public Trustee concluded that the estate was divisible into one-fifth shares, and family negotiations resulted in some land distributions to various descendants over the following years:

12 December 1973 – order made by the Land Titles Investigation Commission that Tuvao was freehold land and title lay with the Public Trustee as administrator of the estate.[4]

1974 – It was established that Otaota, a niece of Teariki, had in fact survived him and that accordingly the estate was devisable into the one sixth shares.

28 September 1975 – a meeting of beneficiaries and Public Trust personal occurred in an endeavour to reach agreement on land distribution.

April 1996 – a solicitor protested that the previous beneficiaries meeting was invalid because not all beneficiaries were present

1 October 1996 – a further beneficiaries meeting was held

17 October 1996 – caveats were lodged on behalf of a beneficiary (David Hunter) to prevent further land distribution.

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[4] Previously, the estate land comprised only Lelepo and Lefoka, both of which had freehold status

16 January 2003 – Patu Afaese Hunter, a beneficiary, died. Land held by Patu's estate was subsequently transferred to the Public Trustee as administrator of the estate.[5]

29 August 2005 – Gafatasi Mika Fuimaono attended the Public Trustee's Apia office and asserted that his grandfather Lafoia, was the legitimate heir.

Late 2007 – Caveats were registered on behalf of the claimants in relation to most of the Apia land.

20 August 2009 – The Supreme Court made an order that the caveats may remain on condition that the claimants filed proceedings by 25 September.

25 September 2009 – Claim filed in the Supreme Court

10 June 2015 – Heirs of Lilli and Tiresa joined as third parties in the proceeding.

30. Further delay ensued before the case was eventually heard in late 2016. Discovery, unsuccessful settlement initiatives and an application to disqualify counsel contributed to the delay. As is self-evident the administration of the estate was likewise beset with delay throughout its history. The best that can be said is that the Public Trustee faced a difficult task when appointed administrator of the estate in 1958. Teariki had been an absentee landowner resident in Rarotonga for about 44 years until his death. He died intestate. Then a further 16 years elapsed before the Public Trustee's appointment.

31. In October 2009, the Public Trustee sought directions from the Supreme Court concerning future distributions from the estates of Teariki and Patu Hunter. This proceeding, however, took priority and the directions application has lain fallow. In response to the claim the Public Trustee invoked a statutory defence available to his office, namely that administrative actions over the years were based on the information available at the time and taken in good faith. The claimants did not take issue with this contention. At trial, the Public Trustee's counsel, Mr Leung Wai, provided evidence of historical information gathered over time but otherwise took a neutral stance and left the defence of the claim to Mrs Betham.

The Evidence for the Heirs of Lilli and Tiresa

32. I shall refer to the Third Respondent's case first. Chronologically, their evidence pre-dates that for the Appellants, and it was largely non-contentious and unchallenged. The evidence of seven witnesses was received by way of affidavit, while two further witnesses swore affidavits and also gave evidence at trial.

33. The unchallenged affidavit evidence was provided by two deponents who descended from Lilli and five from Tiresa's side. This evidence followed a pattern and generally covered these matters:

[5] The Public Trustee is named as the Second Respondent, as the administrator of this estate.

(a) Which sister the deponent descended from, an explanation of the descendant line and whether they were a great, or great-great granddaughter or grandson of the relevant sister.

(b) The Apia land occupied by their family and the time they had been resident there, being either their lifetime or a lesser time as a result of moving elsewhere with a partner.

(c) That they were aware of and in contact with the Rarotongan side of their family, being the descendants of Lole, the feeding child who went to Avarua to be with Teariki.

(d) The uses to which the various areas of land in Apia had been put including for domestic housing, business premises and recreation; while some land had been on-sold.

(e) That various descendants were buried on the land, including multiple generational burials at a common site in some instances.

(f) That they had no knowledge of the claimant family or their claim to the land until 2005 and were very surprised by this development.

(g) That they resented and were distressed by an untrue allegation that they were not descendants of Apai, rather of "Patu Neginegi" a business associate or partner of Apai; and that this name was unknown to them until raised in the context of the present proceeding.[6]

34. Gafatasi Patu provided an affidavit and viva voce evidence as well. He is a lawyer and a younger member of the Hunter family that descended from Tiresa. His evidence concerned inquiries he made of a minister of the Congregational Christian Church in Falefa when a death certificate for Lafoia was exhibited to an affidavit with reference to the caveats registered by the claimants in 2007. I shall refer to this evidence later when the death certificate is discussed.

35. The final witness, Framhein, was introduced earlier (at 22 – 24). He was the only witness who actually met Teariki before his death in 1942. He was described by Nelson J as a "very convincing kaumatua" and accepted by the claimants as a "witness of truth". Framhein was only 9 ½ years old when Teariki died, but they enjoyed regular contact because they lived only a "few yards" from one another and Pepe (Framhein's mother) cared for Teariki. Framhein was fascinated when Teariki spoke to "Mama Lole", (Framhein's grandmother and Teariki's former feeding child) in Samoan. He said that Teariki came to Rarotonga in about 1894 to succeed to the Apai Raropua Mataiapo Tutana tribal title which had fallen vacant because Apai, the next in line, was resident in Samoa. The title was described by Framhein as of "high social status" he being the incumbent for 40 years when he gave evidence.

36. After Teariki's death Framhein found a handwritten statement written by Teariki and retained by his mother, Pepe. Framhein translated it:

[6] This allegation was not pursued at the Supreme Court Hearing.

> "Apai is of his father a Matuatane. My mother is Sieni Matanoanoa? Sieni, Apai's wife, gave birth to me. He himself gave me my name. He asked me to plant his land. The land was full of coconuts, bananas, breadfruit and he was good at planting breadfruit, oranges or Maori oranges. My father's land was full of food that I have planted. Apai's daughter Tiresa. Tiresa gave birth and it was a girl and that's the feeding daughter of Teariki, her name is Rore…."

Framhein was questioned concerning the spelling of Teariki since in Samoa the name is often spelt Tealiki and shortened to Liki. He said this did not happen in Rarotonga because there was no letter "l" in the alphabet. He added that the name means the chief, but it is not a title or rank, just a "common name" in Rarotonga.

The Claimant's Case:

37. In considering this aspect it is necessary to distinguish the "two" Teariki's; the brother of Lilli and Tiresa on the one hand, and Lafoia's father on the other – albeit the claimants say they are one and the same. I shall use Teariki, the Rarotongan spelling, for the brother of Lilli and Tiresa and the Samoan spelling, Tealiki, when referring to Lafoia's father.

38. Ms Needham's written submissions provided a very neat summary of the claimant's case as follows:

> "The plaintiff's case that Teariki is one and the same as Tealiki was twofold. Firstly, Sose Fuimaono gave evidence that her mother-in-law. Etevise told her that Tealiki's father was a man named Apai. She also gave evidence of a visit from some Rarotongan men looking for their Samoan family, who were members of Tealiki's family in Rarotonga. These are direct links between Teariki and Tealiki. Secondly, Teariki and Tealiki had remarkably similar and consistent life trajectories, such that the only reasonable interference is that they were one and the same person. In particular:
>
> (a) Teariki was born in Rarotonga in 1852 and lived for a time in Samoa. Similarly, Tealiki was from Rarotonga, but lived for a period in Samoa.
>
> (b) Teariki returned to Rarotonga in 1894. This is consistent with the lack of evidence of Tealiki remaining in Samoa after that date.
>
> (c) Teariki stated in 1931 that he had a wife, but that she died "many years ago". A handwritten note suggests that his wife died 40 years ago, placing her "death" while he was still living in Samoa and prior to his return to Rarotonga. This is consistent with Tealiki marrying Faaluaumeke while still in Samoa and abandoning hr in order to return to Rarotonga.
>
> (d) Teariki and Tealiki never returned to Samoa.
>
> (e) It follows that it would be an extraordinary coincidence (if) there were *two* such Rarotongan men named Teariki, who each moved to live in Samoa, who each married a Samoan woman, and who each left Samoa for good around the turn of the century. It is more than a reasonable conclusion, on all the evidence, that the father of Lafoia is the brother

> of Lilli and Tiresa. This is also consistent with the evidence of Sose Fuimaono. To the extent the descendants of Lilli and Tiresa profess a lack of knowledge of Faaluaumeke and her descendants, this is explicable, firstly, by the residence of Tealiki in Falefa for a time, and, secondly, by the departure of Tealiki before, or around the time of, the birth of his child." [7]

39. With regard to the trial judge's decision rejecting the claim, counsel's argument continued:

> "Contrary to the submissions of the plaintiffs at trial, the judge concluded that Teariki was a different man from Tealiki basing his conclusion on the following:
>
> (a) The presence of Rarotongan men living in Samoa in the late 1800s
>
> (b) That "Teariki" was a common name in Rarotonga
>
> (c) Teariki had a traditional Samoan 'pe'a' tattoo and there was no indication in the evidence that Tealiki possessed such a tattoo.
>
> (d) Teariki carved canoes and sold them at the market, and that there was no indication in the evidence that Tealiki possessed such a skill.
>
> (e) The improbability that Tealiki would leave a pregnant wife (or a wife and a young child) and return to Rarotonga, taking Lole as his feeding child
>
> (f) The fact that once Faaluaumeke gave birth, no attempt was made by her, or family members, to seek out the whereabouts of the father or his family.
>
> (g) The improbability that the descendants of Tealiki could live in close proximity to the descendants of Teariki, but be unaware of each other."

While I do not necessarily subscribe to the manner in which some of these circumstantial factors have been characterised, the list does capture the key reasons relied upon by Nelson J.

40. The grounds of appeal, as reordered and particularised in the claimant's submissions, were:

> (a) the trial judge erred in law in taking judicial notice of particular historical facts to ground a conclusion that (a number of) Rarotongan men lived in Samoa in the late 1880s

[7] The submission used a different expedient to distinguish the "two" Tearikis, but we have substituted the spelling distinction.

(b) the trial judge erred by placing any weight on the fact that Teariki had a traditional Samoan 'pe'a' tattoo, or carved canoes and sold them at the market.

(c) the trial judge erred in failing to consider the evidence of Sose Fuimaono that Tealiki's father was a man named Apai

(d) the trial judge erred in failing to give any weight to the evidence that Tealiki left Samoa at around the turn of the century

(e) the trial judge erred in failing to give any weight to the fact that there was no evidence that a man named Teariki married anyone other than Faaluaumeke; and

(f) the trial judge erred in failing to give any weight to the fact that Teariki did not return to Samoa and did not communicate in any material way with relatives there."

This outline of the claimants' case does not refer to the evidence advanced at trial but this will be remedied as I evaluate the grounds of appeal.

Three Matters Raised by the Court:

41. At a call over on day one of the session we raised three issues with counsel so they could consider them before the appeal hearing proceeded on day two.

42. The first concerned the equitable defences of laches and acquiescence, both of which were upheld by Nelson J. We sought submissions upon the causes of action relied upon by the claimants in particular whether they were equitable in nature. At the outset of the hearing, Ms Needham submitted that the claim was statutory in nature; reflective of the statutory duty upon the Public Trustee to distribute the assets of an estate to the legitimate heirs regardless of delay. Counsel also stressed that the claim was confined to the undistributed land still held by the Public Trustee. Hence, counsel argued, the two defences should not have been upheld. There was no demur from other counsel and the equitable defences fell away.

43. Secondly, with the consent of counsel we were provided with maps of Upolu Island and central Apia. We requested these to provide an understanding of the location of the undistributed land and its proximity to residential areas of Apia referred to by their customary names in the judgment under appeal. The Upolu map depicted the locations of relevant villages. The maps were received as an aid to a visiting bench so that we could comprehend matters that were second nature to a local judge.

44. Finally, we asked counsel whether consideration had been given to ancestry DNA testing of members of the respective families. We anticipated DNA profiling evidence may be admitted on appeal. However, on day two we were told that the parties did not wish to pursue this option. We consider it regrettable that DNA profiling was not undertaken. The time lapse of more than 60 years from Teariki's death to the initiation of this proceeding compromised the availability of witnesses and evidence. Profiling may well have provided decisive evidence. We are left to do the best we can with the evidence adduced at trial.

Appellant Review of Factual Findings:

45. The claimants seek a reversal of Nelson J's decision on what he termed the "fundamental issue" in this case, whether Teariki the Apia landowner was also the father of Lafoia. This is obviously a question of fact. An appellant Court may reverse a trial judge's factual finding, but only if it is shown to be clearly wrong. Where the factual decision could have gone either way at first instance, it cannot be disturbed if it was one which the trial judge was entitled to reach. For by definition if a decision was available, or one the judge was entitled to reach, it cannot be shown to be wrong. These principles are observed by appellant courts in many jurisdictions.[8]

46. The reasons for their observance are manifest. An appellant court performs a review function. A review of evidence recorded on paper is second best, by comparison to the position of a trial judge who absorbs the evidence live as it is given. Particularly, in determining the weight to be given to various parts of the evidence the trial judge has a distinct advantage. Recognition of these factors demands that appellate courts not interfere with findings of fact unless it is truly justified.

47. In this instance, there are further factors to be born in mind. Most of the evidence was given in Samoan and translated for visiting counsel. As will become apparent, Nelson J's decision in relation to the fundamental issue featured considerations peculiar to Samoa; including the significance of hereditary titles, the importance of family and genealogy and just how the Samoan way of life is and has been in the past. We, as periodic visitors to this jurisdiction have a sense of these matters, whereas Nelson J understands the Samoan language and Samoan society, tradition and custom through the experience of a lifetime. Our appellant review of the case must recognise this significant advantage as well.

48. Inevitably, given that Teariki and Lafoia died in the 1940s, much of the evidence was hearsay. Oral statements made by ancestors and the writings of persons no longer alive were relied upon. Such evidence is admissible where the maker of a statement is unavailable as a witness and provided the surrounding circumstances provide reasonable assurance that the evidence is reliable.[9] Circumstances include the nature and content of the statement; when, why and how it was made or recorded; and anything relevant to the veracity or accuracy of the statement maker.[10]

49. There was no challenge to affidavit or oral evidence on the basis the reasonable assurance of reliability test was not met. Both sides were reliant upon hearsay, and the focus of the hearing was upon the weight to be accorded circumstantial factors and what inferences could be drawn from them. Our review of the evidence must also take the hearsay dimension into account.

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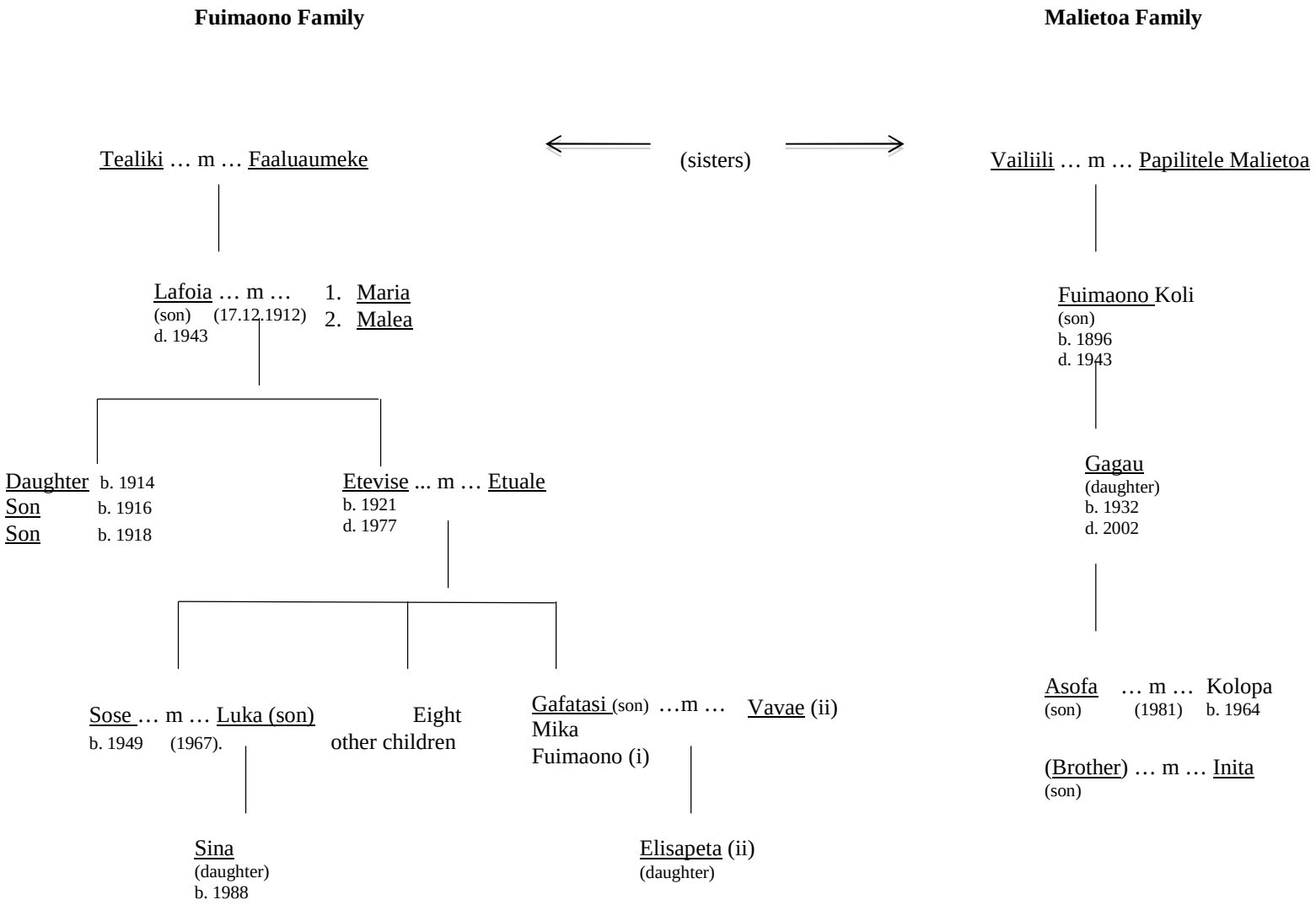
[8] *Rangatira Ltd v Commissioner of Inland* Revenue [1997] 1 NZLR 129 (Privy Council), *Rae v International Insurance Brokers (Nelson & Marlborough) Ltd* [1998] 3 NZLR 190 (CA), *Kerslake v Attorney General*, Supreme Court of Samoa, Sapola CJ, 23 December 2014.

[9] Evidence Act 2015, Section 12 (1)

[10] Section 9 (1) of the Act

Introduction: The Evidence for the Claimants

50. The claimants provided evidence from nine witnesses, most of whom swore affidavits. A number of these deponents also gave oral evidence. The abridged family tree below depicts the relevant generations of the Fuimaono and Malietoa families but is restricted to the immediate ancestors of and the witnesses who provided evidence (otherwise the depiction would have become unmanageable). The Malietoa family is included because Vailiili was the sister of Faaluaumeke (Tealiki's wife/partner) and the descendants of Vailiili kept family books produced as exhibits in support of the claim.



(i) Gafatasi Miki Fuimaono was the original plaintiff. He died on 24 October 2011.

(ii) On 8 July 2013 his wife Vavae and daughter Elisapeta were substituted as plaintiffs in their capacity as executrices and trustees of the estate.

51. In addition to the family books, documentary evidence from two churches and hearsay oral statements of pedigree were provided in evidence. The family books were introduced by Kolopa. She married Asofa, a son of Gagau. Gagau was a cousin of Etevise, Lafoia's youngest child, but the two women were very close, more like sisters. Gagau kept the Malietoa family books, but for the nine years before her death in 2002 she was assisted by her daughter-in-law Kolopa. The family originally lived in Falefa but moved to Leone in Apia after Asofa and Kolopa were married in 1981.

52. Family Books: There were two family books, referred to as books "A" and "B". Book "A" was predominantly written by Gagau, being a re-write of earlier family books dating book to 1900. These were damaged in the floods of Easter 1989 and Gagau, assisted by Kolopa, reconstructed book "A" from the damaged records. It contained a list of Fuimaono title-holders including a notation that the fourteenth title-holder was "Fuimaono Lafoia of Falefa (Rarotongan)".

53. Book "B" was also a collaborative effort created by Gagau, Kolopa and her sister in law, Iutita, who married another of Gagau's sons. Kolopa said that this book was created as a "gift" for Fuimaono Luka, the oldest son of Etevise and the current holder of the family Fuimaono title. Nelson J did not accept this because his comparison of the two books showed that "book (B) has all the hallmarks of a general family record similar to book A". However, he accepted that book B was gifted to Luka since it contained a notation to him translated as follows:

> A gift for you for the sake of the future and the family. With love from your mother Gagau Fuimaono Koli Apia, Leone, 23 March 1998

The book contained entries that confirmed the closeness of the relationship between Gagau and Luka, including an entry that translated said after Lafoia's first wife "Maria passed away… Luka… was taken care of by Vailiili" until Malea assumed that role.

54. In an entry that set out the genealogy of the sisters Faaluaumeke and Vailiili there appeared this:

> "A man from Rarotonga named Keliki got together with Faaluaumeke and their son was Lafoia who held the Title Fuimaono at Falefa. Fuimaono Lafoia married Maria the daughter of Fonoti Puaa from Lotofaga and Vaimoso their issues were Paula, Leo, Posiao and Etevise."

55. Nelson J noted that book "B" contained a notation in Gagau's hand that the contents were "taken from the books of 1900, 1901, 1902 up to 1993." But there was no evidence provided concerning the fate of these original records, save for Kolopa's indication in cross-examination that they had been destroyed.

56. The trial judge held "grave concerns about the authenticity and reliability of these family books". He explained the reasons for his concern in detail:

(a) "The reference to Keliki a Rarotongan and his marriage to Faaluaumeke was otherwise devoid of detail; including that he was from Apia, how he came to be in Falefa, that his mother was the daughter of a high-ranking chief of Moatao in Apia and why, when and how he left his wife and son in Falefa. This was at odds with "the lineages and descriptions of other males married into the family ('usuga') as recorded in the family books.

(b) The books were not records kept by the line of Faaluaumeke, rather by the descendants of the branch of her sister Vailiili. Nor did it appear that anyone from the Faaluaumeke branch had knowledge of the matters of relevance in the books. Luka was called as a witness but impressed as having little familiarity or regard for the books or their contents.

(c) The fact that reconstruction and maintenance of the family records was left to Gagau's daughters in law, Kolopa and Iutita, was disturbing because Samoan custom and tradition suggested that maintaining important family information was not ordinarily entrusted to outsiders.

(d) Books A and B were not original records, rather reconstructions by Gagau and others relating to matters of present relevance that occurred before they were born.

(e) There was a "clear contradiction" between books A and B in that the former listed four Fuimaono title-holders from the sister village of Uafato and sixteen from the village of Falefa; whereas book B recorded a correction communicated from Gagau to Kolopa of fourteen title-holders from Uafato and only six from Falefa. Nelson J regarded these changes as significant and considered that they cast doubt on Gagau's credibility because it was unclear how she could be better informed and more reliable concerning these matters than her predecessors, including her father."

57. He then made this general observation

> "This highlights a sad but common reality in this country. Authors and custodians of family genealogies have been known to insert untrue details and material in an effort to broaden the scope of genealogy for various purposes including incorporating persons and particulars of persons who are not in fact part of the family."

The Judge added that this reality engendered controversy and frequently resulted in litigation in the Land and Titles Court.

58. Church records: Three certificates provided by the Roman Catholic Church were produced by the claimants as exhibits. The first was a marriage certificate issued on 4 November 2016 (a few days before the hearing) certifying that Lafoia and

Marie were married in the Roman Catholic Church in Taufusi on 17 December 1912. The certificate described the parties:

"Valeriano Lafoia son of Tealiti and Faaluaumeke of Sogi"

59. This certificate was issued and signed by a priest, the Chancellor and custodian of the Church archives, who relied upon a hand-written record of the marriage particulars to produce the certificate. The legibility of the record was in issue at the hearing. Nelson J held that "some editing of the relevant entry (had occurred) in particular to the letters 'e' and 'a' in the name "Tealiti". The purpose of the editing was not explained, nor was it known when and by whom the changes were made. Similar changes had been made to the names of the bride's parents.

60. Next was a baptism certificate for Etevise showing she was born at Falefa on 23 March 1921 and baptised three days later. Her father was named as "Lafoia" and his family name as "Tealiki Fuimaono". The certificate was signed on behalf of the Chancellor and issued in 2013. The archival record upon which the certificate was based was not referred to in the Supreme Court. The third certificate related to the birth and baptism of Luka in September 1939, but it contained no reference to his maternal grandfather's name.

61. The final church document was a letter dated 2 September 2005 from a minister of the Congregational Church in Falefa addressed to "Whom it may Concern" and headed "Re – Fuimaono Lafoia (a.k.a. Fui)". It confirmed that "according to our church records" Lafoia died on "September 29th 1943". In fact, a handwritten entry in the Church work book simply recorded "Fui 29.9.1943". When questioned the minister said that the letter was based on information supplied to him by "descendants from Fui or Fuimaono" in 2005 "there (being) only one person by the name of Fui or Fuimaono that attended the Congregational (church) at the time." He had no personal knowledge of these matters, nor of those that supplied the information.

62. Nelson J concluded that these documents were admissible as business records, but questioned whether Lafoia and Maria's marriage certificate could be safely relied upon given the unexplained alterations to the source document. He made no express finding on that point. With regard to Lafoia's death certificate he found its worth was "dubious, certainly questionable at best".

63. Oral statements of pedigree: Evidence of this nature came from both village and family sources. Three men, all born and raised in Falefa, provided written evidence concerning their knowledge and contacts with Lafoia. Tulaï Patolo was born in 1929 and became a police officer. When aged six or seven he became aware of Lafoia and his wife Malea. She was related to Tulaï's father and both his and Lafoia's families attended the Catholic Church. He also knew Lafoia and Malea's children. Posiano and Etevise in particular. Someone in Falefa told him that Fuimaono was from another island in the South Pacific, and that he was part Samoan. Members of Tulaï's family visited the Fuimaono home and the South Pacific reference could have occurred during a visit. At age ten Tulaï moved to Apia to the Marist Brother's School, where he saw Lafoia in Apia at times.

64. Emile Luamona was born in 1939 and knew Lafoia and his family through his friendship with Luka, Lafoia's grandson. He resided near Luka's family. Lafoia took Luka and him fishing and swimming. Emile recalled people of Falefa calling Lafoia Lalotonga (Rarotongan) and Liki the Rarotongan. His mother told him this was because Liki was his father's name but shortened because the full name was hard to pronounce. His declaration dated 24 March 2010 included that he thought Lafoia died between 60-70 years of age and that he had seen his grave and those of his wife Malea, and mother Faaluaumeke at Falefa. Emile died in late 2011.

65. Fulumua Faatafa was born in 1936 and has always lived in Falefa. He knew Lafoia, Malea and Etevise. In 1942 or 1943 he fell ill and was taken to hospital in Fagaloa by rowing boat, as was Lafoia. At the hospital he was examined and discharged but he recalled that Lafoia was admitted for treatment. Village people said of Lafoia that he was from another country.

66. Two family members provided evidence of statements made by deceased members of the Fuimaono family and Falefa residents. Sose married Etevise's son Luka in 1967. She had discussions with her mother-in-law over the ten-year period before Etevise's death in 1977. She was told that her husband's father was Lafoia, who lived in Sogi in Apia until he married Maria and they moved to Falefa. Maria had four children before her death, after which Lafoia moved back to his father, a Rarotongan, in Matautu-uta and married Malea.

67. Sosa explained that Luka was taunted and called a Rarotongan pig by people in Falefa. In 1993 Luka was bestowed the title Fuimaono and Gagau gave family book B to Luka, although Sose took charge of the book from then on. She read the entry concerning the marriage of a Rarotongan Keliki and Faaluaumeke who had a son named Lafoia (see 54). Sose was asked how the book got into the hands of the claimants' solicitor only last year (2015) and not earlier. She said "I had forgotten about the book, but when I was required to give evidence on this issue regarding what me and the old lady used to talk about then I remembered the book." She then "found it" and gave the book to the solicitor as part of her evidence. In cross-examination Sose confirmed that she was aware of the claim being filed in 2009, but this did not awaken her memory to the existence of the book at that time.

68. In 2005 Sose recalled that her mother-in-law had spoken of Lafoia attending the Congregational Christian Church in Falefa following his marriage to Melea, so she approached the minister who provided the letter confirming Lafoia's death in 1943 (see 61). She saw the entry for "Fui" and knew that Lafoia was called this within the family circle, but "during special occasions or church gatherings we refer to him as Fuimaono." For this reason, she requested the minister to check with the church elders and provide the letter if it was confirmed that the Fui entry did relate to Lafoia.

69. Belatedly, Sose provided some significant additional details concerning Tealiki. Those were not mentioned in Nelson J's decision and therefore became the basis of a ground of appeal. I shall discuss them when dealing with the particular appeal ground.

70. Luka was the second family witness. Born in 1939, he referred to time he spent with his grandfather Lafoia when he was young. He said he lived with Lafoia and his second wife Malea "after Etevise passed away" because "they wanted to raise me as their child". This cannot be right because Etevise died in 1977 when Luka was about 39 years of age. In any event, his childhood time with Lafoia and Malea was at Leone in Apia as well as Falefa. With reference to Leone, Luka was asked by Ms Needham:

> Needham: You gave the evidence about your grandfather living when you were young in Leone do you recall that evidence?
>
> Witness: I do not recall the exact years but I do remember there were times where I stayed with the old man in Leone, I was very young at the time.
>
> Needham: Did your grandfather or your step grandmother Malaea tell you anything about the ownership of those lands?
>
> Witness: As stated they did not talk to me regarding ownership of the land I was very young at the time.
>
> Needham: Did Valeriano ever tell you that the land he lived on belonged to his father?
>
> Witness: Yes, there were times where he would say that the land was his father's land.
>
> Needham: Can you recall when your grandfather died?
>
> Witness: I do not remember it was a very long time ago.
>
> Needham: Do you remember how old you were when he died?
>
> Witness: Around 10 years.

71. Luka confirmed that as a child in Falefa he was taunted about being Rarotongan, particularly when he hit other children. When shown book B he said "This is the first time I have ever seen this book". However, he acknowledged Gagau and he had been very close and that she had given him a book when he was bestowed the Fuimaono title in 1998, not 1993 as the family had indicated.[11]

72. Nelson J concluded that the evidence of pedigree was "strong". He referred to overseas authorities that espoused the worth of such evidence because it was derived from the everyday discussion and personal knowledge of persons fully acquainted with the subject matter at the particular time.[12] The Judge then added a Samoan perspective:

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[11] Nelson J confirmed the bestowment details during Luka's evidence by reference to the official Lands and Title record.

[12] Berkley Peerage Case (1811) 4 Camp 401, 416. Re Simpson [1984] 1 NZLR 738 (CA).

> "Villages in this country are typically not large communities physically or numerically. Even smaller in 19th Century Samoa when there were fewer people. New Zealand historical sources estimate the population in November 1918 when the Spanish Flu Pandemic reached Samoa to be around 40,000. In the turbulent times of the latter half of the 19th Century it would have been less. Life in a Samoan village then as now is quite intimate and the social fabric being what it is, everyone literally knows everyone. Knowledge of the familial ties and ancestry of one's neighbours and fellow villagers is an everyday reality of Samoan life from which there can be no escape!"

73. Nelson J's conclusion: After reference to his reservations concerning the reliability of the family books and the church records, Nelson J assessed the available circumstantial evidence as a whole and concluded:

> "Viewed from this perspective and according particular weight to the independent pedigree evidence, I am satisfied that there was more probably than not a Rarotongan named 'Keliki' also known as 'Teariki' who by his union with Faaluaumeke of the Sa-Fuimaono family of Falefa produced a son Valeriano Lafoia who held the title Fuimaono in the village of Falefa. Further that the plaintiffs are descended from said Fuimaono Lafoia."

It remained, however, to consider whether Tealiki, the father of Lafoia, and Teariki were one and the same.

74. One and the same? The grounds of appeal are all focussed on this aspect. I have already referred to a summary of the reasoning by which Nelson J concluded it was not established that Teariki and Tealiki were one and the same (at [39]), the claimants' contrary argument (at [38]) and the grounds of appeal (at [40]). I shall, therefore, go straight to the grounds of appeal.

The trial judge erred in talking judicial notice of historical facts:

75. Counsel submitted that it would be an "extraordinary coincidence" if there were two Rarotongan men living in Samoa with Samoan wives who left Samoa permanently in 1894 and thereafter remained in Rarotonga. Nelson J doubted this saying the presence of Rarotongans in Samoa at the time was not as improbable as was suggested. He relied upon historical records of which he took judicial notice. However, there was no evidence adduced at trial on this topic. The Judge consulted the historical sources of his own motion. Moreover, the number of Rarotongans living in Samoa in the late 19th century was not notorious, something of which ordinary persons could be presumed to be aware. The prevalence of Rarotongans at that time was not free from dispute. And, before a search for such information could be undertaken it was incumbent upon the Judge that he notify the parties and extend to them the opportunity to adduce contrary evidence and provide submissions on the topic.

76. These principles are recognised throughout the common law world. Heydon J sitting in the High Court of Australia in *International Finance Trust Co Ltd v New South Wales Crimes Commission*[13] said this:

> "The court is not entitled to take into account factual material not in evidence without notice to the parties. The Court is not entitled to take judicial notice of particular matters of fact after inquiry without notifying the parties of the inquiry and giving them the opportunity to controvert or comment on the source in which the inquiry is made."

Similar statements appear in other cases, including observations that a failure to provide notice and an opportunity to be heard gives rise to a breach of natural justice that strikes at the essence of the judicial process.

77. Following inquiry into various historical sources concerning the arrival of missionaries accompanied by a Rarotongan chief and teachers in the 1830s and the existence of a Rarotongan church in the 1870s, Nelson J concluded there were "a number of Rarotongan men living in Samoa in the late 1800s". I cannot rely on this conclusion and must base my review on the evidence adduced at trial. For whatever reason, counsel at the appeal hearing did not seek to contradict, or support, the view reached by the trial judge by advancing submissions based on their own historical researches.

78. I am left with scant evidence on the topic. It is evident that travel occurred between Samoa and Rarotonga. Apai made the journey of about 1500 kilometres (or 960 nautical miles) in about 1848, Teariki in 1894 and Tiresa with her infant daughter, Lole, a short time later, including her return voyage to Samoa without Lole. The evidence that Tealiki and Lafoia were subjected to racial taunts in the village of Falefa indicates a general awareness of Rarotonga and its people, even in the villages of Samoa. This, I consider, makes it likely that there were Rarotongans residing in Samoa, but the actual number is unknown.

79. Nelson J went a step further in relation to the claimants' extraordinary coincidence argument, in finding that it was "entirely possible and not necessarily extraordinary" that there were two Rarotongan men named Teariki or one of its derivatives living in Samoa in the 1890s. He relied on evidence given by Framhein that Teariki means "the chief" and it is a common name in Rarotonga; and not to be regarded as a title or rank. This evidence remains intact.

Personal identifying characteristics:

80. Framhein gave evidence of a Samoan 'pe'a' tattoo running from Teariki's waist down to his knees that scared him as a child. He also spoke of Teariki's skill at carving canoes out of hibiscus trees and selling them at the Avarua Wharf. Nelson J referred to the 'pe'a' tattoo as conspicuous and acquired "as a rite of passage to manhood". He added:

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[13] *International Finance Trust Co Ltd v New South Wales Crimes Commission* (2009) 240 CLR 319 at 382.

> "Those who have such an adornment are well known in any community, certainly within the family, the village and surrounding areas. This would be especially notable if carried by a non-Samoan. There is no indication anywhere in the evidence adduced by the plaintiffs that Teariki of Falefa possessed such a tattoo."

With regard to canoe making he noted there was no evidence that Tealiki possessed such a skill, one that would have been unique and of significant commercial value in Samoa.

81. The argument advanced was that Nelson J's reasoning suffered from the "fundamental flaw" that it was simply impossible to find a witness who could speak to Tealiki's personal appearance before be left Samoa in 1894. That evidence had been "lost to time and circumstance" and therefore the trial judge erred in placing any reliance on those two matters.

82. I tend to agree that the evidence of canoe making was of little or no probative value. It is quite possible that a young man on moving to Rarotonga pursued different work activity in a new and different environment. But the Samoan tattoo is another matter. It must have been acquired while Teariki was in Samoa. It was plainly distinctive and noticeable. The complainant's argument is in our view misplaced. The onus of proof rests with the claimants. That there is no comparable evidence that Tealiki had a 'pe'a' tattoo cannot be set aside on the basis that the passage of time precludes the provision of such evidence. Delay in this case is of the claimant's making. This is a legitimate circumstantial factor. I do not accept that Nelson J erred in referring on the tattoo evidence. But whether weight should be accorded to it is another matter, to which I will return shortly.

Sose Fuimaono's evidence:

83. A failure to refer to some evidence given by this witness at the end of her testimony is raised as a "critical omission" on the part of the trial judge. Sose said she was told Teariki's father was named Apai. To further questions she said that her mother-in-law Etevise, told her this. This was the only evidence for the claimants to this effect. If accepted at face value it did indeed establish a crucial link between the Raratongan Apai family and Lafoia's father Tealiki.

84. The manner in which this evidence emerged is of relevance. Sose swore an affidavit in 2016. It referred to conversations she had with Etevise concerning Lafoia's marriages, his father being Rarotongan and why Luka was teased on account of his Rarotongan heritage. The affidavit also explained how family book B came to be in Sose's care and that additions were made by her daughter to update it. There was no reference to Apai. At the hearing, Sose gave evidence in a similar vein to her affidavit, but in a little more detail. She drew attention to the page in book B that sets out the family genealogy (see quotation at 54) which her daughter Mareta had written. Again, there was no mention of Apai.

85. Following cross-examination by defence counsel, Nelson J asked a number of questions. The pertinent ones were these:

Nelson J: and in the course of your associations with this family have you ever heard them mention the name of a Rarotongan man named Apai?

Witness: Yes, I have.

Nelson J: In what connection?

Witness: I heard that Apai was Teariki's father.

Nelson J: And who did you hear that from?

Witness: Records I was in search for?

Nelson J: Faamaumauga?

Witness: I don't remember.

Nelson J: You said records, what records?

Witness: I think I gave my reply too quickly but I think I heard the name Apai mentioned but I cannot recall where I heard about it.

Nelson J: This is very important, can you please try and think back how you came about this information, did you hear it from someone in your husband's family, did you read it somewhere in some documents?

Witness: It's something that I heard but I did not see any documents or records.

Nelson J: And can you recall who you heard it from?

Witness: Lafoia's mother.

Nelson J: Lafoia's mother? And who was Lafoia's mother?

Witness: Sorry, I meant Lafoia's daughter.

Nelson J: Lafoia's daughter.

Witness: Yes.

Nelson J: And her name was?

Witness: Etevise.

Nelson J: So, you heard this from Etevise, is that your evidence?

Witness: Yes.

Nelson J: And apart from her telling you that this person was Teariki's father did she tell you anything else about this person?

Witness: That was the only thing she mentioned.

The Judge then asked another leading question concerning whether Etevise mentioned the "name Siena from Moataa or around the Vaimauga area" (being Apai's wife), but Sose said she had not been told anything of this nature.

86. Strangely, Nelson J did not refer to this evidence in his judgment. Mrs Betham was critical of the manner in which the evidence emerged and submitted it was correctly disregarded by His Honour. I do not accept the latter proposition. Having elicited the evidence the Judge was required to confront it as well. That he did not do so means it is for us to evaluate whether the evidence is reliable and therefore supportive of the claim. I shall do so shortly.

Tealiki's departure from Samoa:

87. Nelson J rejected the claimant's contention that Tealiki must have left Samoa ignorant of the fact that Faaluaumeke was pregnant, or that he simply abandoned both his wife and Lafoia. He did so in strong terms:

> "I discount the suggestion that Teariki would abandon either a pregnant Faaluaumeke, or his son Lafoia and instead prefer to take to Rarotonga his sister's daughter. That makes no sense particularly in the traditional patriarchal societies then existing and to a large extent continuant today in Samoa and Rarotonga. There is no reason appearing from the evidence why Teariki would take such drastic action in defiance of custom."

He added that a child was obviously important to the man who went to Rarotonga, Teariki, since he took Lole as a feeding child.

88. Counsel submitted that "while such conduct may be perplexing, the human experience demonstrates time and again, that it is not at all unusual for relationships to end and for children to be disowned". And, the argument continued, once it is accepted that Tealiki did in fact abandon his wife and return to Rarotonga, it is "not at all improbable" he might take Lole as a feeding child. I note there is simply nothing in the claimants' evidence concerning Tealiki leaving Falefa, let alone to indicate he went to Rarotonga.

Teariki must have married Faaluaumeke:

89. Evidence of correspondence between a firm of New Zealand solicitors and the Resident Commissioner of Rarotonga in 1931 unearthed the fact that Teariki had been married. The solicitors, acting on behalf of David Hunter of Apia, sought answers to a number of questions: was Teariki still alive, if not had he left a will or died intestate, and did he leave a widow or children. The Resident Commissioner responded that Teariki was very much alive, had visited his office and had advised that "his wife died very many years ago, that there were no issue, and that he has not married again." The solicitor's letter produced as an exhibit bore handwritten notes no doubt made during the visit to the office, including:

"Wife died 40 years ago – since not remarried"

90. With reference to the evidence Nelson J said:

> The problem with this piece of evidence is it does not refer either specifically or generally to a woman from Falefa or Samoa named Faaluaumeke. It speaks of Teariki's marriage to a woman but of what nationality and "whether in Samoa or Rarotonga it does not say". On its own, the evidence is neutral and does not greatly assist the plaintiffs.

91. Counsel argued that there was no evidence in the proceeding of anyone by the name of Teariki (or a derivative) marrying or partnering anyone other than Faaluaumeke. Hence, the only available inference was that the woman whom Teariki married was indeed Faaluaumeke. I accept that the letters to and from the Resident Commissioner give rise to a circumstantial factor to be put into the mix in own global evaluation of the case. I shall return to it.

Evidence that Teariki never returned to Samoa:

92. This label is not particularly apt. This ground of appeal is directed at Nelson J's observations that:

> Once Faaluaumeke gave birth, no effort was made by her or her family members to seek out the whereabouts of the father or his family. The records and other evidence indicate she well knew the identity of the father. It is inconceivable that Teariki would not have disclosed or mentioned his roots and the lineage of his Samoan family in Apia. A family that through his mother holds the Tamapua title, one of the paramount titles of the Fuaiupolu District of Vaiala, Matafagatele and Magiagi. A connection any Samoan family would be keen to establish and nurture.

93. The contention advanced was that an absence of evidence about what steps were taken to determine the whereabouts of Teariki was hardly evidence that Faaluaumeke took no steps or made "no effort" in Nelson J's words. Counsel went further by contending that it was unsurprising, and consistent with an abandonment of Faaluaumeke in Samoa, that there should be no contact between the Fuimaono family and the descendants of Lilli and Tiresa. This, it was suggested, may also reflect that communication was difficult and unreliable in these times and Teariki was a very poor correspondent. These various propositions call in question the emphatic observation of the trial judge. I shall evaluate the judge's observations and the criticisms of them shortly.

The Approach to Proof in this Case:

94. Soon after the hearing we issued a minute to counsel concerning proof in the circumstances of this case. There is only one issue: whether the claimants established on the balance of probabilities that they were descended from Teariki Apai. However, Nelson J found it convenient to divide that issue into what he termed "two core matters". These were whether the claimants were the

descendants of Tealiki and Faaluaumeke; and whether Tealiki and Teariki, the Apia landowner, were one in the same. His decision was framed on this basis and, after the first matter was decided in favour of the claimants, the arguments on appeal were confined to the second matter. Our concern was whether the division of the ultimate issue into two discrete parts was possibly logically unsound. In the context of a circumstantial case had the circumstantial factors also been divided so that the ultimate issue was not decided on the basis of a global assessment of all the evidence? This could have disadvantaged one side or the other. Hence the minute invited submissions on this point.

95. The claimants provided the initial submission, but I shall first refer to the submission from Mrs Betham for the Third Respondents. Ms Needham filed a reply submission in which she objected to much of the content in the Third Respondents' submission. In significant measure it referred to matters arising from another pending claim against Teariki's estate by claimants who apparently maintain that they are the rightful heirs. This proceeding is to be heard in the Supreme Court later this year. Mrs Betham not only sought to advance new factual material derived from this proceeding, but "respectfully submitted" that this and the pending case "should not be contained and dealt with in silos." How this court could possibly consider evidence to be advanced in another proceeding was not explained. Otherwise, Mrs Betham supported the trial Judge's approach in dividing the main issue into two core matters. Counsel also referred to various elements of the evidence which she submitted supported the conclusions reached by Nelson J in relation to the divided aspects.

96. Ms Needham began on the note that the trial judge's approach may have been erroneous because "the two strands of the general narrative were not necessarily independent". The submission then set out a global assessment of the evidence in which various arguments were advanced relating to how certain circumstantial features had been treated and why their treatment should be reconsidered. However; there was then a section containing criticisms of the judge's approach to factual matters even if the two-stage determination of the case was not erroneous. Counsel helpfully acknowledged that the opportunity to make further submissions ensured that procedural fairness had been attained.

97. Annexed to the submission was a paper entitled "The Scales of Justice: Probability and Proof in Legal Fact-finding" by Hodgson J, a judge of the Supreme Court of New South Wales.[14] In the course of discussion, the author noted the influence of subject matter; that in some cases a finding that an event had occurred was also decisive of the outcome of the case. Here, the ultimate issue was whether the claimants were the descendants of Teariki. If this was proved on the balance of probabilities then this fact was to be taken as certain, or established, and the right to inherit the land necessarily followed. By contrast where the subject matter of a case is an accident, for example, proof of negligence and resultant damage does not imply an inevitable outcome. It may remain for the decision-maker to determine other probabilities, perhaps whether there was contributory negligence or even the need to predict future occurrences relevant to loss of income or business opportunity. Only then would the remedy,

[14] The Scale of Justice: Probability and Proof in Legal Fact-finding" by Hodgson J (1995) ALJ 741 – 750.

typically damages, be quantifiable. Here, bearing the unitary nature of the subject matter of this case in mind I doubt that Nelson J did err in dividing the ultimate issue into two discrete parts; provided as counsel put it the two strands were also recognised as not necessarily factually independent. The latter dimension has now been covered by the opportunity provided to make supplementary submissions, and the concern that prompted our minute has dissipated.

Our Appellant Review of this Case:

98. I can now review the case and set out my conclusions in a relatively brief fashion. I shall first consider the matters that most influenced Nelson J and then consider any other grounds of appeal. I consider two matters most influenced the trial judge to his conclusion that Teariki and Tealiki were not one and the same. These were:

    (a) it was "inconceivable" that if Teariki had married Faaluaumeke he would not have disclosed his Apia roots and lineage to the Fuimaono family, and

    (b) that the abandonment contention was highly improbable.

    Both matters were closely considered.

99. In terms of the claimants' case Teariki must have married Faaluaumeke sometime before 1894, aged in his twenties or early thirties. His father was still alive and the owner of significant land holdings in Apia. At some time, Teariki had planted the land and was familiar with the foodstuffs grown there. His mother Sieni probably died in 1892 but members of her family, a family that held a paramount title, would have been known to Teariki. He also had two sisters, Tiresa and Lilli, who were raising families. Teariki must have maintained contact with Tiresa, who sailed to Rarotonga to entrust Lole to his care as a feeding child soon after 1894. These are significant family connections that clearly warranted use of the inconceivable label adopted by Nelson J.

100. Nelson J referred to various matters in rejecting the claimants' suggestion that Teariki must have abandoned a pregnant wife or both his wife and son, Lafoia, when he left Samoa for Rarotonga. In his view, the suggestion made no sense, particularly in the context of the patriarchal society of the times. He considered there was no evidence of a reason why Teariki would take such action in defiance of custom. Moreover, a child was obviously important to him given his adoption of Lole as a feeding child. The Judge also considered the "unknown heir" suggestion and concluded it was the most realistic argument. But even assuming Teariki was unaware of Faaluaumeke's pregnancy there was no apparent explanation for his abandoning her. He noted that Faaluaumeke had links to the Malietoa title, one of the four paramount titles of Samoa, and concluded that reason and status would decree her inclusion, not exclusion when Teariki decided to move to Rarotonga.

101. The claimant's response was that although the suggested conduct may be perplexing, human experience demonstrates time and time again that it is not

unusual for relationships to end and for children to be abandoned. Cases cited by counsel showed the extent to which such troubling conduct was not uncommon The argument continued that "once it is accepted that (Lafoia's father) did abandon Faaluaumeke and return to Rarotonga" it was no longer seen to be improbable that he took in Lole as his feeding child.

102. The last proposition, in our view, exposes the most fundamental problem with the claimants' case. There is no evidence from the Fuimaono family or any other source concerning what happened in relation to the marriage of Tealiki and Faaluaumeke. There is nothing to suggest that they separated about the time of Lafoia's birth, let alone that Tealiki left Falefa and went to Rarotonga. Put simply, an evidential void exists concerning whether, if so when and why, the marriage failed. If Tealiki did desert Faaluaumeke, whether she was pregnant or a new mother, it was a drastic action and one that would have captured the attention of the village, and, particularly members of the immediate family.

103. No doubt the void is a product of the time delay from 1894 to 1942 when Teariki died in Rarotonga and more particularly the further delay until the claim was first asserted to the Public Trustee in 2005. Thereby the knowledge and recollections of earlier generations of the Fuimaono family were lost. But this cannot be ignored as simply evidence "lost to time and circumstance" a phrase used in the claimants' submissions. The onus of proof remains with the claimants. It is a considerable stretch to characterise the perplexing abandonment as not uncommon human conduct and somehow accept that the man who departed to Rarotonga to await the arrival of his feeding child was also Lafoia's father. Also, that he did this without his Apia descendants knowing of his marriage or his act of abandonment.

104. But, do other elements of the case sway the balance? Two witnesses gave evidence that provided a direct link between Tealiki and Apai. Sose said that her mother-in-law, Etevise, told her that Tealiki's father was Apai. This was hearsay evidence, admissible if the circumstances relating to the "statement" provided reasonable assurance that it was reliable. Here Etevise made the statement and Sose related it to the Court. The concern about this evidence relates to Sose's reliability. The notes of evidence speak for themselves (see [85]). Until Nelson J asked a leading question in which he named Apai, a Rarotongan man, there had been no mention of him. Sose then said the name appeared in records but then resiled, and said Lafoia's mother told her that Apai was Teariki's father. This answer was then changed to Lafoia's daughter being the source.

105. I doubt the reliability of this evidence. Not only does the way in which the evidence was elicited give cause for concern, but the statement attributed eventually to Etevise was not mentioned in Sose's affidavit or evidence in chief. It was a late, and extraordinary, development. If Sose had a recollection of such a statement being made she would have surely provided evidence of it well before she was questioned by the Judge. She played a significant role as a witness in that she detailed the origins, reconstruction and safekeeping of family books A and B. She also initiated the approach to the Congregational Christian Church that resulted in Lafoia's death being certified as in 1943. Sose must have appreciated the importance of her answers to the Judge.

106. Luka, Sose's husband, gave evidence in chief that his grandfather Lafoia told him that the land where they lived in Leone belonged to his father. This was in response to a gross leading question asked immediately after Luka had said he did not talk to his grandfather and grand-stepmother, Malea, about land ownership as he was "very young at the time" (see at [70]). Luka was born in 1939 and Lafoia died in 1943, if his death certificate is accepted. Aside from the issue of age Luka did not emerge as an accurate witness. He was vague when asked his date of birth and wrong by some years as to when the Malietoa title was bestowed on him. Again, I have serious reservations concerning the reliability of this evidence given that Luka was probably no more than four years of age when the land ownership conversation is alleged to have occurred.

107. Another ground of appeal related to the marriage of Tealiki and Faaluaumeke. The date of their marriage is not a matter of record. However, as recounted at [89] Teariki told the Resident Commissioner of Rarotonga that he had been married once, but his wife died very many years ago and there were no issue. A handwritten note attributable to the Commissioner recorded "40 years ago" as Teariki's words concerned the date of death. The claimants submitted that the date was consistent with Teariki still being in Samoa and that there was no evidence that he "married anyone other than Faaluaumeke". Nor, however, is there evidence that his bride was Faaluaumeke. Nelson J considered that the evidence was neutral and not of great assistance to the claimants because, where, and to whom Teariki was married was not specified (see [90]). I, however, accept that this is a circumstantial factor to be weighted in an overall assessment of the case.

108. Teariki's statement that there was no issue of the marriage is also significant. Other similar correspondence provides an insight into his attitude concerning the land he had inherited. After his father's death, no later than 1898, he became an absentee landowner. It seems he never returned to Samoa, nor was he pro-active in relation to his inheritance. He responded if asked, but with apparent indifference. In 1925 he expressed himself "quite willing" to have a cousin act as his agent in looking after the land and the letter, written by the Resident Commissioner, ended "it is assumed that no rents are accruing from the land". This suggests that Teariki was not materialistic and also someone not likely motivated to make a false statement about not having any children. This does not, of course, exclude the possibility that, he married Faaluaumeke, but rather adds to the intrigue.

109. The last two grounds of appeal can be considered together. I have referred to the scant evidence available concerning Rarotongan men in Samoa in the 1890's (see [61]). But am not persuaded that the view I reached, based on the evidence of travel by members of the Apai family and the fact of racial taunts in the village of Falefa, is much different to the trial Judge's viewpoint reached in breach of the rules of natural justice. The contention that the Judge erred in placing some reliance on the Samoan tattoo that Framhein saw in Rarotonga is a point of some substance. As Ms Needham correctly submitted it is now impossible to provide direct evidence from someone who observed Teariki in Samoa and nor is there documentary evidence of his personal appearance at that time. This absence of evidence does not add anything, but rather emphasises that

through delay the opportunity to have regard to a distinctive identifying feature has been lost. Had there been a historian in the Fuimaono family, there may have been a pertinent record one way or the other, but such is not the case.

Conclusion:

110. I have differed from Nelson J in relation to some matters and put a different slant on others. But even bearing this in mind I am not persuaded that his finding that the claimants had not established, on balance, that Teariki was Lafoia's father is clearly wrong. On my assessment of the evidence as a whole I am satisfied the trial judge was entitled to reach this conclusion. That said this was a difficult and complex factual dispute that was finely balanced. It is also a case where the advantages enjoyed by Nelson J are a very significant factor. Particularly when the nuances of Samoan tradition, custom and society were necessarily influential in relation to the assessment of a circumstantial factor the trial Judge was much better placed than the members of this Court.

111. For these reasons I would dismiss the appeal.

JUDGMENT OF HANSEN JA

112. I have had the advantage of reading the judgments of both Fisher and Panckhurst JJ in draft. I agree with the conclusion both have reached but wish to add some comments of my own.

113. I concur with the view that the two-stage approach adopted in the Supreme Court was unhelpful. The key issue to be determined was whether the appellants were descended from Teariki the Apia landowner.[15] A finding on that issue ultimately turned on whether he was the father of Valeriano Lafoia (Lafoia). It was not in dispute that the appellants were descended from Lafoia. Their task was to prove that his father was Teariki the Apia landowner.

114. For that purpose the appellants relied on evidence in three categories – Family Books, Church records and what Nelson J referred to as family statements, evidence of what was said in the community.[16] The evidence in this third category was described by the Judge as "strong evidence of pedigree".[17] He said:[18]

> Knowledge of the familial ties and ancestry of ones neighbours and fellow villagers is an everyday reality of Samoan life from which there can be no escape!"
>
> This evidence was decisive to the Judge concluding that Lafoia's father was a Rarotongan named Teariki, notwithstanding his reservations about the evidence in the Family Books and Church records.

[15] The nomenclature adopted by Nelson J in his judgment.
[16] Judgment at [49].
[17] At [50].
[18] At [53].

115. That this conclusion did not lead to a finding in the appellant's favour was because the Judge went on to consider a second question: whether Lafoia's father was Teariki the Rarotongan landowner or another person of the same name and origin. We were told in supplementary submissions by the appellants that the possibility of there being another Teariki was raised for the first time in final argument in the Supreme Court and then by way of a passing reference in submissions on behalf of the third respondents. No evidence had been adduced to establish the existence of another man with whom Teariki the Apia landowner might have been confused.

116. So it was that, in considering that possibility, Nelson J relied on historical records of which he took judicial notice which established that there were "a number" of Rarotongan men living in Samoa in the late 1800s, evidence that Teariki is a common name in Rarotonga, and evidence of personal identifying characteristics which were said to support the conclusion that there were two different men.[19] The Judge said that evidence in this last category was not challenged by the appellants. He said they adduced no evidence that the Teariki they claimed to be Lafoia's father had a traditional tattoo or standing as a carver, the two personal characteristics relied on.

117. However, as the appellants' case was that Teariki the Apia landowner **was** the father, and they were never called upon to rebut the suggestion that there might be two Rarotongans called Teariki, they could hardly be criticised for failing to call evidence to show that there was only one Teariki who could be the father. In any event, because Teariki the Apia landowner never visited Samoa after 1894, the only evidence of his personal characteristics, given by a witness who, as a child, knew him in Rarotonga, necessarily related to his life there.

118. However, the decisive consideration in this part of the Judge's analysis, was his assessment that, if Teariki the Apia landowner were the father of Lafoia, he would never have abandoned him and his mother, Faaluaumeke, taking his three year old niece with him as his feeding child. The Judge said there is no apparent reason why Teariki would have taken "such drastic action in defiance of custom"[20] particularly as Faaluaumeke's links to the Malietoa title "would decree her inclusion not exclusion". The Judge also noted that, contrary to what would have been expected, no steps were taken by Faaluaumeke's family to investigate or foster links with the family of Teariki's mother whose family had links to a title that "any Samoan family would be keen to establish and nurture".[21] The Judge also "struggled with the notion" that the heirs of Faaluaumeke would have remained ignorant of Teariki's extended family in Samoa if he had been Lafoia's father.

119. These considerations led Nelson J to conclude that the Teariki who was Lafoia's father could not have been Teariki the Apia landowner and must have been another Rarotongan named Teariki.

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[19] Judgment at [67]-[70].
[20] At [72].
[21] At [78].

120. This conclusion was consistent with the Judge's earlier finding that family statements, what was spoken of in the community, established that a Rarotongan man named Teariki was Lafoia's father. However, the judgment does not address the concern that the same cultural and social imperatives that made it inconceivable that Teariki the Apia landowner could be Lafoia's father, would apply similarly to another Rarotongan Teariki. There is not a skerrick of empirical evidence that another, different Teariki was associated with Faaluaumeke at the relevant time. His existence is postulated solely to explain the disconnect between the evidence of family statements and the behaviour of Teariki the Apia landowner. There is no consideration given to the question of why another Teariki would have abandoned his wife and son with their high-ranking family connections or why Faaluaumeke's family would have taken no steps to foster ties with his family.

121. In the result there was no attempt to confront the central paradox in this case. On the one hand, the community and (to some extent) Family Records reflected a belief that a Rarotongan named Teariki was Lafoia's father. On the other hand, Teariki the Rarotongan landowner and the family of Faaluaumeke acted in a way which, by reference to established Samoan custom and culture, simply could not be reconciled with paternity. The Judge's assessment was, in effect, that actions speak louder than words. He reasoned that, if Teariki the Apia land owner had been Lafoia's father, neither he nor Faaluaumeke's family would have acted as they did.

122. In my view that assessment, which the Judge was eminently well-placed to make, is sufficient to dispose of the case. It does not require a finding that another man named Teariki was Lafoia's father, a finding which I consider to be unsupported by the evidence. It follows that the evidence on which the appellants rely is simply insufficient to support a finding of paternity.

HONOURABLE JUSTICE FISHER
HONOURABLE JUSTICE PANCKHURST
HONOURABLE JUSTICE HANSEN