Trinity Term
[2018] UKPC 18
Privy Council Appeal No 0054 of 2017

JUDGMENT

Browne (Respondent) *v* Munokoa and another (Appellants) (Cook Islands)

From the Court of Appeal of the Cook Islands

before

Lady Hale
Lord Mance
Lord Sumption
Lord Hodge
Lord Briggs

JUDGMENT GIVEN ON

16 July 2018

Heard on 21 and 22 May 2018

Appellants
Gerard McCoy QC
Tim Parker
Zoe McCoy
(Instructed by Martha Henry)

Respondent
Isaac Hikaka
Tony Manarangi

(Instructed by Tony Manarangi)

LORD SUMPTION:

Introduction

1. This appeal relates to the succession to 19 parcels of Native freehold land on the island of Rarotonga, Cook Islands, which were owned by Richard Pare Browne at the time of his death on 21 November 2005. The deceased had been married for many years to Kurai Browne, who died in 2013. He had no natural issue, but on 6 July 1964, he and his wife had adopted the respondent Richard Browne by court order. The respondent, who was then aged 16, had been living with his adoptive parents since the age of three, but he was not related to them by blood. At the adoption hearing, Kurai Browne had stated on oath:

> "I agree boy will not get our lands (he has already succeeded to a number of his natural mother's lands)."

The judge duly noted on the order "Not to affect succession to lands". It will be necessary to say more about the manner of the respondent's adoption and his relations with his adoptive parents in due course, but it is sufficient at this point to say that he was treated in every way as part of the Browne family and has for many years lived on one of the parcels of land in dispute. He claims to be entitled to succeed to the deceased's land as his adopted son.

2. The respondent's claim was contested by the appellants, who are two of the deceased's nieces. Apart from a procedural objection based on an alleged defect of service, their case is that Maori customary law in the Cook Islands does not recognise the right of a child adopted from outside the blood family to succeed to the land of the adoptive parents without the unanimous consent of the family, and that their objection is therefore fatal to the respondent's claim.

The legal framework

3. The Cook Islands are a remote archipelago in the South Pacific Ocean, some 2,000 miles north-east of New Zealand, between Tonga and Samoa on one side and French Polynesia on the other. They comprise 15 major islands, inhabited by a Maori people with a combined population of about 15,000 at the last census in 2011, of whom about 10,500 lived on the principal island of Rarotonga. These numbers are understood to have declined somewhat since 2011. The islands had no prolonged contact with

Europeans until 1827, when the first European missionaries arrived, and no political connection with them until 1888, when they became a British protectorate. They were subsequently annexed to the then British colony of New Zealand with effect from 1901. The islands were administered as a dependency of New Zealand until 1965, when they became an independent territory. But New Zealand continues to be responsible for their external relations and provides a number of significant public services to the islands, including the provision of judges of their superior courts.

4. Section 66A of the Constitution of the Cook Islands provides:

> "(3) Until such time as an Act otherwise provides, custom and usage shall have effect as part of the law of the Cook Islands, provided that this sub-clause shall not apply in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision of this Constitution or of any other enactment."

5. Subject to a number of statutory modifications, rights over land and the succession to land have at all times been governed by the customary law of the islands. The Judicial Committee has previously had occasion to refer to some of the essential features of customary land law in the Cook Islands. In *The Descendants of Utanga and Arerangi Tumu v The Descendants of Iopu Tumu* [2012] UKPC 34 at para 2, Lord Walker and Lord Carnwath, delivering the advice of the Board, referred to "the special character and importance of ancestral property to the indigenous peoples of the Cook Islands, which transcends any commercial significance". In *Baudinet v Tavioni* [2012] UKPC 35, Lady Hale, expanding on this point at para 61, observed:

> "… the case does not concern the property law of any part of the United Kingdom. It concerns the property law of the Cook Islands. We are told by both parties that the relationship between the indigenous people and their ancestral land through Tikanga (right, authority) is an essential component of their identity. This was recognised by the Waitangi Tribunal in New Zealand *(Report on the Crown's Foreshore and Seabed Policy,* Chapter 1, paragraph 1): 'Tikanga is both a consequence and a source of Maori identity. ... Without his relationship through tikanga to land by whakapapa, in a fundamental sense, he does not exist. Tikanga defines him; protects him; shapes his idea of himself and his place in the world.' Nobody disputes that this is equally true of the Maori of the Cook Islands."

6. The annexation of the Cook Islands was followed by important legislation of the New Zealand Parliament governing land tenure in the islands. The background to this legislation is explained in part in the advice of the Board in the *Tumu* case, *supra*. This may be supplemented by the valuable historical survey of the origin and development of customary land law by R G Crocombe, *Land tenure in the Cook Islands* (Victoria University of Wellington, 2016) [http://nzetc.victoria.ac.nz/tm/scholarly/tei-CroLan-c9.html]. In summary, during the protectorate which preceded the annexation of the islands, customary rights over land became a significant political issue. Land had traditionally been treated as a collective asset owned by the Arikis (tribal paramount chiefs) or the Mataiapo (heads of clans) for the benefit the whole body of occupiers. The First British Resident, Mr B J Moss, a prominent New Zealand politician and ethnologist appointed in 1890, created a federal structure, with a government covering the southern group of islands and a Parliament of the Arikis and their nominees, to which he served as an adviser. In 1894, he persuaded the Islands Parliament to issue a "Declaration as to Land", which was based on a paper that he had prepared in the previous year. The Declaration attempted to record "the customs of the Maori in that matter from time immemorial to the present day". It declared, so far as relevant:

> "The land is owned by the tribe; but its use is with the family who occupy that land. The family consists of all the children who have a common ancestor, together with the adopted children, and all the descendants who have not entered other tribes.
>
> The control of that land rests with the head of the family; but it is for the support of all the family; and all children have a right to that support, as well as the others of the family who may be in distress from sickness, weakness, or old age."

At that time, it was the policy of the New Zealand government to improve the productivity of land exploited by the indigenous population and to encourage European settlement on land which was not in active use by the indigenous population. It was perceived that both objectives were liable to be frustrated by the collective character of rights over land, the lack of definition of rights of use and the role of the Ariki, who exercised extensive discretionary powers over the use of land, including a right to evict the current occupants. Mr Moss proposed the creation of a land court which would serve as a court of appeal from the Ariki courts on questions of land tenure and would have exclusive jurisdiction over cases involving foreigners. This proposal, which would have undermined the position of the Ariki, was rejected by the islands Parliament. It led to a loss of confidence in Mr Moss and to demands for his recall. As a result, the New Zealand government sent Sir James Prendergast, Chief Justice of New Zealand, to the islands to report. Among other things, Sir James drew the attention of the New Zealand government to the problems arising from the powers of the Ariki over land, and prevailed upon the islands Parliament to introduce a system of registration of leases administered by a Land Board. The annexation of the islands, which followed four years

later, was an initiative of the New Zealand government. One of its objectives was to enable more extensive reforms to the system of land tenure to be introduced in order to serve the government's policy objectives. The Colonial Office in London, however, was prepared to consent to the annexation only on certain conditions, one of which was that the land rights of the indigenous population were to be properly protected. The result was a pragmatic compromise between Maori traditions of collective rights over land and European concern with security of tenure, legal clarity and judicial enforceability.

7. In 1901, the New Zealand Parliament enacted the Cook and Other Islands Government Act, which was expressed to be provisional and came into force simultaneously with the Order in Council annexing the islands. This provided for existing laws and customs to subsist, unless and until amended or abrogated by the Governor in Council, and conferred power on the Governor in Council to create a court empowered to ascertain and declare title to land. That power was exercised in 1902 by an Order in Council creating the Native Land Court. The court has been through a number of changes of name. For convenience, the Board will refer to it throughout as the Land Court.

8. The Act of 1901 was in due course replaced by the Cook Islands Act 1915, a much more elaborate enactment covering most aspects of the government of the islands, and making fuller and more radical provision for title and succession to land. The Act has frequently been amended and substantial parts of it have been repealed. The Board will refer to it in the form in which it stood at the time of the deceased's death. They will also use the word "Native", in spite of its archaic ring, because it is part of the statutory terminology. Section 354 of the Act vested all land in the islands in the Crown, with the exception of land held for an estate in fee simple. It distinguished two categories of "Native land". The first was "Native freehold land", which was "owned by a Native or a descendant of a Native for a beneficial estate in fee simple, whether legal or equitable" (section 2). The second was "customary land", which was vested in the Crown but "held by Natives or the descendants of Natives under the Native customs and usages of the Cook Islands" (section 2). Part 11 dealt with the powers and procedure of the Land Court. The court was given power to investigate title to customary land and to determine the relative interests of its owners (section 421), in accordance with native custom (section 422). Once a person was identified as the owner of customary land, the court was empowered to make a "freehold order", the effect of which was to create and vest in him a legal estate in fee simple (section 423). The land thereupon ceased to be customary land and became Native freehold land (section 423). Both customary land and Native freehold land were declared to be inalienable (sections 467-468), except that native freehold land could be alienated by way of lease, licence, easement or grant of profits for a term not exceeding 60 years (section 469). It will be apparent that the effect of these provisions was to abolish the concept that all land was owned by the Arikis, and to make considerable inroads into the concept of collective rights over land, by providing for exclusive and absolute title.

9. Under section 445(1) of the Act, interests in Native land are not transmissible by will. Succession rights are regulated by Part 14. Sections 446-448, provide:

> "**446. Succession to deceased Natives**
>
> The persons entitled on the death of a Native to succeed to his real estate …, and the persons entitled on the death of a descendant of a Native to succeed to his interest in Native freehold land, and the shares in which they are so entitled, shall be determined in accordance with Native custom so far as such custom extends; and shall be determined, so far as there is no Native custom applicable to the case, in the same manner as if the deceased was a European.
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> **447. Native land not to vest in administrators**
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> The interest of a Native or descendant of a Native in Native land shall in no case vest in his administrator by virtue of letters of administration, but shall in every case vest, on the death of that Native or descendant of a Native, in the person or persons entitled to succeed thereto, and if there is more than one such person, then as tenants in common in the shares in which they are so entitled.
>
> **448. Succession orders**
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> On the death of a Native or descendant of a Native leaving any interest in Native freehold land the Land Court shall have exclusive jurisdiction to determine the right of any person to succeed to that interest, and may make in favour of every person so found to be entitled (hereinafter called a successor) an order (hereinafter called a succession order) defining the interest to which he is so entitled."

10. Part 15 of the Act deals with adoption. Adoption, both within and beyond the blood family, is a common practice in the islands and, although accounts of earlier practice conflict, it appears from a paper prepared by Mr Moss, dated 9 September 1893, that it was already a common practice at the time when the Act was passed. Mr Moss wrote:

> "The adopted members are numerous in every family and undistinguishable by any title from the rest. They have the same

> rights and are under the same obligations. … The child adopted must belong to kindred families in order to enter at once into the family. If from other tribes or people, he does not become a member till formally admitted, and may at any future time be cast out."

It is, however, clear from the Reports of the Commission of Inquiry into Land (1996) that the succession of non-blood adopted children to the lands of their adoptive parents is controversial and a potential source of ill feeling. This is not only because it displaces or dilutes the share inherited by blood relatives, but because the adopted child is in a position to share in the succession to the lands of both the natural and the adoptive parents, thus giving them a larger share than was enjoyed by children raised by their natural parents. There is a body of opinion that this is an alien import, which is not consistent with Maori tradition.

11. Sections 456-459 of the Cook Islands Act 1915 abolished adoption by native custom and replaced it with a system of adoption by authority of the Land Court. The Act provided:

> "**456. Adoption by Native custom invalid**
>
> No adoption by Native custom, whether made before or after the commencement of this Act, shall be of any force or effect whether in respect of intestate succession or otherwise.
>
> …
>
> **458. Orders of adoption**
>
> The Land Court shall have jurisdiction to make an order (hereinafter called an order of adoption) for the adoption of a child by a Native.
>
> **459. Applications for adoption**
>
> (1) No such order shall be made except on the application of the adopting parent.

(2) Any such application may be made jointly by a husband and wife, and in such case the order of adoption may be made in favour of both or either of the applicants.

460. Who may be adopted

No person other than a Native or the descendant of a Native (whether legitimate or illegitimate) shall be capable of being adopted by a Native."

Section 465 provided:

"**465. Effect of adoption**

An order of adoption shall have in respect of succession to the estate of any Native the same operation and effect as that which is attributed by Native custom to adoption by Native custom."

It should be noted that Part 15 of the Act does not restrict the categories of person who may be adopted by a Native, save that the adoptee must also be a Native or the descendant of a Native. There is no limitation to blood relations of the adoptive parents. Against that background, the Board interprets section 465 as meaning that where an order of adoption is made, the adoptee is to have whatever right of succession he would have under customary law. In other words, if the right of a non-blood adoptee to succeed is conditional as a matter of custom, it will be conditional as a matter of law.

The issues

12. On 19 November 2014, the respondent applied to the High Court (Land Division) under section 448 of the Act for a succession order. His application was originally made together with Teparekura Browne, a niece of the deceased who claimed to succeed as a "feeding child". Her claim was dismissed by the trial judge (Justice Isaac) on the ground that a feeding child had no succession rights in that capacity. She did not appeal, and her claim is no longer relevant.

13. It is common ground on this appeal that by custom the succession right of a non-blood adoptee such as the respondent is conditional. The essential issues are what the condition is and whether it has been satisfied. The respondent contends that the only condition is that by the time of the adoptive parent's death the adoptee should have been fully accepted as a member of the family as if he was a natural child of the parents, a

process referred to as "maturation". The appellants contend (i) that the condition is unanimous consent by the entire family, including the remote family, which is not satisfied because they do not consent; and (ii) that even on the respondent's case about the nature of the condition, it has not been satisfied on the facts.

14. Justice Isaac held that a non-blood adoptee had no right of succession without the unanimous consent of the family. Critically, he thought that that consent might be given or withheld after the deceased's death. It followed that the appellants' opposition was alone fatal to the respondent's claim to a succession order. He accordingly declared that the persons entitled to succeed were the 15 siblings or heirs of siblings of the deceased. The Court of Appeal (Barker, Fisher and Paterson JJA) allowed the appeal. They accepted that maturation was a condition of the right of a non-blood adoptee to succeed, and that the adoptee must have been accepted by the family as one of them for the purpose of succession. But they differed from the judge because they considered that acceptance for that purpose had to be determined as at the time of the deceased's death and that it did not have to be unanimous. The question whether maturation had occurred called in their view for a value judgment in the light of all the facts, and the views of the adoptee's adoptive parents and siblings were of greater weight than those of more distant relatives. They found that the respondent satisfied that test.

Proof of custom

15. No evidence of custom was adduced before Justice Isaac. Instead, the parties relied on two main sources to support their submissions about the relevant customary law. The first comprised the decisions of the Land Court and of the Court of Appeal on appeal from that court. The second comprised what have been called in argument the "House of Ariki papers".

16. In English law, custom is a question of fact, whose existence depends on its historic acceptance as binding by the relevant group. This must be proved by evidence until it has become so notorious that judicial notice may be taken of it. It has been said that the same applied to proof of custom in jurisdictions subject to British colonial rule: see, for example, *Angu v Attah* [1916] UKPC 53. There are, however, practical and conceptual objections to this approach even in a colonial context, which apply *a fortiori* to the law of a sovereign territory such as the Cook Islands. 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.

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.

The case law

18. Although the Land Court had substantial business in the early years of its existence, its early decisions are unfortunately not consistently or adequately recorded. Where there is a record, it often consists of manuscript minutes noting the decision and

giving reasons in summary, not to say laconic terms. For practical purposes, therefore, the case law on the point presently before the Board begins in the middle of the 20th century.

19. First in time, although it is not a judicial decision, is a document entitled "Notes on Adoptions". This is an extract from a letter of Chief Judge H F Ayson to the resident Commissioner, dated 22 July 1940, which was inserted into Minute Book 22 of the Land Court, at p 319A, and was evidently consulted by judges of the court in cases involving adoption. Judge Ayson was an experienced judge who had sat in the Land Court from 1916 to 1937 and resided in Rarotonga throughout that time. He took an extremely restrictive view of the right of adoption and the succession rights of an adopted person. He stated that, where a child was lawfully adopted, there was usually assigned to the child an identified portion of land which he would in due course inherit. The judge went on:

> "According to custom in the Cook Islands (excluding Niue) an adopted child is not treated as a child born of the adopting parents - that is to say, that on investigation or succession such child does not come into all the lands of its adopting parents but only such lands as may be set aside for the adopted child at the time of adoption. … In the Cook Islands the custom is that the adopted child must be related by blood to the adopting parents, and if there is not a fairly close relationship the adopting order should be refused."

20. *Mataroa Iti* (17 November 1950) [Minute Book 306-308] was the first of a number of relevant decisions of Chief Judge Morgan, who held the office for some 20 years, having previously been the Registrar of the Land Court, and had an unrivalled knowledge of the records of the court. In *In re Vaine Nooroa o Taratangi Pauarii (No 2)* [1985] CKCA 1, 4, the Court of Appeal described him as

> "a Judge of very considerable experience and knowledge of the customs of the Cook Islands Maoris, especially in relation to succession to land. The authority of his statements on native custom are widely admired and accepted."

The issue in *Mataroa Iti* was whether the applicants' father Mataroa Iti, a non-blood adoptee of Mataroa Keu, had been entitled to succeed to certain lands belonging to the latter. Mataroa Keu had had no natural issue. It was contended that an adopted person could succeed to the land of his adoptive parents only if he was a blood relation. The judge must have rejected that contention, for he made a succession order in favour of

the applicants on the basis that the evidence showed that Mataroa Keu had intended Mataroa Iti to succeed to those lands.

21. In *In re Moeau (deceased)* (3 October 1957) evidence of custom regarding adoption was given which was broadly in line with Judge Ayson's notes. Chief Judge Morgan, sitting in the Native Appellate Court and delivering its judgment, observed that the court had no reason to believe that the principles stated in the notes were unsound, except that lands could be set aside for an adopted child not only at the time of the adoption but afterwards. But a non-blood adoptee for whom no lands had been set aside could still succeed to the deceased's land, with the consent of those who were close enough in blood to succeed in the absence of any adoption.

22. *In re Succession to Tuokura Maeva (deceased)* (29 May 1968), usually referred to as the first *Emma* decision, contains the fullest judicial account of the principles of customary law relating to the succession of adopted children. It was another decision of Chief Judge Morgan, this time sitting in the Land Court. The deceased, Tuokura Maeva, had no natural issue, and her nearest blood relations had no common ancestor with her within the past 150 years. She had legally adopted the mother of Emma Moetaua. Because Emma's mother was not related by blood to Tuokura, the court had endorsed the adoption order with a note to the effect that it was not to affect succession to Tuokura's lands. Emma's mother having died, Emma claimed to succeed. There was no objection from the family. The only objection came from the Ariki, who claimed that the lands should revert to her in right of her office, but that objection was disallowed by the judge. In those circumstances, the issue was whether there was an absolute bar to the succession to a person's lands by her non-blood adoptee. After observing that the customary law relating to the succession of adopted children had "always been somewhat confusing", the judge said:

> "The taking of a child under Native custom or the making of a court order of adoption are only the first steps in what might or might not lead to a final recognition by the foster parent and his near family of a complete adoption … Between the first steps and the final, complete, adoption there are degrees which govern succession to the foster parent's estate. An adopted child may return to its own parents, or it may live partly with its foster parents and partly with its natural parents. In such cases the adoption never becomes complete but, particularly in the second instance, the foster parent and his family may, and usually do, set aside certain lands to which the child may succeed, but the remaining lands go to the next of kin by blood."

The judge then turned to the question what steps would suffice to entitle a non-blood adoptee to succeed if no land had been set aside for her in this way:

> "Some references to court decisions are given in Minute Book 27, p 76 (and there are many others) and an examination of these will show that in some cases the court has accepted an order of adoption as sufficient grounds for granting succession in favour of an adopted child notwithstanding strong objection from the next of kin of the deceased … In other cases the court has held, and has had evidence to support its decision, that an adopted child, not related by blood to its foster parent, could receive no more than a life interest. These findings represent the two extremes of custom pertaining to succession by adopted children. The Appellate Court [in *In re Moeau*] recognised that an adopted child, having no blood relationship to its foster parent, might, nevertheless, receive more than a life interest in the lands of its foster parent ..."

Next, the judge considered the implication of the endorsement on the adoption order. He considered that although the practice of noting such conditions was common in the case of non-blood adoptions, it lacked any legal basis and could not affect a right of succession conferred by custom. He held that the adoption having subsequently become "complete", the annotation was of no effect. The judge's conclusion was as follows:

> "The court is aware that on numerous occasions direct evidence has been given to the effect that adopted children, not of the blood, can receive no more than a life interest in lands but upon examination of the lists of owners of many lands it is found that such adopted children or their descendants have frequently been entered as owners without restriction. The court did not do this of its own volition but accepted lists of owners submitted by the families or their conductors [representatives]. It is also true that adopted children, not of the blood, have held Ariki and other titles and that their descendants have continued to hold those titles and some of the family lands. In the circumstances, the court cannot accept, as a statement of the full custom, the bare claim that they can receive no more than a life interest.
>
> In the present case, the evidence clearly shows the wishes of the foster parent, there is no family … to consult, the adopted child has not been cast out and the objection by the Ariki has been disallowed. It is doubtful if the next of kin of [the deceased] are related closely enough to raise a valid objection to the applicant's claims but in any case they have not done so.
>
> Succession orders will therefore be made in favour of Emma Moetaua."

23. The Land Appellate Court dismissed the Ariki's appeal from Chief Judge Morgan's decision: Appeal 1970/215. The court adopted the judge's analysis. In particular, it endorsed his view that there was no legal basis for the practice of noting a condition as to succession on an adoption order, observing

> "Had there been competition for succession between close blood relations and the adopted child Emma, the words may have been given some weight, but there was no such competition. The judge when making the notes could not possibly have foreseen the circumstances which ultimately developed."

24. Since the *Emma* decision, it has been a common, although by no means invariable practice of the court to decide disputes by reference to these principles, without recourse to evidence of practice.

25. In *In re Estate of Tanu Raina* [1984] CKHC 5 the facts were that the deceased had no natural issue, but had legally adopted three children. Two of them were blood relations and the third, Mareta, was not. When the deceased died, a succession order in relation to part of the land was made without objection in favour of the three adoptees equally. But after Mareta died, the family of the two adoptees of the blood objected to her land passing to the family of Mareta. They asserted that Mareta could not have had more than a life interest. No evidence of custom appears to have been called. The decision turned on the effect of the custom as described by Chief Justice Morgan in the *Emma* case. The High Court treated that decision as authority for the proposition that a non-blood adoptee was entitled to succeed if the adoption was what Judge Morgan had called "complete" ("mature" in the terminology used in the present case). The judge found that Tanu Raina had treated all three of his adopted children as equally as members of his family, but that it was necessary "if I accept the principles of Maori custom enunciated by Chief Judge Morgan, to consider recognition not only by the adopting parent but also 'his near family'." He found that the near family, by which he meant the two blood adoptees, had recognised the rights of Mareta and that it was not therefore open to their descendants to dispute the rights of persons claiming through Mareta. He therefore made the succession order.

26. In *In re Vaine Nooroa O Taratangi Pauarii (No 2)* [1985] CKCA 1, the disputed lands had been granted to the deceased by one Mangavai. The deceased had adopted the applicant, who was not a blood relation. The deceased had moved to New Zealand with the applicant. Then, when the applicant was 14 years old, she had returned to the Cook Islands, leaving the applicant in New Zealand with his natural mother. The applicant's claim to succeed was opposed by the family of Mangavai on the ground that the adoption had not matured, so that the land should revert to them. That objection had been rejected in the High Court, but it was upheld by the Court of Appeal. Sir Thaddeus McCarthy, delivering the judgment of the court, said:

> "The retention of the use or control of land within the group is a central feature of Polynesian philosophy throughout the Pacific. Land is often scarce and it is always precious; it must be retained for those of the tribal blood and not eroded by allowing others of different descent to occupy it. Native custom is moulded by this inherited instinct and has made blood connection the primary consideration to Native land. So, though an order for adoption has in respect of succession to the estate of any Native in the Cook Islands 'the same operation and effect as that which is attributed by native custom to adoption by native custom' (section 465, Cook Islands Act 1915), and whereas native custom as a rule provides for a child to succeed to the land interest of both his natural parents, nevertheless that custom is somewhat changed when the rights of an adopted child to succeed to his adoptive parents are considered."

Having described Chief Judge Morgan's judgment in the *Emma* case as "widely admired and accepted", and referred to the decision of the Court of Appeal in *In re Moeau (deceased)*, he turned to the "need for the fact of recognition and acceptance by the near family of the adoptive parent to be established by proper evidence":

> "such recognition must be shown to have 'matured' to the stage where the right of the adoptive child to succeed to the interest claimed must be positively established by evidence and <u>especially</u> the evidence of those who would succeed to the land interest in question, if the adoption had not been undertaken …
>
> Though the need for an adoption to develop in the manner we have discussed before giving right of succession to native land was widely, if not universally, accepted, it does appear that what was seen as sufficient to meet the test could vary somewhat from time to time and locality to locality. Custom was never immutable in all its aspects."

Sir Thaddeus declined to accept that that maturation depended only on the attitude of the adoptive parents. It depended also on recognition by the near family. On the facts, he found that that condition had not been satisfied. He also endorsed the views of Chief Justice Morgan about the condition as to succession endorsed on the adoption order. It only served to emphasise the need for a non-blood adoptee or someone claiming through a non-blood adoptee to prove not just the fact of adoption but the necessary acceptance of the adoptee's status by the adoptive family.

27. *Teariki v Strickland* [2007] CKCA 18 was a decision of the Court of Appeal on an application to revoke a succession order made in favour of the heirs of Emma Moetaua in 1996, on the ground that because Emma was not of the blood, she had not been entitled to more than a life interest in her adoptive parents' lands. This would have involved overruling the decisions of the Land Court and the Court of Appeal in the first *Emma* case. The Court of Appeal held that the first Emma decision had been correct, and that on the material before them there was no basis in custom for confining the succession right of a non-blood adoptee to a life interest.

28. The result is that the following points of customary law may be regarded as settled, so far as the case law goes:

(1) The view of customary law on the succession rights of adopted children has stabilised around the account of Cook Islands custom by Chief Judge Morgan in the first *Emma* case. Subsequent disputes on the points covered by that decision have commonly been resolved by reference to it.

(2) There is no objection in principle to the succession of a non-blood adoptee to the lands of his adoptive parents.

(3) The mere fact of adoption, however, is not enough to confer succession rights on an adopted child who is not of the blood. Unless land has been lawfully set aside for the adopted child, the adoption must be "completed" or "matured".

(4) Restrictions on the right of succession endorsed on the adoption order of a non-blood adoptee are of no legal effect. They may be some evidence of the attitude of the adoptive parents to the adopted child, but they record only the position as at the time of the adoption.

(5) The "completion" or "maturation" of an adoption involves acceptance not only by the adoptive parents but also by the "near family" that the adopted child is to be treated in the same way as a natural child for the purposes of succession.

(6) For this purpose, the "near family" comprises those who would be entitled to succeed in the absence of the adoption. It is not disputed that this includes the deceased's nephews and nieces in the present case. The position of more distant family members is unclear from the material before the Board but does not fall to be decided on this appeal.

(7) If completion or maturation of the adoption of a non-blood adoptee is established, there is no wider category of persons whose consent is required or whose objections would be fatal for the adoptee's claims.

(8) The customs of particular islands or tribes may diverge from these principles, in which case evidence will be produced to prove the divergence.

29. That leaves two questions unanswered which bear on the present appeal. The first is whether any opposition to the succession of a non-blood adoptee from members of the near family is fatal to the claims of the adoptee. In other words, does the near family have to be unanimous? The second is whether opposition from near family members which is manifested after the death of the deceased is relevant. The Court of Appeal answered both of these questions in the adoptee's favour in the present case. The Board will return to them after considering the only other source for customary law before them, namely the House of Ariki papers.

The House of Ariki papers

30. The appellants' case rests mainly on the statements made in 1970 and 1977 by the House of Ariki and in 1977 by the Koutu-Nui as to the content of Cook Islands Maori custom, which they submit are legally conclusive. Before these statements are examined, it is necessary to say something about the bodies which produced them.

31. The House of Ariki was created by section 8 of the Constitution of the Cook Islands, adopted at independence. It comprised all the Arikis, or Paramount Chiefs, of the principal islands. The House of Ariki is primarily a consultative and advisory body. Section 9 of the Constitution, as amended, provides that its functions are to "consider such matters relative to the welfare of the people of the Cook Islands as may be submitted to it by Parliament for its consideration … and make recommendations thereon to Parliament"; and to perform such other functions as may be prescribed by law. Section 8(2) of the House of Ariki Act 1966 provides that the House of Ariki

> "may of its own motion make recommendations to the Legislative Assembly upon any question affecting the customs or traditions of the Cook Islands or any of them or of the inhabitants thereof provided that before considering any such motion the President of the House shall invite the Premier or any minister or person the Premier shall appoint to be present and take part in the proceedings …"

32. The Koutu-Nui is an assembly of the subordinate chiefs, namely the Kavana, Matapaio and Rangatira of the islands. It was established by section 2 of the House of Ariki Amendment Act 1972, which introduced a new Part II into the Act of 1966. By section 23(1) of the 1966 Act (as amended), its functions are to "discuss and make recommendations or resolutions on any matter relating to the customs and traditions of the Cook Islands." By section 23(2), these are to be conveyed to the House of Ariki, who may consider whether to make recommendations to the legislature.

33. Finally, it is necessary to refer to the Aronga Mana. Section 66A of the Constitution was introduced by amendment in 1995. The main purpose of this provision, which the Board has already quoted, is to provide for custom to apply, subject to any relevant legislation and to the other provisions of the Constitution. It also provides, at subsection (4):

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

The Constitution does not define an Aronga Mana. The minister introducing the amendment which inserted section 66A into the Constitution described it as a hereditary title derived from an ancestor who had shown distinction within his community, for example in war or in the arts. This is helpful so far as it goes but falls well short of a definition. At the time of the amendment, the only statutory definition was to be found in the Rarotonga Local Government Act 1988, which applied only to Rarotonga and provided for consultation with the Aronga Mana on (inter alia) land use. Section 2 provided:

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

The Environment Act 2003 later made similar provision in relation to the whole of the Cook Islands. Section 2 of this Act contains a definition in similar terms, but without the reference to the Koutu-Nui.

34. The uncertain identity of the Aronga Mana has given rise to difficulty in a number of cases decided in the courts of the Cook Islands: see *Hunt v De Miguel* (19 February 2016) [CA 2, 3, 7, 8/14], paras 10-11; *Framheim v Attorney General* [2017] CKHC 37, para 141. The Appellants submit that the Aronga Mana is synonymous with the combined membership of the House of Ariki and the Koutu-Nui. However, the Board has no material before it to support that suggestion, and notes that the statutory functions of the House of Ariki and the Koutu-Nui differ significantly from those of the Aronga Mana as described in the Constitution. The former are consultative and advisory assemblies, while the latter is the final authority on matters of custom. The Board is bound to observe that in circumstances where the Aronga Mana has important constitutional and legal functions, it is highly unsatisfactory that there should be no legislation identifying it, determining its composition, or declaring how its acts are to be recognised as such. Without such legislation, it is difficult for the courts to give effect to section 66A(4) of the Constitution. The matter does not, however, need to be resolved on this appeal because there is nothing which in the Board's opinion can be described as a definitive opinion from any of these bodies on the points of customary law at issue on this appeal.

35. In 1970 the House of Ariki approved a paper entitled "Maori Customs approved by the House of Ariki" and forwarded it to the Legislative Assembly with a recommendation that it should request the government to prepare legislation in accordance with its content. The paper contained a radical programme for reverting to the principles of Maori customary law which had prevailed before the land title legislation of the early 20th century. In particular, it considered that land should be treated as belonging to the Ariki and the tribe collectively, and that rights of user should be treated as belonging collectively to the family, defined as "all the children who have a common ancestor, together with the adopted children with blood relation, and all the descendants who have not entered other tribes." Part 5 of the paper dealt with adopted children. It read:

> "(1) An adopted child has no Legal Rights to the land and title of the family if he has no blood relationship to the ancestral land-owner, but he may be given occupation rights for his life-time only and will be directly responsible to the family. When he dies his family will be under the direction of either the Ariki or the Mataiapo.
>
> (2) a. Any person who may be admitted to any land as owner, must have blood right to the ancestral owner of the land.
>
> b. That if he is an adopted child, he must have blood connection with the ancestral owner of the land.

> c. That if he is an adopted child, who has no rights by blood to the ancestral owner of that land, his tenure of ownership is for his lifetime only.
>
> d. There is only one qualification to ownership of land under Maori Custom, that is, right of blood to the source of land, which is the ancestral land owner.
>
> e. The right of succession to any land is by blood to the ancestral landowner and not only to the person he succeeds. There is no registration of birth in the old Maori Custom with regard to adopted children instead, if a child is adopted, and is of blood relation to his adopted parent, then his right of ownership is equal to that of the natural children of his adoptive parents. But an adopted child with no blood relation has no right to the title or lands of his adopted parent.
>
> Under Maori Custom, an adopted child with blood relation to his adopted parents, cannot alter the blood right of a child from his family or their lands."

Accordingly, the paper recommended legislation to ensure that ownership and rights of occupation of land should be confined to close blood relations of the Ariki or the Mataiapo.

36. These recommendations were considered by a select committee of the Legislative Assembly in 1971. The Committee made the following recommendation to the Assembly concerning title to land:

> "That the Legislative Assembly agrees with the decision of the Ui Ariki of 1894 [ie the Declaration of that year] that the land belongs to the tribe but its use is with the family which occupies that land, that the course of time has changed this in that today that land belongs to families consisting of children who have common ancestors who are land owners in their own right, and that the matter be referred to Government for preparation of Legislation accordingly."

On adoption, the Committee offered only a qualified endorsement of the proposals of the House of Ariki:

> "Your Committee noted in considering Part 5 that there were two conflicting points of view emerging regarding adopted children. While the House of Ariki maintains that an adopted child with no blood right has no legal right in the land, the Court has indicated by its decisions that, blood connection aside, any registered child has the right to succeed to the interests in land of his or her adopting parent. Your Committee is concerned and sympathetic over the plight of the children with no blood right and to this end you Committee wishes to recommend
>
> > 'That the Legislature Assembly supports the recommendation of the House of Ariki that succession to family lands by adopted children be by blood right to ancestral land owners; and further recommends
> >
> > That the legal status of a child with no blood right to the adopting parents be also recognised for the purposes of succession into the defined individual land interests of his or her adopting parent or parents and that the matter be referred to Government for preparation of legislation.'"

37. In August 1977, the Koutu-Nui prepared a "Report on Lands and Traditional Titles of the Indigenous People of the Cook Islands". The report began by stating that its basis was the Declaration of 1894, and that the Koutu-Nui had considered the implications of that declaration, reviewing previous documents and court decisions on the relevant customs. No action having been taken on the report of 1970, it urged that it should now be implemented. The Koutu-Nui proposed to restore the principle of collective rights over land, subject to any variants applying in particular islands or places; to restore the power of the Ariki and the Mataiapo to determine the distribution, occupation and use of land by members of the tribe or clan; and to confine land ownership to blood relations of the head of the tribe or clan. Consistently with that approach, the Koutu-Nui made the following proposals about adoption:

> "**PART IV - CHILD ADOPTION**
>
> The Koutu-Nui … recognises that, while adoption according to the indigenous custom is based upon blood right, the adoption of a child without blood right is based upon a law born out of foreign customs and imposed upon and enforced in the Cook Islands. However, the Koutu-Nui recognises the two types of adoption but is bound to accept only the adoption according to the indigenous custom as the only adoption that carries with it the right to

succession to any traditional title and to rights of occupation and use of land.

While the Koutu-Nui gives paramount importance to adoption according to the indigenous custom, it is forced by law to accept also the adoption according to the law of the country. In respect of the latter case, the·Koutu-Nui proposes that the law be changed to allow the descendants of the common ancestor to decide what right the child adopted other than in accordance with the indigenous custom should have.

The Koutu-Nui makes the fol1owing further comments:-

(A) ADOPTION ACCORDING TO INDIGENOUS CUSTOMS

Any child adopted according to indigenous custom cannot be denied his/her right to succession, through both the maternal and the paternal lines to traditional land.

(B) ADOPTION NOT ACCORDING TO INDIGENOUS CUSTOMS

Any child not adopted in accordance with the indigenous custom may claim the right of succession to traditional land but subject only to the approval of the descendants of the common ancestor and upon such terms and conditions as the descendants of the common ancestor may impose."

38. The report of the Koutu-Nui was immediately considered by the House of Ariki, which prepared a further report of its own. Like the Koutu-Nui, the House of Ariki declared the basis of their view to be the Declaration of 1894, but recognised that this was couched in general terms which called for "clarification and re-defining". Under the heading "Adopted Children" they wrote:

"**5. ADOPTED CHILDREN (Tamariki Angai)**

There are two kinds of adopted children. Firstly the adopted children who have blood relationship with the adoptive parent - that is the true and rightful adoption under the Ancient Custom.

> Such an adopted child has rights of his own into the clan and the land of his adoptive parent because he and his adoptive parent have descended from the same Common Ancestor. Where they are related by blood, so also their right to the land and the clan.
>
> Secondly, the adoption of a child that has no blood right to the adoptive parent; children in this position are known as 'tamariki angai kere e pirianga toto'. Because he has no blood right to the adoptive parent, therefore he has no natural right into the clan and its lands; but he may occupy and use the land of that clan with the consent of the clan. There is only one reason why such an adopted child may be ejected off the land, and that is for being over-bearing over the land lord [ie the Ariki or Mataiapo].
>
> There is nothing under the Native Custom that severs the right of any child to his natural parent and his land."

The Report concluded by recommending that the Legislative Assembly codify Maori custom in accordance with their two reports, and that any laws which were repugnant to that custom should be "amended or revoked". The relevant provisions of the Cook Islands Act 1915 should be reviewed and amended as necessary. Recommendations 6 and 7 were as follows:

> "6. As both the House of Arikis and the Koutu-Nui declare that the only qualification to land ownership is blood right to the source of the land which is the Common Ancestor or the Ancestral landowner, it is recommended that any person who may succeed to land must trace himself not only to the person he is succeeding to but also to the common ancestral land owner.
>
> 7. That the land matter be looked at from two aspects:-
>
> (a) Ownership - the qualification is 'blood right' to the Ancestral Land owner
>
> (b) Occupation - the qualification is 'long use of the land'."

39. No action was taken on this report until 1996, when a Commission of Inquiry was appointed to examine the question. The Commission made more limited recommendations than the House of Ariki. But no legislation has been enacted.

40. The main point to be made about these papers is that the reports of the House of Ariki were expressed to be an exercise of its advisory function under section 8 of the House of Ariki Act 1966; while the report of the Koutu-Nui was expressed to be an exercise of the power conferred on the Koutu-Nui by section 2 of the House of Ariki Amendment Act 1972 to "discuss and make recommendations or resolutions" to the House of Ariki. None of the reports claimed to be an opinion of an Aronga Mana, or to be an immediately binding ruling such as an Aronga Mana might have given under section 66A of the Constitution. They were all proposals for law reform, which in the event have not been acted on. It follows that the accounts of Maori customary law which they contain are not binding on a court. They are, at best, strong evidence of custom from an authoritative source. On some points the courts have treated them as such: see *Rake Aituoterangi Tamati Kainuku v Mata Nia* (29 November 1991) [CA 1/91] (custom regarding the election of an Ariki); and *Short v Whittaker* [2003] CKCA 7 (adopted child's right to succeed to the lands of his natural parents). However, as the decisions in *In re Estate of Tanu Raina* [1984] CKHC 5, *In re Vaine Nooroa o Taratangi Pauarii (No 2)* [1985] CKCA 1 and *Teariki v Strickland* [2007] CKCA 18 show, the courts have continued to treat Chief Judge Morgan's judgment in *Emma* as an authoritative statement of the custom regarding the right of a non-blood adoptee to succeed to its adoptive parents' lands. In the Board's opinion, this approach to the succession rights of non-blood adoptees is justified.

41. In the first place, the statements of the House of Ariki and the Koutu-Nui about customary law are in terms a programme for reverting to custom as it was conceived to have been in 1894. But custom, as the Board has pointed out, is not immutable, and is necessarily affected by the century and more of legislation and the case law since the islands were annexed to New Zealand in 1901. Assuming that the statements in the reports about the position in 1894 are correct and complete, and some of them may well be controversial, the reports implicitly recognise that since that date the principles actually applied have in certain respects been modified by the legislature and in others by the decisions of the courts. Adoption by native custom has been replaced by statutory adoption, which is not limited to blood relations. The decisions of the courts have consistently recognised the right of a non-blood adoptee to succeed if the child has been accepted by the family as one of them for the purposes of succession. A custom is a practice consistently followed in a particular community on the footing that it is binding. The custom regarding the rights of a non-blood adoptee which the House of Ariki and the Koutu-Nui wishes to restore has not for many years been treated as binding. Adoption and succession orders have been made on the basis of the custom as the courts have understood it to be, and presumably many of them have been left uncontested on the same basis. In those circumstances it is difficult to regard the custom in 1894, as stated by the House of Ariki and the Koutu-Nui, as remaining unaltered today. Absent an opinion of the Aronga Mana, the former custom would have to be restored by

legislation, which is what the House of Ariki and the Koutu-Nui proposed, but without success.

42. Secondly, the former custom regarding the rights of non-blood adoptees which the reports propose should be enacted as law is intrinsically bound up with other principles of land law which prevailed in 1894. In particular, it is bound up with the general principle of ownership of land by the Ariki and the Mataiapo for the collective benefit of the tribe, and with the extensive powers which these title-holders enjoyed over land use. These aspects of land tenure were deliberately changed by statute in 1915. Moreover, the proposed requirement of consent by the clan, meaning the descendants of a common ancestor, would pose significant practical difficulties in a society which in modern times has been characterised by high levels of emigration, unless measures were also taken to determine how that consent is to be expressed and what rights of participation are enjoyed by non-resident members of the clan. These are just some of the problems arising from the interconnected nature of rules of customary law, their sensitivity to current social conventions and the extensive social and political implications of reverting to an older system of values. They make it inappropriate for a court of law to give effect to the reports of the House of Ariki and the Koutu-Nui judicially. They are, in the nature of things, matters for the legislature.

Customary law: conclusion

43. The Board concludes that a non-blood adoptee is entitled to succeed to the lands of his or her adoptive parents if the adoption is complete or "mature", ie if the adoptive parents and the near family (ie those who would be entitled to succeed in the absence of the adoption) have accepted the adoptee as part of the family for the purpose of succession in the same way as if he had been the natural child of his adoptive parents. This appears to them to be the basic rule, subject to any variants which may be proved for particular islands or tribes. It remains to consider (i) as at what point of time that acceptance must have occurred, and (ii) whether the consent of the relevant family members must be unanimous. Neither of these points is directly answered by the existing case law, or indeed by the House of Ariki papers, and no other evidence has been produced. In those circumstances, the Board approaches these questions by applying what appears to be the logic of the basic rule.

44. On the first point, the Board considers that the Court of Appeal was right to hold that the relevant acceptance must have occurred by the time of the deceased's death, and that if this is demonstrated, then subsequent objections, for example in the course of succession proceedings, cannot alter the position. In the first place, section 447 of the Cook Islands Act 1915 (cited above) provides that upon the death of a Native his interest in lands is not to pass to administrators but directly to the person or persons entitled to succeed. It follows that the succession rights of the persons entitled to succeed must be capable of ascertainment at that point. Objections made thereafter, like

consent given thereafter, may bear on the question whether in the deceased's lifetime the adoptee was in fact accepted as part of the family for the purposes of succession, but they have no wider significance. Secondly, the process of completion or "maturation" of an adoption is not like a poll or a veto at a general meeting. It depends on whether the adoptee has acquired the relevant status consensually, something which will normally depend on the way that he was treated over a substantial period of time before the death of the deceased and not on any express decision, let alone one made after the deceased's death. Thirdly, while the wishes of the adoptive parents are certainly not conclusive, they are plainly relevant and important. A test which made them immaterial, because it depended on attitudes formed after their death, cannot in the Board's view be correct.

45. These considerations (apart from the first) are also relevant to the question whether unanimity among the relevant family members is required. If completion or maturation of an adoption depends on the way that the adoptee was treated over a period of time before the deceased's death, the Court of Appeal must be right is saying that it "involves a value judgment to be exercised in the light of all the facts leading up to the deceased's death". The attitude of a family member to the adoptee may be more or less significant, depending on how closely he or she is related to the adoptive parents, how closely he or she has been involved in the life of the family, how influential his or her views are on the rest of the family, and how strongly they are expressed. Other factors may also be relevant. In those circumstances, a single veto or even a numerical majority is no more than part of the factual material to be considered and accorded greater or lesser weight according to the circumstances. It will not necessarily be conclusive.

Was the respondent's adoption complete or mature?

46. The Board is satisfied that it was, for substantially the same reasons as those given by the Court of Appeal. The main points are as follows:

> (1) Kurai Browne's statement in 1964 at the time of the adoption order, when the respondent was 16, strongly suggests that at that time he had not yet been accepted as having the same rights of succession as a natural child.
>
> (2) Thereafter, he lived with them until he married in 1982 at the age of 34, except for a period when he went to New Zealand to train as a policeman. He took the family name of his adoptive parents. He participated in family events, such as weddings, at one of which he was among the groomsmen.
>
> (3) In 1973, he asked his adoptive father for a plot of land on the beach at Turamatuti on which to build a house. His father called a family meeting, which supported the grant without objection. A consent document was drawn up in the

name of 15 family members, including the deceased's brother Mani (the father of one of the appellants) and his sister Upokotokoa (the mother of the other appellant). All of them signed except for the deceased's half-sister Te Paeru, whose signature space was left blank. On 23 October 1973, the Land Court without objection granted a right of occupation to the respondent and his direct dependents for 20 years "and thereafter for so long as [the respondent] and his direct descendants or any of them shall occupy." Mani Browne appeared in court to support the application. Its effect, under section 50 of the Cook Islands Amendment Act 1946 was that the respondent was "deemed to be the owner of the land under Native custom".

(4) From 1980, the respondent, at the request of his adoptive father, represented him at landowners' meetings, without objection from any one. He spoke at these meeting and signed papers on his adoptive father's behalf.

(5) Subsequently, in 1981, the occupation right was converted to a lease with the support of the family. When the respondent married in 1982, he built a house on the plot on Turamatuti beach, in which he and his wife lived.

(6) In 1991, the respondent and his wife moved to a plot of land at Nikao, a co-owned family property on which his father had an occupation right and on which the respondent built another house. The family consented to this transaction, and to the subsequent conversion of the occupation right into a lease.

(7) As the deceased grew older, the respondent paid his share of contributions to the renovation costs of their church, legal fees, Ariki day celebrations and other community matters.

(8) Eight representatives of various lines of the Browne family swore an affidavit in support of the respondent's application for a succession order. Only the lines represented by the two appellants opposed it.

The procedural point

47. Rule 332(3)(a) of the Code of Civil Procedure provides that upon an application (including an application for a succession order) being set down for hearing, the Registrar is to give public notice not later than 14 days before the date fixed for the hearing by a notice in specified newspapers and by radio broadcast on at least three separate days. This requirement was observed. There is no requirement for service of documents on interested parties. The appellants say that the respondent should nevertheless have taken steps to serve them. In the Board's opinion this objection is

without merit. The respondent cannot be required to take steps to initiate the proceedings which are not required by the Rules, when the Rules make provision for notifying applications by advertisement. In any event, the appellants learned of the application and were heard in opposition to it.

Disposal

48. Before parting with this appeal, the Board would wish to express their indebtedness to Counsel who appeared before them, drawn from the New Zealand, Cook Islands and English bars, for their considerable assistance. The Board is especially grateful to those on both sides who appeared pro bono.

49. The Board will humbly advise Her Majesty that this appeal should be dismissed.