IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION) **APPLICATION NO. 10/2016**

IN THE MATTER	of Section 390A of the Cook Islands Act 1915 (NZ)
AND IN THE MATTER	of the lands known as **KAINGAVAI 49C2, TAKITUMU; TE VAIMAPIA[1] 19, TAKITUMU; KURUTOKI 10H2, NGATANGIIA; NURIKI 11B, NGATANGIIA**
AND IN THE MATTER	of an application relating to the Succession Orders to MANUANGA of 23 October 1933 and of 26 November 1984 and to rehear the Succession Orders to TEKURA made on 11 September 1954
BETWEEN	**LYNNSAY RONGOKEA FRANCIS** of Rarotonga, self employed Applicant
AND	**SIMON SNOWBALL, TAERO TEOE CRUMMER, TEIRONUI TEOE CRUMMER, PERIRA TEOE CRUMMER, TEOE JUNIOR TEOE CRUMMER, NGAPOKO TEOE CRUMMER, MARIA TEOE CRUMMER; URAIATA TEOE CRUMMER, TEREMOANA TEOE CRUMMER; TEREAPII TEOE CRUMMER & EMILY TEOE CRUMMER** Respondents

Date of Application: 13 October 2016

Counsel: Mrs T Browne for Applicant
Mr T Moore as agent for Respondents Simon Snowball & Teremoana Teoe Crummer @ Theresa Samuels
Mrs T Carr for Respondents Maria Teoe Crummer and Tereapii Teoe Crummer and Objector E Short
No appearance for remaining respondents

Date of Land Division Report: 30 October 2020 (NZT)

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[1] Vaimapi? as per the Register: 390A 1/20: *Kainuku v Nicholls (Minute (No.11)* et v Coxhead J at [12] cited at [23].

Date of Judgment: 19 April 2021

JUDGMENT OF HUGH WILLIAMS, CJ

[0081.dss]

[1]: For the reasons appearing in this judgment and the Report of Coxhead, J dated 30 October 2020 (NZT) the application is dismissed.

[2]: Costs are to be dealt with in accordance with paragraph [63].

[3]: Those appearing are to file submissions in accordance with the timetable in [63] as to the issues outlined in [6], including whether they can be dealt with as part of this application.

Application and procedural

[1] By application under s 390A of the Cook Islands Act 1915 (NZ) filed on 13 October 2016 Ms Francis, the applicant, sought orders cancelling succession orders in relation to the lands listed in the intituling made to "Manuanga" on 23 October 1933 and 26 November 1984 and "remedying by revocation" a succession order to the same lands made to Tekura on 11 September 1954. The grounds were that the genealogy provided by Tueki in relation to those orders was wrong in that it omitted to include "Manuaanga" as the other child of Tekura and omitted the adopted daughter of "Manuanga Tapaeru alias Tapaeru a Tau and that under Maori custom Tapaeru a Tau was entitled to succeed to Tekura and Manuanga".

[2] At that stage the application was supported by two affidavits by Ms Francis sworn on 7 and 13 October 2016 and submissions by her counsel, Mrs Browne, dated 14 March 2017, and opposed by submissions by Mr Moore, agent for those listed in the intituling, dated 24 November 2016

[3] On 27 March 2018, the application was referred to the Land Division of the Court[2] but with the direction that the hearing before the Land Division not be convened until the

[2] Minute (No.1), at [13].

decision of the Privy Council in the possibly-relevant appeal in *Browne v. Munokoa*[3] was delivered. That referral was confirmed by Minute (No.2)[4] and the inquiry was undertaken by Coxhead J[5] who, by report to the Chief Justice of 30 October 2020 (NZT), recommended the application be dismissed for the reasons set out in the report.

[4] Up until approximately two years ago practice varied concerning reports by the Land Division to the Chief Justice following referral and inquiry under s 390A in that it was not invariable for copies of such reports to be furnished to parties and counsel at that point either by the Land Division Judge or by the Chief Justice. But it has now become the practice that Land Division Judges report to the Chief Justice, with the default position being that Chief Justices will refer copies of the report to the parties and counsel for comment, not as an opportunity to re-run arguments which were raised in the Land Division hearing and failed to find support in the Judge's report, but to give the parties an opportunity to raise matters which in their submission might disclose a patent error or vitiate the Land Division findings and thus the recommendation.

[5] That practice was followed in this case with the report being distributed to the parties and counsel on 5 November 2020[6]. It resulted in full submissions being filed by Mrs Browne[7] and Mrs Carr, counsel for two of the respondents, Maria Teoe Crummer and Tereapii Teoe Crummer, and the objector, Mr Short.[8]

[6] To round off that narrative, there were also memoranda filed by Mr Moore[9]. To the extent they are relevant to this Judgment, their contents have been taken into account in what follows. It is particularly noted that Mr Moore's memorandum of 14 September 2020 advised that Savage J's October 2020 panui included an application for a combined partition of Kaingavai 49C2 and Te Vaimapia 19 which had been on foot since 2016 and said there were two "suspended" matters before the court in respect of Kaingavai 49C2, namely applications to confirm Meetings of Assembled Owners in respect of commercial leases to be granted to the Cook Islands Trading Corporation Limited and Cook Islands

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3 [2018] UKPC 18, 16 July 2018.
4 11 September 2018.
5 On 16 and 18 July 2019.
6 Minute (No.3).
7 18 December 2020.
8 9 February 2021, with Mr Moore saying, on 10 February 2021, that his clients adopted Mrs Carr's submissions.
9 5 March 2018, 18 May 2018, 14 September 2020, 23 December 2020 and 10 February 2021.

Noni Marketing Limited. He said the consideration for the two leases totalled $560,000 with owners in the land leased to the Cook Islands Trading Corporation expected to receive $30,000 annually. He advised that on 9 October 2019 Savage J confirmed the resolutions of the MOAOs, but the confirmations are held in Court pending conclusion of this application. He said a third confirmation on the same day in respect of the same land allowed a 50% payment to the owners but reserved a $175,000 balance. He submitted that $735,000, which is to be paid to the owners of Kaingavai 49C, should no longer be withheld from them.

Approach to Section 390A applications

[7] As noted, the application is brought under 390A which relevantly reads:

> **390A Amendment of orders after title ascertained**
>
> (1) Where through any mistake, error, or omission whether of fact or of law however arising, and whether of the party applying to amend or not, the Land [Division] or the Land Appellate Court[10] by its order has in effect done or left undone something which it did not actually intend to do or leave undone, or something which it would not but for that mistake, error, or omission have done or left undone, or where the Land [Division] or the Land Appellate Court has decided any point of law erroneously, the Chief [Justice] may, upon the application in writing of any person alleging that he is affected by the mistake, error, omission, or erroneous decision in point of law, make such order in the matter for the purpose of remedying the same or the effect of the same respectively as the nature of the case may require; and for any such purpose may, if he deems it necessary or expedient, amend, vary, or cancel any order made by the Land [Division] or the Land Appellate Court, or revoke any decision or intended decision of either of those Courts.
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> (2) Any order made by the Chief [Justice] upon any such proceedings amending, varying, or cancelling any prior order shall be subject to appeal in the same manner as any final order of the Land [Division] but there shall be no appeal against the refusal to make any such order.
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> (3) The Chief [Justice] may refer any such application to the Land [Division] for inquiry and report, and he may act upon that report or otherwise deal with the application without holding formal sittings or hearing the parties in open Court.
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> …

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

> (8) This section shall extend and apply (with the exception hereinafter mentioned) to orders, whether made before or after the commencement of this section, save that in all cases where an order is dated more than 5 years previously to the receipt of the application under this section the Chief [Justice] shall first obtain the consent of the [Queen's Representative] before making any order hereunder. The Chief [Justice] shall nevertheless have full power without that consent to dismiss any such application or to refer it to the Land [Division] for inquiry and report.
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> …
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> (10) This section shall not apply to any order made upon investigation of title or partition save with regard to the relative interests defined thereunder, but the provisions of this subsection shall not prevent the making of any necessary consequential amendments with regard to partition orders.

[8] The jurisdiction created by s 390A can be problematic, procedurally and substantively, but, in an effort to codify and clarify the operation of the section a paper was prepared[11] which contained the following passages:

> [4] The jurisdiction conferred by s 390A is an important one. It is similar to that conferred on the Chief Judge of the Maori Land Court in New Zealand by s 45 Te Ture Whenua Maori Act 1993 (NZ) in relation to which the singularity of the jurisdictions is emphasised in the following passage:
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> > It is important to note that the jurisdiction provided to the Chief Justice in the Cook Islands by s 390A Cook Islands Act 1915 and that provided to the Chief Justice of the Maori Land Court in New Zealand by s 45 Te Ture Whenua Maori Act 1993 are not provided to the general Courts. In fact they are unique to these two jurisdictions.
> >
> > Unlike the general courts there is no time limit to question an order of the Court and at times the Chief Justice is required to cancel vary or amend an order of many years' standing.
> >
> > The reasoning behind these provisions is simply that both the Land Division of the Cook Islands Court and the Maori Land Court of New Zealand are titles courts. They are Courts that establish who are the rightful title owners and the interests of those persons in the land. The s 390A jurisdiction enables the Chief Justice to ensure the integrity of title to land in the Cook Islands exists and can be relied on by the present owners and their successors.
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> [5] The wide-ranging and largely unlimited nature of the s 390A jurisdiction has been recognized by the Court of Appeal in the following passage[12]:

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

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

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

[7] Though the passage conflates the three main steps required by s 390A in deciding whether to make orders under the section, – (a) refers to the initial consideration, (b) to the second and (c) to the third[13] – the approach adopted by Chief Justices to applications over the years under s 390A has been [14]:

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

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

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

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

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

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

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

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

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

avoid possible intrusion on persons' property rights – or claimed rights – this is an unusual result at this stage.

(b) If the Applicant is able to establish a prima facie case, and the Chief Justice is satisfied with the explanation as to the delay in filing the application, the Chief Justice normally refers the application to a Justice of the Land Division for inquiry and report pursuant to 390A(3). On such references [full] hearings are often held "involving new evidence, additional argument and another considered appraisal of all aspects of the case"[15].

(c) Thereafter, on considering the report, the Chief Justice decides whether to adopt the report and recommendation of the Land Division or what other order may be appropriate.

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

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

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

> power to amend orders should only be exercised in exceptional circumstances as:
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> > These principles … make it clear that the general intent of the legislation is that orders of the Court should be binding and conclusive on all parties and that the applications to the Chief Justice are made only in exceptional circumstances where the applicant can show a clear mistake or error in the original order which the Chief Justice deems necessary or expedient to remedy[16].
>
> Also, s 390A(8) requires the consent of the Queen's Representative before making an order when the application has been filed over five years after the making of the order complained of. This reinforces the need for certainty and the conclusive nature of orders, especially those affecting title[17].

[9] That approach has since been glossed in the following two passages[18].

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

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

[11] In summary:

> [12] For the reasons set out above, applicants face considerable barriers to the success of applications under s 390A given the onus of proof and the applicable presumptions discussed in the authorities. To those hurdles … must be added the

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

17 Et v fn [16].

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

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

Evidence and submissions

[12] As noted, the application was based on a claimed error in the genealogy provided by Tueki in the two respects earlier cited together with the allegation that under Maori custom Tepaeru A Tau was entitled to succeed to Tekura and Manuanga. The applicant's supporting affidavit[19] explained her contentions in the following way:

> 2. My late mothers name is Mary Rongokea (nee Samuela). Her mother was Tapaeru @ Tapaeru a Tau from Ngati Maoate and her father was Metua Samuela from Ngati Te Akareva. My mother is one of the five children of Tapaeru from her second marriage to Metua.
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> …
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> 5. During my research into my family history I discovered that my grandmother TAPAERU A TAU @ TAPAERU was adopted and registered (No.66) in 1909 by MANUANGA.
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> 6. MANUANGA'S biological father was TUAUA @ TUAWA his biological mother was TE KURA. He was not raised by his birth parents. He was adopted by TAPAERU's aunt VAI who was married to TAMAIVA (MB 27/171) the brother of TEKURA.

[19] Sworn 7 October 2016.

7. On 27 January 1917 (MB 8/236 & 248) MANUANGA succeeded to his father TUAUA's vested interests in one of his lands KURUTOKI 10H, in Ngatangiia.

8. On 26 November 1984 (RB 3/333) in the land known as KURUTOKI 10H, MANUANGA was succeeded to by URAIATA TAERO f.a. solely. On the genealogy attached to her application she has included MANUANGA as being the son of TE KURA from her 1st marriage to TUAUA and in addition she has included the names of Manuanga's children but has omitted his adopted daughter TAPAERU. URAIATA TAERO is from Te Kura's 2nd marriage and therefore is not entitled to succeed to the interests of Manuanga in his father's land.

9. MANUANGA was married to Ngapoko Te Ura and they had two daughters Vai and Ngapoko who died without issue. Manuanga adopted Tapaeru in 1909 when he had no children of his own.

10. I am filing this application because I discovered that MANUANGA was an owner in KAINGAVAI SECTION 49C2 and his interests were partitioned into KAINGAVAI 49C2A. …

11. On the 19 November 1913 (MB 7/193) a Partition Order was made KAINGAVAI 49C vesting the land in the following persons:

1. Tamaiva Anatai	m.a.	brother of No.2 and 3
2. Te Kura	f.a.	sister of No.1 and 3. Mother of No.6 and 7
3. Teavae	m.a.	brother of No.1 and 2
4. Moate	m.	grandfather of Tapaeru a Tau (Mataiapo)
5. Tamati	m.	related to 1, 2 & 3
6. Manuanga	m.	son of No.2 from 1st marriage and brother of 7
7. Tueki	m.	son of No.2 from 2nd marriage and brother of 6

12. The genealogical relationship of the owners are as follows: No.1 Tamaiva Anatai @ Tamaiva is the brother of No.2 Te Kura, is the mother of No.6 Manuanga and No.7 Tueki. No.3 Teavae, is the brother of No.1 and No.2, No.6 Manuanga and No.7 Tueke are half-brothers. (MB 10/388, MB 12/369 and MB 24/40-1). Owner No.4 Maoate is the grandfather of Tapaeru a Tau.

13. On 23 October 1933, owner No.7 Tueki, appeared in Court for succession to his half-brother owner No.6 Manuanga (dcd) in Kaingavai 49C2 he told the court, Tueki (sworn) "all his children died without issue." (MB 388/389).

…

15. The succession order made in 1933 to Tekura should be revoked because the person Tueki m.a. is not the only person entitled to succeed to the

> interests of TE KURA F.a. The person Te Kura f.a. named in the title had two issue: MANUANGA from her 1st marriage to Tuaua and TUEKI from her 2nd marriage to Mitaera.
>
> 16. The succession order made in 1933 should be revoked because Manuaanga m.a. had not died without issue, contrary to the assumption made in 1933. He had adopted a daughter Tapaeru @ Tapaeru a Tau and she has issue. The adoption was registered in 1909 (Reg.No.66). Tapaeru was the daughter of Terii and Tau Maoate of Ngatangiia. Tapaeru and her descendant would be the persons entitled to succeed to the interests of Manuaanga.
>
> …
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> 21. I submit that when the earlier succession orders made to MANUANGA were made in error or due to an error or omission of fact as the information provided to the Court at that time did not include the evidence that MANUANGA had an adopted daughter.

[13] Mr Moore's submissions,[20] noted the application challenged the various orders on the basis that Ms Francis' grandmother, Tepaeru A Tau, was the adopted child of Manuanga and therefore had the absolute right to succeed to Manuanga's interests but submitted the adopted child of Manuanga, Tepaeru A Tau, was not an adoptee of the blood and that the respondents are the next of kin by blood of Manuanga in Kaingavai 49C2, Te Vaimapia 19 (and Ngatekoro 11) as those lands derive from Tekura the wife of Tuaua and the parents of Manuanga as adoptive father and Tueki great-grandfather of the respondents.

[14] That was challenged by Mrs Browne who said Tepaeru A Tau was legally adopted by Manuanga and the evidence at the time made no reference to an adopted child so the Court had no opportunity to consider the custom applying to succession by an adopted child to a foster parent, a submission on which she expanded in her submissions[21].

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20 24 November 2016, at 2-4, 12 and 13.
21 14 March 2017, at 6, 10-24.

[15] The differences evinced in those contrasting submissions were pursued when Ms Francis was cross-examined by Mrs Carr at the s 390A hearing. Asked whether an entry in a 1976 papaanga concerning Aremango 13E – not in contention in this matter – that Tepaeru, as mentioned in the application and referred to as Tepaeru A Tau[22], actually had a biological father of Tepaau, Ms Francis said the papaanga was correct but Tepaau was not Tepaeru's biological father[23].

[16] Though the issue was clouded by Ms Francis having made two affidavits which were not always mutually consistent, she was asked about Minute Book evidence from 1921. She agreed that evidence confirmed the Tepaeru A Tau there mentioned was her grandmother and succeeded to a person called Tau in two parcels of land not relevant to this application. She then said her grandmother was at the hearing when a papaanga was given by Iro that a person called Manuanga had two wives, the first being Tepaeru and that the papaanga also showed two people called Tau alias Manuanga and Vai[24] with Manuanga having a second wife called Tearuru, but disagreed that the person called Tau was the child of Manuanga saying:

> "Tau had a sister called Vai. Vai had no issue but adopted Tau, and that Tau is also known as Tau Manuanga and that person adopted Tepaeru A Tau [who is] the Tepaeru A Tau that's named on the adoption register number 66 and her mother's name is Tereii. So in this minute book she is applying to succeed to Tau who is her natural father."[25]

[17] She continued that:

> "… in 1921 Tepaeru A Tau succeeded to Tau. In 1941 she succeeded to Vai. And the minute book reference to that where Tau had a sister Vai and she adopted Manuanga who also had a daughter Vai, relates to that genealogy is in MB 14/239.[26]"

[18] Mrs Carr put it to Ms Francis that "there's two Tau's being talked about here" and continued "there's Tau the child of Manuanga [who] died about six years ago refers to Tau alias Manuanga. And then there's a second Tau, so he also adopted a son who died

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22 Spelled "Atau" in the transcript.
23 Transcript, 6-7.
24 Transcript, 11.
25 Transcript, 12.
26 Transcript, 13.

in Samoa long time ago … and then the Tepaeru A Tau comes off that person", an assertion Ms Francis apparently accepted[27].

[19] Asked whether, when her grandmother gave evidence and said "I was a baby then and 20 now," that she was referring to Tau the adopted son, not Tau the real son who had died a long time ago, Ms Francis said:

> "I said that she was succeeding to her natural father and that Vai had adopted a young male called Manuanga who adopted Tepaeru A Tau. And the reason that I believe that that is the person is because the adoption certificate shows that Vai adopted a person called Manuanga whose mother was Tekura and in 1941 Tepaeru succeeds to the interest of Vai. So that's my connection to why I believe that that is the Manuanga."[28]

[20] Ms Francis said that when Tepaeru gave evidence that "I was adopted by Tau Metua alias Manuanga" she was referring to the Manuanga who was adopted by Vai" because

> "the minute book references given by Tamaiva, Iro's brother, when she succeeds to Vai, he said Tau had a sister called Vai who adopted a man called Manuanga who had a daughter called Vai. And my grandmother has succeeded to the interests of Vai."[29]

something she continued to assert in the following passage:

> Mrs Carr: "I'm just dealing strictly with the evidence here because I think this is critical and explains why there are two Manuanga. The one that you say is Tekura and Tuaua's child and who you say was adopted by Vai, or the Manuanga in this minute book that deals with people called Manuanga who had a son called Tau alias Manuanga and the parents are not the same. There's two different Manuanga's we're dealing with, would you accept that?
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> Ms Francis: Yes, but the people who, the person who said Tau had a sister called Vai who adopted a son called Manuanga, whose mother is Tekura, was also in the land at that time. And my grandmother succeeded to the interests of Vai."[30]

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27 Transcript, 13.
28 Transcript, 14.
29 Transcript, 15.
30 Transcript, 16.

[21] That led to Mrs Carr suggesting Ms Francis was saying that "Vai actually adopted her brother in a sense because that's who Tepaeru says adopted her as her brother, Tau alias Manuanga"[31] and to the following exchange: "this Manuanga who is the son of Tuaua and Tekura is the one who adopted [Ms Francis'] grandmother who was 38 years old when he died, and so in 1909 would have been 19". That gave rise to the question that "he was a 19 year old boy, you say, adopting a 5 year old," to which Ms Francis argued that "during that period young men got married around about 16 to 19 years old so it wouldn't have been unusual[32]" for a 19 year old to adopt a 5 year old "because she was raised by her by, by Vai"[33] and the 19 year old was 24 when he adopted Ms Francis' grandmother[34].

[22] Ms Francis' cross-examination had been foreshadowed in Mr Moore's submissions[35] where he said:

> "the lands intituled in this application come from Manuanga. Ms Francis, it is submitted, has mistaken the identity of the person that she claims adopted her grandmother named Tepaeru. Ms Francis' Manuanga is not the Manuanga from which the respondents inherited the lands.
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> Clearly there are two different persons with the same name 'Manuanga' and Ms Francis has confused the two persons and is now attempting to succeed to the Manuanga who owned the lands when in fact the real adopting parent had already been named by her grandmother in 1921 as Tau Metua alias Manuanga. This Manuanga is unrelated to the Manuanga who owned the lands.
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> The Manuanga who owned the lands is not the Manuanga claimed by Ms Francis as being the one who adopted her grandmother Tepaeru. There was in fact no adoption involving the Manuanga who owned the lands."

assertions which were challenged by Mrs Browne who, for the reasons she set out, said "there is no mistake as to the identity of Manuanga"[36].

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31 Transcript, 17.
32 Transcript 19.
33 Transcript, 18-19.
34 Transcript, 20.
35 18 May 2018, at 6, 13 and 14.
36 27 August 2018.

Coxhead J's Report

[23] After recounting the application and procedural history of this matter the Judge summarised the applicant's case in the following way[37]:

> [10] The applicant claims that the succession orders in respect of Manuaanga dated 23 October 1933 and 26 November 1984, along with the succession order to Manuaanga's mother, Te Kura, dated 24 March 1958, were all made in error as they did not include Tepaeru a Tau as an adopted child of Manuaanga.
>
> [11] In particular, the applicant claims:
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> (a) The genealogy provided by Tueki on succession to Manuaanga on 23 October 1933 at MB 10/388-389 was wrong. While it noted Manuaanga as a son of Tekura and Tuaua, it recorded that all his children died without issue. It omitted to include the adopted child of Manuaanga, Tepaeru a Tau.
>
> (b) The genealogy provided by Uraiata in 1984 on succession to Manuaanga, resulting in the order at RB 3/333, was wrong. While she included Manuaanga as a son of Te Kura and Tuaua and referred to two children who died without issue, she failed to include the adopted child, Tepaeru a Tau.
>
> (c) The genealogy provided by Te Kura Mare Amoa on succession to Te Kura on 24 March 1958 at MB 24/40 was wrong. She relied on the incorrect genealogy given by Tueki at MB 10/388, which failed to include Tepaeru a Tau.
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> [12] The application states that it concerns the lands Kaingavai 49C2 and Te Vaimapia 19 in the Takitumu district and Kurutoki 10H2 and Nuriki 11B in the Ngatangiia district. However, I note that both Te Vaimapia 19 and Nuriki 11B are not mentioned in any of the orders the applicant seeks to cancel. Further, the land Ngatekaio Sec 11, Ngatangiia has not been included in the application, even though it is the subject of the succession to Te Kura in the 1958 order.
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> [13] Counsel for the applicant submitted that Tepaeru a Tau was the natural child of Tau (of Ngati Maoate) and Tearii but was adopted by Manuaanga. She referred to the notice of adoption dated 30 October 1909, which records registration of the adoption of Tepaeru by Manuaanga. The minutes of the adoption hearing show Tepaeru as a female aged five years, being a daughter of Tearii who consented to the adoption. The minutes also record Manuaanga as stating "I have no children of my own and will keep this child."
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> [14] Mrs Browne also relied on evidence given at Minute Book 9/96-97 on 25 November 1921, when Tepaeru a Tau applied to succeed to her natural father,

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37 At [10]-[22], references and genealogies omitted.

Tau. At that hearing, Tepaeru a Tau gave evidence that she was the only child of Tau and confirmed that she was his real daughter, not an adopted daughter as was alleged by an objector. The genealogy set out in the minutes shows that Manuanga (senior) and first wife Tapaeru had two children; Tau alias Manuanga and Vai. It records that Tau alias Manuanga had no issue but adopted a son, Tau (the deceased in that case), who had Tepaeru a Tau. Tepaeru a Tau then states "I was adopted by Tau Metua alias Manu anga." The minutes further refer to the adoption registration and note Tepaeru's mother's name was Tearii. The Court granted succession to Tepaeru a Tau solely in Pokata 14N and to Tepaeru a Tau and Vai equally in Atekaro 14G.

[15] Counsel submitted that the Tau alias Manuanga or Tau Metua referred to in 1921 who adopted Tepaeru a Tau, is the same person as the Manuaanga in the succession orders of 1933, 1958 and 1984 which are the subject of the present application. She submitted that although the adoption records state that Tepaeru a Tau was five years old, at the hearing in 1921 she advised the Court that she was 20. That would mean she was born in 1901 and would have been eight years old when adopted by Manuaanga.

[16] Mrs Browne argues that the identity of Manuaanga is supported by the fact that Manuaanga was also adopted by Vai, who was the sister of Tau alias Manuanga and the wife of Tamaiva, a brother of Te Kura. The notice of adoption dated 18 August 1914 shows the application by Vai to register the adoption of Manuaanga, being a child of Te Kura. The minutes record that Manuaanga was a male of 24 years and was adopted from birth by Vai, who had no natural children but had another child Tereapii who was adopted by her husband Tamaiva. Te Kura was present in Court and consented.

[17] Mrs Browne noted there appeared to be some confusion at the hearing of the present proceedings, as to whether Vai had adopted her brother Tau alias Manuanga. However, she referred to the applicant's evidence in reply that Manuaanga's mother was Te Kura, which is supported by Manuaanga's adoption documents. Mrs Browne submitted that Vai adopted Manuaanga who adopted Tepaeru a Tau. In further support of this submission at hearing, the applicant advised that Tepaeru a Tau also succeeded to Vai in 1941. ...

[18] Counsel contended that there is a blood connection between Tepaeru a Tau and Manuaanga. She submitted the blood connection was evident in the original owners listed in the partition order for Kaingavai 49C, which included Te Kura, Manuaanga and Moate (the great grandfather of Tepaeru a Tau. …

[19] Mrs Browne noted that Manuaanga derived his rights to the lands from his natural parents, Te Kura and Tuaua. As Tepaeru a Tau is an adopted daughter related by blood, she is the rightful successor.

…

[22] In summary, the applicant submitted that, due to the erroneous evidence provided to the Court in 1933, 1958 and 1984, the question of Tepaeru A Tau's

rights to succeed to Manuaanga as an adopted child was not considered. The succession orders should therefore be cancelled, and new orders made to include Tepaeru A Tau and her descendants.

[24] The Judge then summarised the respondents' case in the following terms[38]:

> [23] The respondents opposed the application and submitted there was no error in the said succession orders. The respondents are the next of kin of Manuaanga, through Manuaanga's half-brother Tueki, both being children of Te Kura. Tueki succeeded to Manuaanga and when Tueki later also died without issue, the respondents succeeded as next of kin. The respondents argue that the applicant is mistaken in her identity of Manuaanga, as the person claimed by Tepaeru a Tau in 1921 to be her adopted father is a different Manuaanga to the one that the applicant now seeks succession to by virtue of adoption.
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> [24] The respondents submitted that the applicant has relied on conflicting evidence. The application states the natural father of Tepaeru a Tau was Tau and her natural mother was Tearii, but that she was adopted by Manuaanga. This is supported by the adoption order where it is recorded that Tepaeru's mother is Tearii. However, the evidence given by Tepaeru a Tau herself at Minute Book 9/96-97 when she succeeded to her natural father Tau, was "I was adopted by Tau Metua alias Manu Anga". The genealogy recorded there shows the parents of "Tau alias Manuanga" as being Manuanga and Tapaeru. This is in direct contrast to the applicant's evidence which is that the natural parents of Manuaanga are Te Kura and Tuaua. The respondents argued that there is clearly two different people with the name Manuaanga and the applicant has confused the two.
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> [25] Mrs Carr submitted that Tepaeru a Tau has already succeeded to three persons who are claimed to be her father and the applicant is now seeking to add a fourth. She contends that Tepaeru a Tau has succeeded to the ancestral lands of Te Pau, Tau alias Manuaanga and Tau Maoate. Mrs Carr says there is also significant conflicting evidence in relation to these successions when compared with the claims made by the applicant.
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> [26] Counsel referred to the evidence at Minute Book 35/75 for succession to Te Pau, which shows Te Pau's wife as Terii and that they had six children, including Tepaeru. At the hearing of the present matter, the applicant claimed that Te Pau was Terii's second husband and not the natural father of Tepaeru a Tau. The applicant conceded however, that this is not reflected in the minutes. Counsel also noted that the death certificate for Terii lists Te Pau as her only husband.
>
> [27] Mrs Carr noted that Tau alias Manuanga, is the person referred to by Tepaeru a Tau at as [sic] being her adopted father at Minute Book 9/96-97 in 1921. As noted, the genealogy shows his natural parents were Manuanga and

[38] At [23]-[32].

Tapaeru. It also records that he had a sister named Vai. Mrs Carr submitted that when the applicant was questioned with regard to these minutes at the Court hearing, she confirmed her submission that the Vai who adopted Manuaanga was the Vai named in these minutes as the sister of Tau alias Manuanga. Counsel argued that this caused significant confusion as, based on the genealogy, Vai would have adopted her brother. Mrs Carr noted that the applicant later claimed that Tau alias Manuanga was actually the natural father of Tepaeru a Tau, which contradicted the evidence of Tepaeru a Tau that he was her adopted father and that Tau was her natural father. Mrs Carr further submitted that there was no evidence that the Manuaanga whom the applicant is attempting to succeed in the present case was also known as Tau. Neither of the adoption orders record the name Tau alongside Manuaanga and there is no other evidence in the minute books or Court records to support this assertion made by the applicant.

[28] Counsel further noted that the applicant has also claimed that Tau Maoate was Tepaeru a Tau's natural father. The applicant submitted a genealogy of Ngati More-Maoate, which she relied on to confirm Vai was the aunt of Tepaeru a Tau and to show a blood connection between Tepaeru a Tau and Manuaanga. Mrs Carr argued however that the genealogy does not show Tau as having a sister named Vai. Further, now that the applicant has claimed Tau alias Manuanga as Tepaeru a Tau's natural father, there would be no blood connection. Counsel submitted that there has also been no other evidence produced to prove that Tau Maoate is the natural father of Tepaeru a Tau.

[29] In addition, Mrs Carr noted the applicant claimed that Tepaeru a Tau had succeeded to Vai in 1941, which it was contended confirmed that the Manuaanga who was adopted by Vai was the same Manuaanga who adopted Tepaeru a Tau. However, Mrs Carr pointed out that the succession referred to by the applicant shows that Tepaeru a Tau did not succeed, rather Tione, Tamaiva and Tuaana succeeded to Vai. Counsel submitted that it is important to note Tamaiva's evidence that "Tau had a sister Vai. She adopted Manuaanga who had a daughter Vai. Manuaanga and Vai are dead and have no issue living…".

[30] The respondents submitted that there are several other factors which support their contention that the applicant is mistaken as to the Manuaanga who adopted Tepaeru a Tau. These can be summarised as follows:

(a) The death certificate for Manuaanga shows he died in 1928 when he was 38 years old. If the Manuaanga who adopted Tepaeru a Tau was the same Manuaanga who was adopted by Vai, he would have been 19 years old in 1909 when he adopted Tepaeru. He could not therefore be considered a "metua'' (which indicates a person of seniority) and does not line up with Tepaeru's statement that she was "adopted by Tau Metua alias Manuanga";

(b) The Manuaanga adopted by Vai in 1914 would have been adopted after he supposedly adopted Vai's five year old niece in 1909;

(c) This Manuaanga was raised from birth by his aunt Vai, wife of his uncle Tamaiva. She legally adopted him in 1914 when he was 24. Te Kura the natural mother consented and stated that she had one other child. That would have been Tueki who was alive in 1914 and was the half-brother of Manuaanga and ancestor of the respondents;

(d) In 1933 at Minute Book 10/388-389, Tueki correctly gave evidence that Manuaanga had died with no issue. The evidence was given five years after Manuaanga died, by his closest blood relative. The evidence of Tueki was corroborated by Te Kura Mare Amoa in 1958 at Minute Book 24/40-41;

(e) It was not disputed that Manuaanga married Ngapoko and had two children, named Vai and Ngapoko, who both died without issue. This is confirmed by Manuaanga's death certificate which records two female children. The birth certificate of Ngapoko, who was born on 26 November 1923, names her parents as "Manuaanga Tamaiva and Ngapoko". Accordingly, this Manuaanga was also known as "Manuaanga Tamaiva"; and

(f) No claim was made by Tepaeru during her lifetime to succeed to this Manuaanga. Instead, the applicant is making this claim 110 years later.

[31] Mrs Carr also noted the applicant has indicated that, if she is successful with this application, it will enable her to revisit other orders in which she believes Tepaeru a Tau would have a right of succession by virtue of her adoption. Counsel argued that, despite the applicant's early assertions, this would include the interests of Tuaua and could have implications for the Pa Ariki family. Mrs Carr submitted that, in any event, all the minute book evidence produced by Mata Noora [sic] and Eric Short in these proceedings consistently show that Tuaua and Manuaanga died without issue.

[32] In summary, the respondents submitted that the evidence provided by the applicant is inconsistent and contradictory, and points to the fact that she is mistaken as to the identity of the Manuaanga who adopted her grandmother Tepaeru a Tau. The evidence of Tepaeru a Tau herself, given almost 100 years ago, is to be preferred over the recent claims of the applicant. The respondents say those claims have been motivated primarily by the applicant's lease of their ancestral land and her desire to own it outright.

[25] After summarising other evidence, citing s 390A and the principles earlier stated applying to s 390A applications, the report turned to Tepaeru A Tau's adoption, the adoption order of 30 October 1909 recording the adoption of Tepaeru, a 5 year old girl and the daughter of Tearii by Manuaanga, and held that Tepaeru A Tau was adopted by

Manuaanga saying from her own evidence Tepaeru's natural parents were Tau and Tearii and her adopted father was "Tau Metua alias Manu anga" being the Tau alias Manuanga in the genealogy[39].

[26] The report then noted that "the difficulty for the applicant in this case is proving that the Tau alias Manuanga who adopted Tepaeru A Tau is the same Manuaanga as the one in the succession orders she seeks to overturn"[40]. The evidence concerning the challenged succession orders was found consistent as recording "Manuaanga's parents as Tekura and Tuauaa and his half-brother as Tueki", that "Manuaanga had no surviving issue" and none of the orders mention Tepaeru A Tau or other adopted children[41].

[27] Turning to the identity of Manuaanga, Coxhead J noted the applicant's agreement that Manuaanga's parents were Tekura and Tuaua, but her assertion that the Manuaanga who adopted Tepaeru A Tau relied on an adoption order of 23 October 1914 where Manuaanga was adopted by Vai, as to which the report observed that there were difficulties with that assertion, namely that, while both adoption orders named "Manuaanga," there was no evidence to link them and show it was the same person. That, after summarizing the evidence, led the Judge to conclude that "on their own the documents do not confirm the Manuaanga in the two orders is the same person and therefore do not show that the Manuaanga who Vai adopted is the Manuaanga who adopted Tepaera A Tau"[42].

[28] After recording the relevant minutes, the report said that, while suggesting a link between the Vai who adopted Manuaanga and Tepaeru A Tau, it did not follow that "these Manuaanga are one and the same",[43] going on to say that the "main hurdle for the applicant is the evidence given in 1921" of Tepaeru A Tau which, in the evidence as analyzed, said that if the Manuaanga is the same person as in the genealogies then the parents should be the same, but they are not, and that "if the Court was to accept that Tau alias Manuaanga was the same person adopted by Vai, that would mean that Vai adopted

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39 At [47], [48].
40 At [50].
41 At [55].
42 At [57].
43 At [59], [60].

her own brother,"[44] with the contention that the Tau alias Manuanga was in fact Tepaeru A Tau's natural father being unsupported by evidence and contrary to that given by Tepaeru herself almost a hundred years ago that Tau alias Manuanga was her adopted father and Tau was her natural father[45], a view also supported by the objectors' evidence. The report added references to the anomalies that Manuaanga would have been 19 when he adopted Tepaeru A Tau at the age of 5, but Manuaanga would have been adopted himself 5 years after the Tepaeru A Tau adoption and that Tau died in 1903 and must have been adopted by Manuanga prior to that when Manuaanga would have been only 13 in 1903[46].

[29] The findings in the report were prefaced with reference to authority which refers to the "heavy burden" on applicants and the need for "reasonably substantial evidence before cancelling court orders" especially those of some age[47] before recommending dismissal of the application[48]:

> [68] It is always difficult to assess historical matters in a contemporary context. Here we are being asked to assess what happened in 1933, 1958 and 1984 from a 2020 perspective. Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is normally deemed to have been correct. The principle of omnia praseumuntur rite esse acta (everything is presumed to have been lawfully unless there is evidence to the contrary) must apply in these circumstances. Therefore, in the absence of a patent defect in an order, there is a presumption that the order made was correct. The burden of proof is on the applicant to rebut that proposition with clear evidence.
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> [69] In the present case, I am not persuaded on the balance of probabilities that there has been a mistake, error or omission with regard to the three succession [sic] the applicant seeks to overturn. It is not clear that Manuaanga in those orders is the same person who adopted Tepaeru A Tau. In fact, the weight of the evidence presented to the Court suggests that these are two different Manuaanga from different genealogies, although they may have some connection through Vai. *[In this matter, the evidence given by Tepaeru A Tau herself almost 100 years ago is to be preferred.]*[49]

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44 At [60].
45 At [61].
46 At [63].
47 *Jones v. Tini*, HC Land Division 15/2012, 14 March 2014; *in Re. Raera*, HC Land Division, 25 November 1993, at [16]-[17].
48 At [68]-[69].
49 Italicisation in original.

Post-report submissions

[30] Mrs Browne's comprehensive submissions[50] – largely, it would appear, rehearsing her submissions at the referral hearing but referenced to the relevant passages from the report – said that Coxhead J's recommendation "would have been different had he correctly interpreted the court records and the evidence given at the hearing"[51], and proceeded to cite chapter and verse submitted to be in support of that comment.

[31] As to the Judge's evidential review concerning Tepaeru A Tau's adoption, Mrs Browne said the court was in error in saying the applicant relied on Minute Book 9/96-97 as that was in Mr Moore's submissions[52], not those of the applicant, and had been rebutted by her submissions in reply. The genealogy to which the Judge referred was given by Iro who opposed Tepaeru A Tau's application to succeed to Tau where Iro mistakenly thought the application was to succeed to Tau alias Manuanga when she was not legally adopted by that person, but she relied on Iro's genealogy showing that the adoption of Tepaeru A Tau was by Manuanga and thus "there can be no doubt that Tau was also known as Manuanga." That supported Ms Francis' application that "Manuanga was also known as Tau and he adopted Tepaeru A Tau"[53].

[32] In reply, Mrs Carr's submissions[54] pointed to the Judge's comment that the minute book was "further support of the adoption" and that the applicant contradictorily relied on the minute book to confirm Tepaeru A Tau's adoption, a submission she supported with detailed reference to the transcript and her submissions to the Judge. That led Mrs Carr to submit[55] "therefore while it is accepted that a person called Manuanga adopted the applicant's grandmother in 1909, the adoptee, namely Tepaeru A Tau, confirmed to the court in 1921 that this person was also known as 'Tau'. The new 'Manuanga' (the 1914 adoptee) that is now being alleged to be the adopted father has never had the name 'Tau' attached to his name, as evidenced by the lack of any evidence by the applicant to support this erroneous claim".

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50 18 December 2020.
51 At 3.
52 18 May 2018.
53 At 6.1.5-8.
54 9 February 2021.
55 At 4-32, especially 31.

[33] There is cogency in Mrs Carr's submissions that the Judge's conclusions concerning the Minute Book were "further support of the adoption". In any event, for the reasons mentioned in the principles recited earlier in this judgment, the applicant has not shown the Judge's conclusions were not open to him and Mrs Browne's submissions on this point are not accepted.

[34] Mrs Browne next submitted that when the Judge concluded[56] that "from her own evidence, Tepaeru's natural parents were Tau and Tearii and her adopted father was 'Tau Metua alias Manu Anga' being the Tau alias Manuanga set out in the genealogy contained in the relevant minutes," that conclusion was clearly wrong because the 'Manuanga alias Tau' who adopted Tepaeru A Tau was the son of Tekura and Tuaua and not the Tau alias Manuanga referred to in Iro's genealogy, the error arising with the Judge's incorrect interpretation of Iro's genealogy[57].

[35] In response, Mrs Carr relied on the evidence that Tepaeru A Tau herself confirmed to the court in 1921 that her natural parents were Tau and Terii and her adopted father was Tau Metua alias Manuanga, making the point the 1914 adoption papers did not show Tekura and Tamaiva as Manuanga's natural parents[58].

[36] On the evidence on this point, there is more than sufficient evidence to support the Judge's conclusion and Mrs Browne's submissions on this aspect of the matter are also declined.

[37] Mrs Browne's submissions then turned to the Judge's consideration of the succession orders[59] and his reliance on the evidence given by Manuaanga's half-brother Tueki on 23 October 1933 that Manuaanga's children died without issue.

[38] She submitted Tueki's evidence was incorrect because Manuaanga's death certificate showed he died at 38 on 20 October 1928, he being the son of Tuana and Te Kura and had two daughters, an error carried through to a hearing on 14 March 1958 when Tekura More Amoa gave evidence in support of an application to succeed to Tekura

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56 At [49].
57 At 6.2.1-4.
58 At 33-38.
59 At [52].

and said the deceased died about 40 years before him leaving Tueki as the only issue. She submitted that Tekura relied on the erroneous evidence given by Tueki in 1933[60].

[39] Mrs Carr said Tueki's evidence was correct as the Manuanga to which Tueki was succeeding did not adopt Tepaeru A Tau, that being Tau alias Manuanga. Mrs Carr submitted that Mrs Browne was in error in submitting that Tueki's evidence was incorrect and misleading as such had not been proved at the referral hearing and the criticisms were merely an attempt to re-litigate an issue where the Judge's conclusion was founded on the evidence[61].

[40] Mrs Carr's submissions are accepted.

[41] Mrs Browne's submissions[62] then reviewed the passages in the report as to the identity of Manuaanga where the Judge said that Ms Francis was "in agreement with the respondents that the parents of Manuaanga are Tekura and Tuaua" saying that misunderstood the applicant's case. She was critical of the Judge's further comments[63].

[42] Mrs Carr relied on the Judge's comment that Ms Francis asserted the relevant Manuaanga was the one who adopted Tepaeru A Tau[64].

[43] The passage criticised by Mrs Browne is an accurate summary of the applicant's submissions concerning the identity of Manuaanga and the Court again declines to accept Mrs Browne's criticism of the Judge's findings.

[44] Mrs Browne then made submissions as to the Judge's comments[65] concerning the problems facing Ms Francis' assertion as to the lack of evidence as to the identity of the persons named Manuaanga. She said the parents of an applicant for adoption are never shown on the application or the order. Only the natural parents, whose consent is required, are identified, so the Judge's comments as to the lack of notification of the parents in Manuaanga's adoption order was erroneous.

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60 At 6.3.1-5.
61 At 39-42.
62 At 6.4.1-4.
63 At [56].
64 At 43-53.
65 At [57].

[45] Mrs Carr pointed to the Judge's conclusion that "the documents do not confirm the Manuaanga in the two orders is the same person".

[46] While the report may perhaps have been an error as to whether parents of an applicant for adoption have the option of being shown in the application or order – that suggestion was only in Mrs Browne's submissions – that does little to undermine the Judge's conclusion[66], particularly when he describes the documents' lack of confirmation "on their own".

[47] Mrs Browne was then critical of the Judge's comment that Tepaeru A Tau succeeded to Vai when she did and attached a copy of the relevant minute book[67].

[48] Mrs Carr pointed to the evidence that the succession orders to Manuaanga and Vai were made in favour of three others[68].

[49] The applicant's submissions appear to misread the Judge's summary of the evidence and the Court accordingly declines to accept them.

[50] The applicant's submissions[69] then turned to what the Judge described[70] as Ms Francis' "main hurdle" being the 1921 evidence of Tepaeru A Tau summarising the evidence on the identities which, it was submitted, showed the Judge was in error.

[51] Mrs Carr's submissions also analysed the evidence.

[52] Re-reading the passage of the report under consideration shows the views are persuasive and the Judge's conclusions appear sound.

[53] Mrs Browne then challenged[71] the Judge's finding that there was an inconsistency[72] commenting on the evidence.

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66 At [57].
67 MB 14/181 and 239, at 6.6.1.
68 At 59-62.
69 At 6.7.1-3.
70 At [60].
71 At 6.7.1-3.
72 At [61].

[54] Mrs Carr submitted that Mrs Browne's comments contradicted the evidence at the referral hearing.

[55] Again the Judge's comments appear sound and are accepted.

[56] Mrs Browne was also critical of other passages in the report but as they have no direct bearing on the Judge's ultimate conclusion they require no further consideration.

Conclusion

[57] Despite the extensiveness of the review of the issues arising in this application, the conclusions can be shortly stated.

[58] In Minute (No.3) counsel and the parties were advised that the Chief Justice was minded to accept the recommendation for dismissal in Coxhead J's report but, in accordance with practice, gave counsel the opportunity of commenting on the same.

[59] Comprehensive submissions have been filed and, as the above shows, analysed. Mrs Browne's largely consisted of criticism of the Judge's conclusions, despite their being based on his view of the evidence he heard, the documents adduced and his observations of the difficulties the applicant faced based on them. They have been met, in detail, by Mrs Carr's careful analysis. Overall, Mrs Browne's submissions do nothing to undermine the detailed analysis of the law and evidence which supports the Judge's recommendation for dismissal.

[60] In essence, the applicant set herself the task of showing the two persons named in the records as "Manuanga"[73] were the same. After a careful analysis of all the evidence, Coxhead, J, applying the conventional approach to deciding such issues, held, applying the principles earlier recounted, that she was unable to prove that. There is no basis to differ.

[61] This application is almost a case study of the difficulties applicants face in s 390A matters. As this matter shows, their efforts to interpret – or re-interpret – history, often

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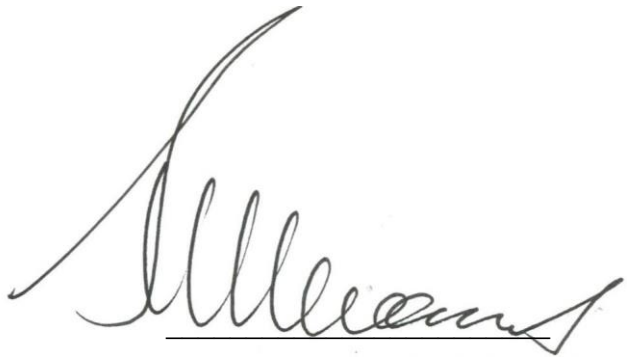
[73] Or "Manuaanga" and, in one case "Manu anga".

based on aged, inadequate or incomplete records, face major hurdles and fully justify the principles set out earlier, particularly the significant burden of proof, the finality of Court orders and the two presumptions applicants face. When those are applied to Ms Francis' application – as Coxhead J carefully did – no reason has been shown to depart from his conclusions based on the evidence.

[62] The tentative conclusion expressed in Minute (No.3) is accordingly confirmed and the application is dismissed.

[63] If costs are sought memoranda may be filed with that from the respondents due within 35 days of delivery of this judgment, and that from counsel for the applicants being due within a further 14 days[74].

[64] Within the same timetable, those appearing are to file memoranda as to the issues mentioned in [6], including whether orders in relation to those matters can, and should, be made as part of the disposal of this application, and, if so, in what terms.



Hugh Williams, CJ

[74] In that regard, on 26 March 2021, Mr Mason applied in what would appear to be another matter for payment of Mrs Carr's fees in, it seems, this application, from funds apparently paid into Court in the other matter. Those involved in this case are to comment on that application in any memorandum they file concerning costs.