[2012] UKPC 35
Privy Council Appeal No 0078 of 2010

JUDGMENT

June Margaret Baudinet (Appellant) v Ellen Tavioni and Meremaraea Velma Tinirau Macquarie (Respondent)

From the Court of Appeal of the Cook Islands

before

Lord Phillips
Lord Walker
Lady Hale
Lord Mance
Lord Carnwath

JUDGMENT DELIVERED BY LORD MANCE giving the majority judgment

ON

22 OCTOBER 2012

Heard on 18-19 April 2012

Appellant	*Respondent*
Ross Holmes Kate Davenport Justin Wall (New Zealand and Cook Islands Bar)	Rebecca Edwards Tina Browne Sarah Inder (New Zealand and Cook Islands Bar)
(Instructed by Ross Holmes Lawyers L.P)	(Instructed by Browne Harvey & Associates P.C)

LORD MANCE

Introduction

1. The first issue in this appeal is whether the High Court of the Cook Islands has power, under section 44 of the Judicature Act 1980-81, to correct an alleged slip in an order made in the Cook and Other Islands Land Titles Court in 1903. If there is such a power, the next issue is whether there was a slip. If there was, the final issue is whether it should be corrected now. Included in the principal issue is whether the application to correct the alleged slip is foreclosed by or abusive in the light of two previous sets of proceedings brought by the appellant's family in respect of the same land.

2. The appellant claims the 53 acre parcel of land known as Tuarea Nui Section 40 in the vaka (tribal territory) of Takitumu on the south side of the island of Rarotonga. The land was awarded to Makea Nui Takau, the Ariki (tribal chief) of the Makea family who stemmed from Avarua on the north side of the island, by Order of the Land Titles Court dated 10 August 1903 in 1903. The appellant claims it for the Ngãti Raina family. The Makea and Ngãti Raina families are not related by blood. Some members of the Ngãti Raina family lived on the land until 1932, when they were evicted by Makea Nui Tinirau, the then Ariki of the Makea family. Since 1932 the Ngãti Raina have had a sense of grievance, which they have twice previously sought to pursue, on a different basis to the present, by the two previous sets of proceedings which came to court in 1937 and 1950.

3. The Land Titles Court was set up by an Order in Council of 7 July 1902 made by the Governor of New Zealand, acting under the powers given to him by section 6 of the Cook and Other Islands Government Act 1901 (see the associated "*Tumu*" case: *Descendants of Utanga and Arerangi Tumu v Descendants of Iopu Tumu* [2012] UKPC 34, para 4). Lieutenant Colonel Walter Gudgeon was appointed the first Resident Commissioner of the Islands and also the Chief Judge of the Land Titles Court. The Order in Council required there to be at least two judges, and Pa Ariki Maretu, one of the two Ariki of the Takitumu vaka, was appointed as second judge.

4. The court began sitting on 2 April 1903. On 3 June 1903, the court heard a series of applications by Makea Nui Takau relating to various parcels of land, including Tuarea Nui Section 40. The Minute Book for the day, of which the Board has seen a colour photocopy, contains the following handwritten words (punctuation supplied):

> "Makea applicant. Makea: I claim this land as my own land. No objections. Land awarded to Makea Takau. Land restricted from sale or lease except by permission of court. A life interest only no power of devise."

The word "Court" is written above the word "Makea", which has been crossed out with two short straight lines. The parties are agreed that the deletion was by a quill pen, that the word "court" appears to be in the same handwriting as the rest of the writing, and it corrects a typographical error. But the words "A life interest only no power of devise" have also been crossed out, with a single wavy line. The parties agree that those words too were written in a quill pen in what appears to be the same handwriting as the rest of the Minute Book entry for that day, but they do not agree upon when they were written or how they came to be crossed out. The factual question which arises is whether the Order drawn up and signed by Chief Judge Gudgeon on 10 August 1903 was correct in omitting the handwritten words.

5. The Order was in a standard form for what were then known as native titles. It declared "the Natives whose names are set out in the first column of the Schedule indorsed hereon . . . are, and they are hereby declared to be, the owners of the parcel of land to be called or known as" (the name of the parcel is then written in by hand) . . . . ; "and it is hereby declared that so much and such part of the share of each owner as is set out in the third column of the said Schedule shall be inalienable". The Schedule, which would have been on the back of the order, records only one name, Makea Takau, in the first column, and the part declared inalienable in the third is "The whole" (for the form of the Schedule, see the *Tumu* case, para 8).

6. The block file (titles record) for this parcel begins with the Order on Investigation of Title of 3 June 1903 and contains the following note:

> "The minutes of the Court at first restricted the interest of Makea Takau to 'a life interest only no power of devise'. This restriction appears to have been deleted later by means of ink pencil, but such alteration has not been initialled by the Judge of the Court."

Thereafter, however, orders were made on the basis that there was no such restriction. Thus, there was a series of succession orders vesting the interest in the land in favour of her successors as Makea Arikis, in each case expressing this to be by virtue of his or her office as Ariki. The first was on 7 March 1912 vesting the interest of Makea Takau in Rangi Makea as from 1 May 1911, the second on 20 October 1926 vesting the interest of Rangi Makea in Makea Nui Tinirau Ariki as from 27 July 1922, the third on 26 July 1944 vesting the interest of Makea Nui

Tinirau Ariki in Makea Nui Takau Ariki as from 26 January 1939, and the fourth on 14 March 1966 vesting the interest of Makea Nui Takau Ariki in Makeanui Teremoana Ariki as from 15 September 1947. The first respondent represents the current Makea Kopu Ariki and the second respondent is the daughter of Makeanui Teremoana Ariki.

7. The claim by successive Makea to inherit the land "by virtue of [their] office as Ariki" is in issue in separate proceedings brought by members of the Makea family represented by Teariki Akamoeau Manarangi. The Makea family claims that the land is and has always been Makea family land, not Makea Ariki or title land, and that Makea Takau could only claim and have been awarded it in 1903 as, in effect, trustee for the whole family. (One point relied upon in this connection is that the land is in the vaka of Takitumu, where Pa and Kainuku were Ariki, and outside the district to which the Makea Ariki chiefly title relates, which is Avarua some ten miles away on the north coast, in which connection it is in dispute whether Arikis can hold title land in a district other than that from which their chiefly title stems.) The appellant's case is much more fundamental. She claims that the original award of the land in 1903 to Makea Takau in any capacity was wrong. Her claim on behalf of the Ngãti Raina is not therefore related to or contingent on the resolution of the dispute between the Makea Ariki and the Makea family. It is inconsistent with both.

8. In the 1937 proceedings application was made on behalf of the Ngãti Raina family for the title to be amended. In a judgment dated 31 March 1937, Chief Judge Ayson dismissed the claim, pointing out at the outset that under section 390 of the Cook Islands Act 1915 there was no power to grant a re-hearing or to vary or annul any order after it was signed and sealed. Section 391 did permit the court to annul any order obtained by fraud, but fraud was not then alleged. Nevertheless, the judge went on to hear evidence and express views on the merits of the Ngãti Raina claim. He found that the family had been notified of and been present at the hearing on 3 June 1903 and raised no objection. There was conflicting evidence of their occupation, but it appeared to Chief Justice Ayson that they were on the land only on sufferance and at the will of Makea Nui Tinirau, to whom they had unwisely offered insult at the end of 1932, whereupon he had put an end to their occupation. They could not show any real right to the land.

9. Then came section 32 of the Cook Islands Amendment Act 1946, which gave the Land Appellate Court power to grant a rehearing on the application of any person claiming to be prejudicially affected by an earlier order, provided that the application was made within 12 months of the commencement of the Act. So the Ngãti Raina made such an application. This too was dismissed by the Land Appellate Court in 1950, relying on the evidence given in the 1937 case, on the ground that there was no prospect of the applicants being able to show title before

the Native Land Court (as the Land Titles Court had become) if given the opportunity to do so.

The present proceedings

10. The present proceedings were begun in 2004. The amended pleading of December 2007 applies to the High Court, which now has the land titles jurisdiction: (1) for an order under section 44 of the Judicature Act 1980-81, that the order of 3 June 1903 be corrected to restore the words "A life interest only no power of devise" (alternatively for judicial review of the deletion) and (2) for an order annulling the Order of 3 June 1903 under section 391 of the Cook Islands Act (alternatively for judicial review of the order) on the ground of fraud. Should either succeed, there would have been no-one entitled to a succession order in 1912, or later, and it is submitted that the whole question of title to the land could be re-opened. Thus the pleading goes on to apply for the succession orders to be revoked, for an investigation of title to the land, and for the various leases and occupation rights granted in relation to the land to be revoked. The current issues are therefore raised as the opening skirmish in what could, in one event, be a very long war. The appellant has filed extensive evidence of genealogical research which is said to reveal a completely different basis for the Ngāti Raina claim to the land from that which had been put forward in 1937.

11. It has also been suggested by the appellant that the Makea Takau was not the legitimate heiress of the Makea Ariki (a claim which takes one back to the 1860s). The suggestion is however, in the Board's view, irrelevant in the present context. Chief Judge Gudgeon himself observed that she had been accepted as Makea Ariki for some 40 years by the early 1900s. The Court in 1950 observed that

> "it is of no moment whether the title as it stands is faulty. The claim is to oust the Makea completely and to have themselves substituted as owners.
>
> They have made an unconvincing attempt to show ownership …
>
> It is not open to the applicants to raise any question as to the obvious faults in the title as no amendment could in any case introduce them into the title. It does appear all the same that there is the important question still to be settled whether this is Makea title land or Makea family land."

Hingston J in the present case also took the view that any attack on the Makea Takau's legitimacy as heiress of the Makea title was irrelevant, saying:

> "I am of the view that this part of the applicant's case does not advance their claim. I say this because Makea was the recognized Makea at the time and …. had held this office for some forty years."

12. In the High Court, Hingston J invited the parties to make submissions on (a) whether the doctrine of res judicata precluded the court from entering into the enquiry; (b) whether the record should be corrected; and (c) whether the investigation of title order was obtained by fraud. For reasons given in a written decision of 8 April 2008, Hingston J made a direction that the record be corrected, as applied for. He believed it "not inappropriate to assume that if a judge had made the 'correction' it would at the least have been initialled". It was also "fair to assume that [Chief Judge Gudgeon's] intention was that after the death of Makea Takau a determination of those persons properly entitled to the land would be finalised". However, he rejected the claim that the 1903 order had been obtained by fraud, and there has been no appeal against that decision.

13. Both the respondents to the present appeal applied to the Cook Islands Court of Appeal for special leave to appeal, long after the 21 day time limit for making such applications had expired. Further, while the second respondent had been represented in the High Court and made submissions on the preliminary issues to Hingston J, the first respondent had at that stage taken no part in the proceedings. The Court of Appeal granted both applications. As explained in its judgment of 10 July 2009, the Court did "not want to see a matter with such far-reaching ramifications determined on the technicality that one of the individuals concerned had failed to adhere to a procedural time limit" [14]. The first respondent had not previously taken part because she thought that her interests were being represented by another party to the proceedings, but it had since become clear that this was not so:

> "Cook Islands litigation over family land impacts upon all those family members who have a present or future interest in that land. As a person whose interests were adversely affected by Hingston J's decision, Ms Tavioni was directly involved in the original hearing, whether or not named or formally represented . . . " [17].

14. In this appeal, the appellant has formally challenged the grant of special leave, but Mr Holmes on her behalf wisely did not pursue it with any vigour at the hearing before the Board. The Board would be most reluctant to differ from the

Court of Appeal on such procedural questions in a case which does indeed have "far-reaching ramifications" for all concerned.

15. Having granted the respondents special leave to appeal, the Court of Appeal went on to allow their appeal. It held, firstly, that the general "slip rule" in section 44 of the Judicature Act 1980-81 had in this context to be read subject to the specific rules governing the remedying of errors made by the Land Court contained in section 390A of the Cook Islands Act 1915, which did not apply to orders made on the investigation of title such as this [26]. Given this conclusion, the other grounds of appeal could be dealt with briefly [33]. The Court held, secondly, that the issues raised could have been raised in the 1937 and 1950 proceedings, and so the rule in *Henderson v Henderson* (1843) 3 Hare 100 applied [35]; and thirdly, that it was "far from clear" that the order of 10 August 1903 failed to reflect the judge's intention at the time [37].

16. The appellant appeals to Her Majesty in respect of each of the above three holdings. The Board propose to deal with them in the same order.

The "slip rule"

17. Section 44 of the Judicature Act 1980-81 provides:

> "Amendments - A Judge may at any time amend any minute or judgment of the Court or other record of the Court in order to give effect to the true intent of the Court in respect thereof or truly to record the course of any proceeding."

As the Court of Appeal pointed out, this "is essentially a 'slip rule' which permits the Court to correct a failure accurately to record a Judge's intention at the time that he or she promulgates a decision. In no sense is it a revision of the actual decision. It is merely a clerical correction to ensure that the decision already made is properly recorded" [21]. As the Court also pointed out, the courts have always had power to rectify inconsistencies between the decision they intended and the recorded text. Section 44 is "merely a recent embodiment of that long-standing power" [35].

18. In the land law context, however, the Court held that section 44 had to be read subject to section 390A of the Cook Islands Act 1915. Section 390A was inserted into the 1915 Act by section 16 of the Cook Islands Amendment Act 1950. It is headed "Amendment of orders after title ascertained". The relevant subsections for present purposes are (1) and (10):

> "(1) Where through any mistake, error, or omission whether of fact or of law however arising, and whether of the party applying to amend or not, the Land Court or the Land Appellate Court by its order has in effect done or left undone something which it did not actually intend to do or leave undone, or something which it would not but for that mistake, error, or omission have done or left undone, or where the Land Court or the Land Appellate Court has decided any point of law erroneously, the Chief Judge may, upon the application in writing of any person alleging that he is affected by the mistake, error, omission, or erroneous decision in point of law, make such order in the matter for the purpose of remedying the same or the effect of the same respectively as the nature of the case may require; and for any such purpose may, if he deems it necessary or expedient, amend, vary, or cancel any order made by the Land Court or the Land Appellate Court, or revoke any decision or intended decision of either of those Courts.
>
> (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."

19. Section 390A thus also contains a slip rule, although it is included among other, wider, grounds for correction. The power can only be exercised by the Chief Judge and cannot be used to interfere with orders made on the investigation of title, save to a limited extent which does not apply to the order in question here. In the Court of Appeal's view, this was because such orders create rights in rem which endure from generation to generation, many people will order their affairs on the strength of them and "certainty of title is one of the chief objectives of land law" [25]. Thus "the general slip rule in section 44 of the Judicature Act was not intended to override the specific code for amending Land Court orders in section 390A of the Cook Islands Act" [26]. As the Court might have said, but did not, generalia specialibus non derogant or, to put it the other way round, generalibus specialia derogant. In the Court's view, had section 390A(10) been drawn to the attention of Hingston J, he would have declined to intervene [32].

20. However, the Court of Appeal might well have taken a different view had its attention been drawn to section 389 of the Cook Island Act 1915, which was repealed by the Cook Islands Amendment Act 1982. Headed "Amendments of records", this provided:

> "(1) The Land Court or any Judge thereof may at any time make or authorise to be made in any order, warrant, record, or other document made, issued, or kept by the Court all such amendments as are considered necessary to give effect to the intended decision or determination of the Court or to record the actual course and nature of any proceedings in the Court.
>
> (2) Any such amendment shall take effect as at the date of the order, warrant, record, or other document so amended; but no such amendment shall take away or affect any right or title acquired in good faith and for value before the making of the amendment.
>
> (3) This section shall extend and apply to all such orders, warrants, records, and other documents as aforesaid whether made before or after the commencement of this Act."

21. It is thus clear that the 1915 Act had contained a general slip rule from its inception (as indeed did clause 25 of the Order in Council establishing the Land Titles Court, quoted in the *Tumu* case, at para 6). Although it contained protection for "equity's darling", it contained no exception for orders made on investigation of title. This power of amendment was later joined by the wider power of amendment in section 390A, inserted by the 1950 Amendment Act. Both powers co-existed until section 389 was repealed. Indeed, in 1962, Chief Judge Morgan made an order amending the plan annexed to the order at issue in this very case (among others) when it was discovered that a mistake had been made in delineating the boundaries of the land, because there could be little doubt that the Court had intended to grant ownership to the land with the boundaries as now recorded (Minute Book for 27 February 1962).

22. There is thus no reason to think that the legislature intended that the special rules in section 390A should derogate from the general rule in section 389. Had the legislature so intended, it would have provided in section 390A(10) that "This section and section 389 shall not apply . . ." Section 389 was only repealed after the enactment of the general slip rule in section 44 of the Judicature Act 1980-81. That rule applies throughout the High Court, which is established under section 47 of the Constitution of the Cook Islands, adopted in 1964, when the Islands gained their independence from New Zealand.

23. It is perhaps worth noting that the Judicature Act was "to consolidate and amend enactments of the Legislative Assembly and other enactments in force in the Cook Islands relating to the High Court of the Cook Islands . . . " Some sections of the 1915 Act and later amending Acts were repealed by section 104 and

the Third Schedule. It may be that it was not immediately appreciated that section 44 meant that section 389 was no longer needed, but this was picked up in the Cook Islands Amendment Act 1982. The Board has been shown nothing to suggest that the Legislative Assembly intended thereby to remove the general power to correct errors in all kinds of orders and records which had existed since the establishment of the jurisdiction in 1902.

24. In the view of the Board, therefore, the general rule in section 44 of the Judicature Act 1980-81 is not to be read subject to section 390A of the Cook Islands Act 1915 and does apply to orders made on the investigation of title such as this. Whether the power should be exercised is another matter, to which the Board will return.

Res judicata/abuse of process

25. Hingston J disposed very swiftly of a plea of res judicata based upon the 1937 and 1950 decisions, on the ground that in neither case was the issue of section 44 or the allegation of fraud before the court. Thus the issues currently raised had not been the subject of a previous decision. The Court of Appeal correctly pointed out that "the rule in *Henderson v Henderson* (1843) 3 Hare 100 is that res judicata embraces not only those matters which a party elected to advance in previous litigation but also those which it could and should have advanced but neglected to do so" [34]. In the Court's view, the present arguments would have been available then. The slip rule existed then and could have been prayed in aid. The allegation of fraud amounted to no more than that Makea Takau had claimed land to which she was not entitled, which was the allegation being pursued in 1937 and 1950. Hence res judicata applied [35].

26. The Board takes a different view from the Court of Appeal on this issue also. In *Henderson v Henderson*, Wigram V-C stated the principle thus, at pp114-115:

> "In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of *litigation in, and of adjudication by, a Court of competent jurisdiction*, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata

> applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." (emphasis supplied)

27. The *Henderson* principle is distinct from both cause of action estoppel and issue estoppel per rem judicatem, and is now regarded as an aspect of abuse of process, although, as Lord Bingham pointed out in *Johnson v Gore Wood & Co* [2000] UKHL 65, [2002] 2 AC 1, 31, all are based upon the same public interest "that there should be finality in litigation and that a party should not be twice vexed in the same matter". Lord Bingham went on to say that:

> "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

28. The appellant argues that a great deal of evidence has been discovered since 1950, which could not have been discovered by the exercise of what was reasonable diligence at the time. The Board should take account of the difficulties facing litigants in person in a tiny jurisdiction in the middle of the Pacific Ocean. There were no lawyers on the islands then. The court records were in a mess until a registrar was appointed in the 1940s (see the *Tumu* case, para 11). The historical records were dispersed in libraries as far away as Hawaii and New Zealand. A great deal of evidence relevant both to the basis of the Ngāti Raina's claim to the land and to the thinking of Chief Judge Gudgeon at the time has since come to light, in particular by the diligence of Mr Holmes. Thus the Court of Appeal was not correct to state that "We have not been referred to any evidence or argument in support of [the current appellant's] present application that would not have been available to her predecessors in 1937 and 1950" [35].

29. It is also important, however, to consider the nature of the proceedings in 1937 and 1950. The subject-matter of the claim is title to the parcel of land known as Tuarea Nui Section 40. In neither 1937 nor 1950 was this subject-matter adjudicated upon by a court of competent jurisdiction. In 1937, Chief Judge Ayson

began his judgment by (correctly) stating that he had no jurisdiction to do what he was being asked to do. His subsequent observations on the evidence which he had heard cannot be regarded as an adjudication as he was not competent to adjudicate upon the issue. The position was a little different in 1950, because a window of opportunity to re-open old decisions had been given by the 1946 Act. But the application before the court was for the case to be re-opened. The court dismissed that application, so there was never an adjudication upon the merits of the subject-matter in dispute. The most that can be said is that had the information currently available been before the court then, the application to re-open the case might have met with more success. But neither of the earlier decisions falls within the statement of principle in *Henderson v Henderson*. Even though it appears from *Johnson v Gore Wood* that the principle applies to cases which are settled by agreement as well as adjudication, this case has certainly never been settled. The dispute is as alive today as it was when the Makea evicted the Ngāti Raina from the land in 1932.

Was there a slip and, if so, should it now be rectified?

30. The appellant seeks to pursue her claim by rectifying the 1903 order on the investigation of title to add the words "A life interest only no power of devise". If added, these words would, it is submitted, mean that there was no determination of title in 1903, other than one giving Makea Takau a life interest. Anyone, including the Ngãti Raina, could pursue any claim that might be sustainable.

31. The basis of the claim to rectification is the crossed out words "a life interest no power to devise" which appear in the handwritten record of the formal court proceedings which took place relating to Section 40 on 3 June 1903. In the same entry appear the preceding words "Land restricted from sale or lease except by permission of the Makea", but the word "Makea" is (for obvious good reason) crossed out and replaced by "Court", an alteration which it is not suggested was inappropriate. At least three other crossings out also appear, with and without substitutions, elsewhere in the handwritten Minute Book for 3 June 1903. None of these crossings out appears to be accompanied by any signature or initialling. It is true (as noted by Lady Hale in paragraph 7 of her judgment) that the initials "W E G" are written against a very minor spelling correction ("opened" for "oepened") in a typed-up version of the Minute Book for one earlier date (15 April 2003). I do not think that anything by way of "practice" or otherwise can be deduced from that. If anything could be, it might that Chief Judge Gudgeon used to inspect the Minute Book and note any errors in it. There are in fact two typed-up copies of the Minute Book for 3 June 1903; their typescript omits the phrase "a life interest only and no power of devise", but that phrase has, in each case in different handwriting, been written in and then deleted, again without initialling. Again, I do not think any inference can be drawn from this recording of the position in the handwritten Minute Book. The writing in and crossing out of the phrase must have taken place

at some stage after even the original typed-up version of the Minute Book was made. It may have occurred whenever the Block Entry in the Titles Register (to which Lady Hale refers in her paragraph 6) was made; that, since the Block Entry contains a series of entries set out in identical typeface and style up to at least 1972, may well have been many decades after the relevant events, by when the present suggestion of an error in 1903 had already been mooted.

32. There is an issue whether the members of the Ngãti Raina were actually present at the hearing on 3 June 1903. But, on any view, the position is that they did not either then or at any time before 1932 take issue with the order which was recorded. When the matter came before the very experienced Chief Judge Ayson in the Land Court in 1937, on the application for re-hearing of the investigation of title, he held that the statute gave him no such jurisdiction, absent an allegation of fraud. But he heard evidence which included testimony from the court interpreter, Mr Savage, and Makea Tinirau, who had both been present in 1903 and it was also shown to his satisfaction that Raina Metua, the father of the Ngãti Raina family applicants who brought the 1937 proceedings, had been present at the survey and all subsequent proceedings regarding the land in 1903 and had raised no objection. The clear views which Chief Judge Ayson, with his 20 or so years' experience of the islands, went on to express in the light of the evidence he had heard are in the present context not without relevance: the Ngãti Raina were, he said, present at the hearing on 3 June 1903 and raised no objection to the Makea's claim, and "the Court had no doubt that [they] had due notice of the hearing of the title to the land in June 1903"; their occupation of the land "was of fairly recent origin"; it appeared that they were only there "on sufferance and at the will of Makea"; that "they had rendered tribute to the Makea is beyond doubt"; and "the Raina family were very ill advised to offer the insult that they did to Makea which they did at the end of 1932, and they simply gave him justification for doing what he had, in any case, a legal right to do, viz. to put an end to their occupation". When under section 32 of the Cook Islands Amendment Act 1946 it became possible, by an application made within 12 months of the commencement of that Act, to seek a rehearing of old land title investigations, and representatives of the Ngãti Raina applied accordingly, the Court was similarly unpersuaded. It referred to documentary evidence that the Makea held a tapere or administrative area in Takitumu.

33. The 1903 hearing took place before Chief Judge Gudgeon, who also signed the 1903 Order to give effect to his decision. It is evident that he was a clear-headed, conscientious judge, with a very extensive experience and understanding of the locality, the local Maori and Maori customs. He was also acutely aware of the dominance which Ariki exercised over their family members, and which often meant that the latter were unwilling or unable to resist claims by Ariki to keep land to themselves as title land, when it was in reality family land. He made various written statements to this effect, some set out in the appellant's speaking note

before the Board, pp3 and 6. In a passage quoted in the appellant's submissions in the High Court, para 219 (pp180-181 of the core bundle), Chief Judge Gudgeon is reported as concluding (it appears in 1904):

> "that it might be inexpedient to grant what we know as freehold title to any landowner applicants because it was custom that the senior member of the family (Mataiapo = first born of the first born) was the natural guardian and trustee of the family lands and so great was the respect of the people for this old custom that it was well nigh impossible to make those most deeply interested (the people) come forward and claim inclusion in a list of names …"

34. In his report to the Minister for the Islands for the year ending 31 March 1904, he stated that "My experience in the Land Titles Court of these Islands has taught me that it is inexpedient to grant an absolute freehold title to any landholder in Rarotonga". The custom of the island was to regard the eldest born of the senior branch of the family (Mata'iapo) as the natural guardian and trustee of the family land, who would manage the whole estate in the interests of the family; his right to the land was no greater than that of any other member, but it was "well nigh impossible" to get them to come forward and claim inclusion in the list of persons interested. When discussing the rights of an Ariki, Chief Judge Gudgeon commented further that

> "It may, indeed, be said that a life interest was the highest title ever recognised by the Maori of Polynesia. An Ariki might divide among his children the land he had actually held or cultivated by his servants or slaves, but he had no power to devise the tribal lands in the occupation of others, nor could he appoint his successor. It was the privilege of the elders of the tribe to appoint the Ariki and that man would continue the distribution of the tribal lands in accordance with Native custom."

In his Report for the year ended 31 March 1906, he reported that:

> "In every instance in which an Ariki has been the claimant I have deemed it advisable that a life interest should be awarded, that having been the old tenure. An Ariki was nothing more than a trustee for the tribe or family, and the so-called Ariki lands really belonged to the younger branch of the Ariki family."

35. However, it is clear that the practice Chief Judge Gudgeon adopted was not categorical, and the appellant herself does not suggest that Chief Judge Gudgeon concluded in every case that it was the appropriate course to include the words "a life interest no [or "without"] power to devise". In paragraph 233 of her submissions dated 17 January 2008 in the High Court, what is said is that in undisputed cases in which he

> "realised that the titled claimants to land were either not the right ones, or not the only ones, ... he frequently awarded the claimant a life interest only, with the intention that the investigation of title to the land would be deferred until after that person's death."

Paradoxically, in the immediately preceding paragraph 232, the appellant also asserted that Chief Judge Gudgeon had no power under the relevant Act and Regulations to grant the life interest which she now asserts should have been included in the formal Order. The Chief Judge is further reported as expressing in 1904 his opinion that:

> "Where the rights of independent Mataiapos and their families are clear and undisputed the fee-simple may be awarded to them but in all other cases it seems to me that no more than a life interest should be awarded, for in no other way can the interest of the small people and the Government be effectively guarded."

This again confirms that there were cases where the title appeared clearly to belong to chiefs and where Chief Judge Gudgeon awarded it to them outright.

36. The question is whether it is now proved that it was by a slip that Chief Judge Gudgeon did not include the words providing for a life interest in the case of Section 40. It is in the Board's view impossible at this stage to reach any sensible conclusion as to the reasons why different Sections were dealt with differently. But a firm counter-indication to the suggestion of a slip is Chief Judge Gudgeon's recognized conscientiousness and the improbability that he would have by mistake overlooked a practice he followed in relation to a number of other lands claimed by the Makea. Chief Judge Ayson in 1937 rightly in the Board's view attached significance to this, saying that it was

> "to be remembered that the title was investigated by Judge Gudgeon who had a very complete knowledge of the lands in Rarotonga, and the ownership thereof, and there is no possibility of his having named an Ariki as the sole owner of the land if there had been any

> question in his mind that there were any other persons who had a right to be included in the title.
>
> It is well known that he was very careful where the claims of Arikis were concerned to see that no injustice was being done to other possible claimants who might have freehold or occupation rights."

37. Relied on in favour of the thesis of a slip is the handwritten but crossed-out entry "a life interest only no power of devise". It is said that this would have been initialled, had it represented Chief Judge Gudgeon's intention. It is suggested that this was required by Rule 77 of the Land Titles Court Rules, made by Chief Judge Gudgeon in 1902. Rules 77 and 78, headed "Amendments" provided that

> "77. Every amendment shall be signed or initialled by the Judge or presiding Judge at the time of making the same, and shall specify the date on which the same was made.
>
> 78. No amendment whereby the interest of any person may be prejudicially affected shall be made without due notice, nor until opportunity to show cause against such amendment has been given."

These Rules relate to the "amendments necessary to remedy or correct defects or errors in any proceeding or document, or to give effect to or record the intended decision in any proceeding" contemplated by paragraph 25 of the Order in Council of 7 July 1902. Viewed in their respective contexts, there is at least a question whether either paragraph 25 or Rules 77 and 78 should be understood as referring to the Minute Book. But, assuming that they should be, the fact is that none of the handwritten record entries is initialled, and none of the deletions and alterations either. Whatever the Rules may have required (and neither Rule 83 requiring proceedings and evidence to be recorded in a minute book nor any other Rule appears to require minute book entries to be signed or initialled), the practice (certainly on and in relation to 3 June 1903 – see paragraph 31 above) was not to sign or initial alterations made in the Minute Book. The absence of signature or initialing cannot therefore be a test of their validity or their accuracy. Hingston J's acceptance of the probability of a slip was based, either entirely or almost exclusively, on the fact as he put it that "<u>such alteration has not been initialled by the Judge of the Court</u>" (his underlining). The Board cannot in the circumstances attach any significance to this point, which loomed so large in his mind as well as in the argument before the Board.

38. Further, it is obvious from the photocopy records, and indeed asserted by the appellant, that, where the words "a life interest only no [or "without"] power of devise" appear, as they do in relation to some seven other entries on 3 June 1903, they were in every or almost every case "crammed in" (words used in written submissions for the appellant), making it clear that they were written in as an (uninitialled) afterthought. The same words, then crossed out, also appear to have been made after the main body of the entry for Section 40, because they occupy the gap otherwise used to distinguish this from the next entry. It seems that someone, presumably Chief Judge Gudgeon, must have applied his mind to the inclusion of these words at some point after the making of all the entries, and quite probably therefore after the close of oral proceedings, and have concluded that they should in most cases be included. It is entirely plausible that they were then written in once too often, against an entry where Chief Judge Gudgeon did not, for whatever reason, consider they were appropriate, and were consequently crossed out. What is not plausible is that they were crossed out by mistake. The most obvious explanation of their crossing out is a deliberate conclusion that they were inappropriate. The reason for whatever happened may be lost in the mists of time, but that militates against rather than in favour of a conclusion that there was any slip. One possible explanation, advanced by the Makea family interests, represented by T A Manarangi, is that the phrase was deleted from the order on grounds of inconsistency with the remaining prohibition on alienation "except by permission of the court" (p90).

39. Reliance is placed on the appearance of the words in the other seven entries, all relating to land claimed by Makea Takau as her own. But these entries differ in other respects from that relating to Section 40. In every one of the other seven entries, the formulation used was "Subject to existing lease[s] & usual restrictions a life interest only no [or "without"] power of devise". In the case of Section 40, the formulation used was, as stated, "Land restricted from sale or lease except by permission of Court", followed by the words then crossed out. This formulation matched that used in the case of a yet further entry on 3 June 1903, that for Araporanga appearing in the middle of the seven other entries. In the case of Araporanga, the Makea claimed not for herself but for Arona or Aronga as trustee, and the formulation used was simply "Land restricted from sale or lease except by permission of Court".

40. The appellant's present claim to rectify the order of 10 August 1903 under the slip rule seeks to gain by a side-wind an advantage which it is clear that no-one intended in 1903. Whenever the words "a life interest only no [or "without"] power of devise" were used, Chief Judge Gudgeon had in mind to preserve the possible rights of family members against their tribal chief or Ariki. No-one had in mind in 1903 any claim by persons outside the Makea family, such as the Ngãti Raina. The 1937 judgment records that the surveys and proceedings involved in the investigations of title which occurred in 1903 were publicised, and that there

were, in addition to the court hearings, associated feasts in the area and at Makea's palace. No claim to title was made by the Ngãti Raina at any time until after their eviction. In addressing the significance of the words "a life interest only no [or "without"] power of devise", where used, Hington J failed to identify the nature of Chief Judge Gudgeon's concern, which was that the Makea Ariki should not deprive the Makea family of what was effectively trust land. He proceeded as if Chief Judge Gudgeon would have had it in mind to protect indefinite third parties who might develop claims at any stage in the future before it was determined whether the land was Makea Ariki title or Makea family land.

41. In the current proceedings between those representing the interests of the Makea Ariki and the Makea family, little significance is being attached to the words entered and then crossed out in the entry for Section 40 on 3 June 1903. The highest that the current Makea (Makea Nui Teremoana Ariki) puts it is to say that the phrase reflects the fact, recognised in later succession orders that the Makea was entitled "by virtue of [her] Office" (p68), i.e. that the land was title land. As the Board has already indicated, an opposite thesis, namely that the phrase would, where used, show that Chief Judge Gudgeon wanted to keep the position open as between Makea Ariki title and Makea family land appears equally if not more credible. However, the rest of the Makea family, represented by T A Manarangi, in fact treats the phrase as effectively neutral and explains its deletion from the order on grounds of inconsistency with the remaining prohibition on alienation "except by permission of the court" (p90). Neither of the parties in those proceedings appears to suggest that the order should be amended to insert the phrase.

Conclusion

42. The application of the slip rule over a century after the relevant Order requires on any view to be clearly justified. In the above circumstances, the Board is not satisfied on the balance of probability that any slip has been shown, and it considers that Hington J was wrong to conclude that one was. For these reasons, the Board will humbly advise Her Majesty that the decision of the Court of Appeal should be upheld, albeit on different grounds, and that the appeal should be dismissed.

43. The Board would add this. Whether or not there was any slip, it would be an uncovenanted and unintended windfall, if it now enabled the Ngãti Raina to achieve a complete re-opening of the whole title investigation which took place in 1903. If, which is not in the Board's view established, the crossed out words were omitted from the final order by oversight of the otherwise so conscientious and careful Chief Judge Gudgeon, they were never intended to open the title to any subsequent claimant who might come forward. They were, at most, intended to preserve the position as between the Makea Ariki and the Makea family as a

whole. That is the issue now being contested in separate proceedings. But it is nothing to do with the Ngãti Raina. The present Ngãti Raina claim is, in effect, for a rehearing notwithstanding the refusal of such to them on the application they pursued in 1950 and notwithstanding that the 12 month period for such an application is long expired. A great deal of genealogical material has been gathered on their behalf in recent years, and an entirely new basis for a claim to title in respect of Section 40 has been developed on their behalf as a result. But, as the time limit in section 32 of the Cook Islands Amendment Act 1946 itself postulated, there must be a time when ancient claims come too late. Even if the Board was satisfied that a slip had probably occurred, the Board would in such circumstances have been disinclined to exercise the discretionary power available under section 44 of the Judicature Act 1980-1981.

44. The Board invites submissions on costs within 28 days.

LADY HALE (WITH WHOM LORD WALKER AGREES):

45. There were two points of law raised in this appeal. On these I am in full agreement with (and indeed contributed to the drafting of) the opinion of the majority. But I would have reached a different conclusion on the factual issue: whether the order signed on 10 August 1903 reflected the true intention of the court which made the order on 3 June 1903. That issue is one on which judicial views may well differ, and the respondents are right to say that it cannot be conclusively determined, but I am satisfied that it is more likely than not that the order does not, without more, reflect the true intentions of the court. And having reached that conclusion, I am also satisfied that, in the particular circumstances of this case, justice requires that the error be corrected.

What did the court intend?

46. I start from the proposition that the Minute Book, as the contemporaneous record compiled by the Judge himself, is more likely to be a true reflection of his intentions than a formal order signed some two months later. The order is a printed form. It appears to have been filled in by the Registrar and presented to the Judge for signature, no doubt along with several other orders. The schedule was on the back. It is unlikely that the Judge would have checked each of the batch of orders presented against the Minute Book to ensure that the Registrar had transcribed them correctly. Moreover, it is not at all clear how the order should have differed if he had. The whole of the land is declared inalienable in the third column of the schedule and that is all that the printed form provides for.

47. The order first recorded in the Minute Book contains two different restraints which together make the land virtually inalienable: "land restricted from sale or lease except by permission of court" and "a life interest only no power of devise". There is no inconsistency between these (as suggested by one of the respondents in the litigation between the two branches of the Makea family): devise is not the same as sale or lease. Land which can be left as the owner pleases is not inalienable.

48. It is not at all surprising that the Minute Book contains the life interest provision. All but one of the nine orders made on claims by Makea Takau that day also contain it. The only exception is entry no 24, where she claimed the land, not for herself, but for "Aronga". The land was awarded to "Arona Makea", with "Trustee Makea". Whatever the nature of the interest awarded to Aronga, Makea as trustee could only have had a life interest without power of devise. Entry no 24 however resembles the entry for Tuarea Nui in also containing the words "land restricted from sale or lease except by permission of the court". Those words are not contained in any of the other seven awards to Makea. But these all contain the words "subject to existing lease(s) & (the) usual restrictions" as well as "life interest only no (without) power of devise". It would appear, therefore, that the restriction on sale or lease was expressly added in those cases where there were no existing leases. Whether the "usual restrictions" refers to this, or to the later words limiting the interest to a life interest without power of devise, or to something else entirely, is not clear. But the limitation to a life interest is clear in all the cases where Makea claimed the land as her own land. Sometimes it appears a little cramped on the page and sometimes it does not. But even those few pages which we have seen are not consistent in leaving a line space between entries, so it is not possible to draw any conclusions from this.

49. Although we do not have the evidence of a hand-writing expert, it also appears that this limitation was added in the same handwriting as the rest of the entries. The respondents have suggested that it could have been added pursuant to an order made by Judge MacCormick in 1912. He ordered that these words be added in relation to some other lands entirely. So, it is suggested, they were added in relation to this plot and then deleted as the order did not refer to it. But this suggestion is pure speculation and inconsistent with the appearance of the handwriting. The respondents did not pursue it in oral argument. It can safely be rejected.

50. Also significant is the Block entry in the Titles Register kept by the court. This records under the order on investigation of title of 3 June 1903,

> "NOTE: The minutes of the Court at first restricted the interest of Makea Takau to 'A life interest only no power of devise'. This

> restriction appears to have been deleted later by means of Ink pencil, but such alteration has not been initialled by the Judge of the Court."

We do not know when or by whom this note was made, but that person had clearly looked at the original Minute Book and is recording the view that the deletion was made later and by an Ink pencil rather than the quill pen used in the original.

51. That author also attached some importance to the fact that the deletion was not initialled by the Judge, as did Hingston J at first instance in this case. The same point is made in the argument on behalf of the second respondent's mother in the litigation between the different branches of the Makea family as to whether this land is family land or Ariki (or title) land. She points out that Chief Judge Gudgeon had initialled a correction in the typed-up copy of the Minute Book for an earlier day, which suggests that it was his practice to initial corrections. On the other hand, the manuscript correction of "Makea" to "court" in the original entry for Tuarea Nui is not initialled, nor is another correction lower down the same page. We have not seen enough of the original Minute Book to know whether he had a consistent practice. However, it is one thing not to initial a contemporaneous correction and another thing not to initial a later correction, still more a substantive amendment. While the point does not bear the weight which Hingston J put upon it, therefore, it is not entirely valueless.

52. More important is the evidence that it would have been entirely consistent with Chief Judge Gudgeon's whole approach to these claims for him to limit Makea Takau's claim to a life interest only. In his report to the Minister for the Islands for the year ending 31 March 1904, he states that "My experience in the Land Titles Court of these Islands has taught me that it is inexpedient to grant an absolute freehold title to any landholder in Rarotonga". There was more than one reason for this. First, the custom of the island was to regard the eldest born of the senior branch of the family (Mata'iapo) as the natural guardian and trustee of the family land, who would manage the whole estate in the interests of the family; his right to the land was no greater than that of any other member, but it was "well-nigh impossible" to get them to come forward and claim inclusion in the list of persons interested. So even if Makea Takau was claiming the land as family land, he would have limited her claim. Second, when discussing the rights of a chief (Ariki), he comments that "It may, indeed, be said that a life interest was the highest title ever recognised by the Maori of Polynesia. An Ariki might divide among his children the land he had actually held or cultivated by his servants or slaves, but he had no power to devise the tribal lands in the occupation of others, nor could he appoint his successor. It was the privilege of the elders of the tribe to appoint the Ariki and that man would continue the distribution of the tribal lands in accordance with Native custom". Once again, therefore, if Makea Takau had claimed in her capacity as Ariki, he would have limited her interest to a life interest. In his Report for the year ended 31 March 1906, he reported that: "In

every instance in which an Ariki has been the claimant I have deemed it advisable that a life interest should be awarded, that having been the old tenure. An Ariki was nothing more than a trustee for the tribe or family, and the so-called Ariki lands really belonged to the younger branch of the Ariki family."

53. In his 1902 journal he had also recorded that "the people were oppressed by their chiefs, and did not dare complain or argue the point lest they should be accused of the crime of Akateitei, and for that offence be driven from their ancestral lands". Indeed, he went further:

> "I am not clear that the fee simple of the lands should be given to anyone for such a title is unknown to the Maoris. The land belongs to the tribe, which at the present time is the Govt, but I am afraid of the men who may follow me and of the Mission who would put everything into the hands of the Arikis who would support them and their system. It will be good for the place when the present lot of Arikis die out. Three out of the five have no children and no near relatives, and it would be far better that the Ariki lands should be divided up among the Ariki family. As for the present Makea she is not a Makea at all, she is a mere Mission fake . . . "

Fake or not, she was elected Ariki, but his general policy was clear.

54. Other factors may also have been at work. His initial view was that the definition of title to land in Takitumu was "simple" because the district had "from the most ancient times been divided among the numerous Mata'iapo families of Takitumu" (there is evidence that the Ngāti Raina were among them). The Makea claim would have been an exception to this. It would also have been exceptional if it had been a claim to Ariki land, as the court in 1950 acknowledged that the Ariki in one district could not hold lands as Ariki in another. Indeed, the Makea paid tribute to the Takitumu Ariki. But as the claim was uncontested, we do not know the evidence upon which it was based in 1903.

55. All of these considerations combine in my view to make it much more likely than not that the intention of the court was to limit Makea's interest to a life interest and that the disputed words should not have been deleted from the Minute Book whatever the formal order should have said.

What should be the consequences?

56. On one view, it is now far too late to put matters right. The land has been recorded as Makea land for more than a century and a series of succession orders has been made on that basis. The majority are clearly correct to point out that the object of limiting the Ariki's claim to a life interest only was principally to protect other members of the family or tribe. It would be a windfall if another family entirely were able to take advantage of the position to advance their own independent claim to the land. This factor (as it seems to me) goes to the exercise of the court's discretion rather than to the factual issue of what the court originally intended.

57. It is in this context that the dispute between the two different branches of the Makea family, each represented by one of the present respondents, becomes relevant. If this plot of land was awarded to Makea Takau without restriction, then it may be family land, in which case the series of succession orders, which awarded the land to successive Makea Arikis in their capacity as such, is called in question. If it was awarded to her for her life only, however, this could support the view that it was Ariki land, and thus that her successors as Ariki were entitled to it as such. That is why those successors are arguing in favour of such a restriction in the Makea proceedings. However, if it was indeed awarded to her in her capacity as Ariki, one assumes that the order could have said so. Further, as earlier judges have pointed out, Chief Judge Gudgeon had a habit of granting a life interest without fixing a remainder. In 1912 Judge MacCormick had a habit of dealing with this by inserting (perhaps improperly) "with remainder to such person or persons as the Court may by succession order declare to be the true owners of the land described therein". Once again, if this was indeed what Chief Judge Gudgeon had intended, he could have said so.

58. On the face of it, if a claim is recognised only for the lifetime of the claimant, the matter becomes open once the claimant dies. As Hingston J pointed out, Chief Judge Gudgeon (who was also the Resident in charge of the Islands) believed that

> "to upset the Ariki elected in Rarotonga would have made his work much more difficult. He also believed that those living Ariki were probably the last that would hold office and it appears to this Court he pacified the Ariki – in the instant case, Makea Takau by recognising them and allowing their continued use of the land though they may not have been eligible to take title to it. Makea Takau was given a life interest with no power to devise. At this point in time one may accept that Judge Gudgeon intended, upon the demise of Makea Takau, to then determine those persons entitled to 'ownership'".

59. There are therefore (at least) three possible answers to the ownership of this land: that it is Makea family land, that it is Makea Ariki land, and that it is Ngāti Raina land. As yet the respondents have filed no evidence in the case. The appellant has filed extensive evidence of the basis of her claim, much of which she says was not available in 1937 or 1950, but this evidence has not (yet) been countered or tested. We have not seen it, but we are told that it contains evidence of long occupation and use of the land by the Ngāti Raina until driven out in 1932; evidence of the genealogy of the Ngāti Raina from a book written in 1927 by Aiteina Raina, which records what had been written in a book by Te Atua O Iro in 1890, which was in turn based upon an earlier book by Rau Tuti Ito Ao; and evidence that Ngāti Raina had a marae, a burial ground and a house on the land, whereas the Makea did not until they evicted the Raina in 1932.

60. It is, of course, the case that Chief Judge Ayson said that there was nothing in the Ngāti Raina claim in 1937. We are told that much of the evidence which is now before the court was not available, let alone put before the court, then. We are also told that the evidence filed on behalf of the appellant gives good reasons for believing Chief Judge Ayson to have been very close to the Makea, close enough to support a finding of apparent bias. I repeat that we have not seen this evidence and it has not yet been tested in any court. But in the circumstances it would be unjust to the appellant, on the one hand to reject a plea of res judicata based upon the earlier proceedings, and on the other hand to place great weight upon the obiter statements made in those proceedings to reach a decision against her.

61. Were this to be a case from the United Kingdom, it would now be far too late to put matters right, even assuming that they had gone wrong in the first place. But 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 tika'anga (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.

62. The purpose of the jurisdiction established under the Cook and Other Islands Government Act 1901 and under the Cook Islands Act 1915 was to recognise what were then called Native titles. Section 422 of the 1915 Act provides that "Every title to and interest in customary land shall be determined according to the ancient custom and usage of the Natives of the Cook Islands". Those customs did not allow either the mata'iapo or the Ariki to alienate land from the family or the tribe. Nor can land be acquired by adverse possession or

prescription. In such a context, the passage of time has much less significance than it would have in the United Kingdom. Furthermore, the commercial interest in the land might be very small, because of its division between so many family members, but the importance of tika'anga would remain.

63. Title to the land is currently disputed between two branches of the Makea family. The life interest point is not conclusive on either side, although one side argues for it. Their respective claims will depend upon the evidence to support the Makea claim to this land. Were this appeal to be allowed, the appellant's claim should obviously be heard along with the Makea dispute, thus enabling all the available evidence to be properly considered and adjudicated upon. It is even possible that such a proceeding would resolve the long-standing sense of injustice felt by more sides than one in this dispute. Without that, I fear that this dispute will never be laid to rest.