

**IN THE HIGH COURT OF NIUE
(LAND DIVISION)**

Application No. 11345

UNDER	Section 13, Niue Land Act 1969
IN THE MATTER OF	Part Lauoka Block, Tamakautoga Survey District
BETWEEN	ETTIE SALAMASINA ASEMAGA, LOI EKUAKI MALIETOA, TONY EDWARDS and ENIKI PALAMOA Applicants
AND	FENOGATAO SUAMILI, VIHI SENITULI, MOKAMUA VALAMAKA, HEGHEMOTU LOSELI and ANGELA SALT Respondents

Hearing: 15 November 2017

Appearances: Ms Anne Gibbons for the Applicants
Mr Romero Toailoa for the Respondents

Judgment: 17 April 2020

DECISION OF JUSTICE S F REEVES

Introduction

[1] This decision concerns an application to determine relative interests in four blocks of land known as Part Lauoku located at Tamakautoga. The blocks form part of the site of the Matavai Resort and are Section 2 Block 1 (Plan 892), Section 3 Block 1 (Plan 866), Section 3 Block 1 (Plan 892), and Section 4 Block 1 (Plan 892) (“the land”).

[2] During 1995 and 1996 the Court made orders for each of the blocks determining the magafaoa as Foufili, and leveki magafaoa as Umuti Makani. All the blocks are currently leased to the Matavai Resort Limited.¹

[3] The applicants seek orders under s 13 of the Land Act 1969 (“the Act”) ascertaining or declaring the members of the Magafaoa Foufili and determining their relative interests in the proceeds of the lease of the land.

[4] All the parties are descendants of the tupuna Foufili through her son Malietoa Kuto. Both parties submitted that it is only the descendants of Malietoa who should share in the proceeds of the lease, but they differ as to the relative interests that should be awarded.

[5] The issue in this case is whether the orders for relative interests sought by the applicants should be granted. I regret the delay in finalising this decision which sets out my final view on this matter.

Procedural History

[6] The application was filed by Ettie Salamasina Asemaga, Loi Ekuaki Malietoa and Tony Edwards on 21 December 2015. Later, Eniki Palamoa joined as an applicant. An application for an injunction in respect of lease payments to the leveki magafaoa was also filed but later withdrawn.

[7] On 28 January 2016, Umuti Makani, the leveki for the land, filed a response to the applicant’s application.

¹ Leases dated 1 July 1996 were registered to the title on 10 July 1997.

[8] On 8 March 2016, Judge Isaac adjourned the application and directed that the applicants provide to the Court, within 3 months, full details of their connection to the common ancestor and details of all the descendants of Foufili.

[9] Judge Isaac also directed that the leveki, Umuti Makani, be present at the next hearing to answer questions of the Court regarding the distribution of the lease money. The injunction application was also withdrawn at this stage.

[10] On 9 November 2016, Judge Coxhead further adjourned the matter as the applicant had not fully complied with the Court's earlier directions to provide details of all the descendants of Foufili. Judge Coxhead also ordered that no lease money be paid out until the matter was resolved.

[11] On 27 March 2017, Judge Coxhead issued memorandum-directions containing a draft genealogy document compiled by the Court after reviewing the genealogy provided by the parties. He made no orders but highlighted gaps in the genealogy that the parties needed to consider in order to progress the matter. The genealogy set out by Judge Coxhead is attached as Appendix 1.²

[12] Following several court hearings and adjournments between 2015 and 2017, I heard evidence from the parties on 15 November 2017. Following the hearing, submissions were provided by counsel with final submissions received on 2 July 2018.

Part Makafotu

[13] There is a related application by Mr Malietoa to determine title and appoint leveki for land at Part Makafotu near to but not included in the current application.³ A rehearing has been granted of an earlier decision by the Commissioners.

[14] At the hearing on 15 November 2017 it was agreed the relative interests application should be determined first. This decision deals with that aspect only and a further judgment will be issued in respect of Part Makafotu in due course.

² This was provided to the parties in March 2017 and will be attached to the judgment following the COVID-19 lock-down.

³ Application No. 11304

Case for the Applicants

[15] Ms Gibbons for the applicants submitted the applicants are members of the Foufili magafaoa and entitled to receive a relative interest in the proceeds of the Matavai lease.

[16] Ms Asemaga, Mr Malietoa, and Mr Edwards are direct descendants of the tupuna, Futifa Foufili Kapagahemata through her son Malietoa Kuto, and his son Ekuaki Malietoa. Mr Palamoa claims through his father Palamoa Neki, the adopted son of Fa'atai, the sister of Ekuaki.

[17] In his evidence, Mr Malietoa referred to the draft genealogy provided by the Court, and confirmed his father was Ekuaki Malietoa, the son of Malietoa Kuto. Ekuaki left for Samoa in 1919 under an indentured labour scheme and never returned to Niue. Ekuaki had seven other children besides Mr Malietoa, with the eldest being Ms Asemaga's mother Lutatagi. Mr Malietoa also confirmed that the applicant Mr Edwards is a son of his brother Pita (Peter). Further details of his other siblings are set out in his affidavit.

[18] Ms Asemaga produced her genealogy showing she is a descendant of Foufili through her grandfather, Ekuaki. She is one of seven siblings named in her affidavit.

[19] Mr Malietoa also confirmed that Palamoa Neki was the adopted son of his aunt Fa'atai and his son Euini (Eniki) is also an applicant. No further details of any other children of Palamoa are provided.

[20] The applicants stated that they were not informed by Valamaka Meleke and Mr Makani of the lands being surveyed and titled nearly 20 years ago. Further, they submitted they were not informed that Mr Makani was made leveki of the land and are concerned that he is not a blood relative or direct descendent from Foufili.

[21] The applicants say they have not received any share of income from the leased land, calculating that Mr Makani has received \$70,896.96 in rent money. They requested that this be accounted for, and that the lease payments to the leveki cease until all the direct descendants of Foufili can reach a satisfactory agreement or orders of the Court are made.

[22] A meeting of all descendants of Foufili was called in Niue on 17 November 2016. The meeting was advertised over the radio in Niue and the descendants who attended were Crispina Konelio, Mr Malietoa, Ms Asemaga and Mr Edwards.⁴ The meeting agreed to set up the Foufili Family Trust to receive the proceeds of the Matavai lease for distribution to the magafaoa members.

[23] Ms Gibbons, counsel for the applicants, submitted that land-based activities should not be the only criteria when considering Niuean custom and usage and emphasised the contribution to the magafaoa and wider Niuean community made by the applicants. She submitted that the respondents do not live in Niue and only visit occasionally, like some of the applicants.

[24] It was submitted that Mr Malietoa has participated in magafaoa affairs, representing members in Niue, Samoa and Australia by taking their views to the New Zealand cohort. He returned to live in Niue for 2 years in the 1960s and more recently has tended to the gravesite of Malietoa. While his father left Niue in 1919 and never returned, the applicants submitted that this was a physical separation only, not a spiritual one.

[25] Mr Edwards is a son of Mr Malietoa's brother Peter. It was submitted he contributes to Niuean custom by having been the Chief of Police. It was also submitted that Ms Asemaga's contribution to Niuean custom is by being a local hairdresser.

[26] It was further submitted that of Foufili's eleven children only five left issue and of those five only Malietoa Kuto, the father of Fa'atai and Ekuaki remained on this land. The others moved away from the family land and over time lost their connection to the magafaoa.

[27] The applicants meet the definition of magafaoa in s 2 of the Land Act 1969. They submitted that only the descendants of Ekuaki and Fa'atai should be entitled to receive the proceeds of the lease because of their continuing connection with the land and magafaoa. They argued that a 50% share in proceeds of the lease should go to the descendants of

⁴ Crispina Konelio is a descendant of Hulata Fulutau, but no further details were given of which line she descends from or of other descendants of Hulata.

Ekuaki, with the rest being distributed 25% to the Valamaka line and 25% to the line of Palamoa Neki, the son and adopted son of Fa'atai respectively.

[28] Despite submitting that the current leveki has a conflict of interest due to favouring the rights of some of the magafaoa over others, the applicants were willing to let him remain as leveki to provide continuity. They did not agree to the respondents offer of a 25% share.

Case for the Respondents

[29] The respondents are also directly descended from the tupuna through Malietoa Kuto, and his daughter Fa'atai, the elder sister of Ekuaki.

[30] In response to the application, Mr Toailoa, counsel for the respondents sought directions from the Court that the applicants provide full and better particulars of their claim including their connection to the magafaoa and which shares were sought. Mr Makani, the current leveki, did not wish to be a part of proceedings as a party, and asked that the descendants of Valamaka be noted on the record instead.

[31] Following further evidence, the respondents accepted that the applicants are the descendants of Ekuaki but submitted they cannot return after 100 years to claim an equal share in the income from the land.

[32] In the hearing on 15 November 2017, Mr Makani provided evidence as to how he was appointed. He said Mr Meleke, the son of Fa'atai, appointed him as a customary leveki before he moved to New Zealand. Mr Makani said he helped with the surveying and titling of the lands from 1995-1996 and was then appointed leveki by the Court. In cross-examination he said that Mr Malietoa's family have not contributed to the land, they only want to claim from it.

[33] Regarding the lease to the Matavai Resort, Mr Makani said he was acting under instructions from Mr Meleke and Palamoa Neki to sign the lease on behalf of the landowners. When he receives lease money, Mr Makani said he provides 50% to the Palamoa side of the family, and 50% to the Valamaka side. He said he is related to the tupuna Foufili but is not a direct descendant.

[34] Evidence was also given at the hearing by Fenogatao Suamili and Mokamua Valamaka, the daughters of Mr Meleke. They said that after Ekuaki left Niue their grandmother Fa'atai and her family remained on the land. They were also raised there by their parents. They are the only descendants of Foufili who stayed on this land and spent many years working and maintaining the land and keeping it clean and tidy including cleaning the road frontage. Further evidence of their family's occupation and connection with the land is contained in their affidavits.

[35] It was submitted that the Valamaka family has retained a close connection to the land through the leveki even though they have now lived in New Zealand for many years. Mr Makani is a close family friend and relation who was appointed by their father to look after the land. The blocks that were titled to Foufili were entrusted to him and they say he has conducted his duties as leveki diligently and with the best interests of the family in mind.

[36] Ms Suamili and Ms Valamaka both said they have only briefly met Mr Malietoa and aside from blood, they say there is no bond between them. When Mr Malietoa came to Niue in the 1960s, he never lived on the land. He stayed at Alofi with other family. They said the applicants have not contributed to the magafaoa or looked after the land at all. The Valamaka family has taken full responsibility for protecting and maintaining the land, getting it surveyed and organising the lease, so the family can get a financial benefit.

[37] The respondents submitted that the Court should take account of s 10(1) of the Land Act 1969 which requires the Court to determine title and interest based on Niuean custom, but Mr Toailoa submitted that the Act does not define the Niuean customs that determine entitlement to any right or interest in Niuean land. It was submitted that custom cannot be based on blood relationship alone.

[38] Mr Toailoa referred to certain publications which highlight certain Niuean customs relevant to these applications and went on to set out some criterion for assessing customary rights and interests in the land. He submitted that the applicants should only enjoy 25% relative interests, with 75% to the respondents. This is largely due, he said, to the applicants' absence from the land for 100 years and failure to contribute to the magafaoa.

[39] In relation to whether the lease money should be accounted for, the respondents submitted that no specific claim has been made in relation to this and it was only raised at hearing. They said the leveki, Mr Makani has discharged his duty to distribute money to the descendants he knew of, and there were no court orders to the contrary.

[40] Regarding Palamoa Neki, the respondents submitted he should not have an interest in the land as he was only customarily adopted, and it was not formalised.

Law

[41] Part 2 of the Act sets out the provisions for determining title, ownership and interests in Niuean land including relative interests. The relevant sections within Part 2 are as follows:

10 Determination of title

(1) The Court shall determine every title to and every interest in Niuean land according to the customs and usages of the Niuean people, as far as the same can be ascertained.

(2) The Court may refuse to proceed with any application for investigation of title for the determination of the Mangafaoa or relative interests in that land, until it has before it a plan of the survey of the land affected by it.

(3) The Court may at any stage of the proceedings require that all claims relating to such land, whether by the applicant or by any other person, shall be made in writing to the Court within a time to be fixed by the Court, after which time no further claims for inclusion will be admitted, except by the leave of the Court and upon such terms as the Court determines.

11 Court may require written statement

The Court may require any person having an interest in any application under this Part to lodge with the Court a statement in writing setting out any one or more particulars of the following matters –

(a) The boundaries of the portion of the land which he claims;

(b) The grounds of the claim;

(c) The genealogical tables showing descent from the ancestor or ancestors through whom title is claimed down to and including all persons admitted by the claimant as entitled with him under his claim;

(d) The names and the approximate location of cultivations, villages, burial places, with the names of relatives of the claimant and persons included in

his claim who have been buried there, and any other places or marks of historical interest;

(e) Any other proof or signs of occupation of or connection with the land by the claimant and other persons included in his claim.

Ownership

12 Ownership determined by ascertaining and declaring Mangafaoa

The Court shall determine the ownership of any land by ascertaining and declaring the Mangafaoa of that land by reference to the common ancestor of it or by any other means which clearly identifies the Mangafaoa.

[42] Once the ownership of the land has been determined, relative interests can be considered, and the present application was filed under s 13 of the Act which provides:

13 Relative interests

(1) (a) At any time after the ownership of land has been determined the Court upon application, may ascertain or declare the several members of the Mangafaoa and their relative interests in the land.

(b) The jurisdiction of the Court under this section shall not be exercised except for the purposes of allocating moneys derived from land or any other purposes relating to this Act.

(2) Relative interests shall, in all cases where it can be conveniently done, be expressed in shares or decimal points of a share.

[43] Section 13(1) requires the Court to ascertain or declare the membership of the magafaoa. The definition of “Magafaoa” set out in section 2 of the Act is also relevant:

"Mangafaoa" in relation to any Niuean land means the family or group of persons descended from a common ancestor, including any person who has been legally adopted into the family, who at any given time are recognised as entitled by Niuean custom to any share or interest in the land, and excludes a former member of the family legally adopted into some other family. Where Niuean land is owned by a single person exclusively, that person is the Mangafaoa of the land;

[44] The overarching language used in ss 10 and 11 of the Act strongly suggests that the Court is required to take the same approach as it does to title and determine the relative interests of magafaoa members according to the customs and usages of the Niuean people. Section 10 refers to “every title to and *every interest in Niuean land*” (emphasis added) and

s 11 refers to “any application under this Part”. This approach is also reflected in s 23 of the Niue Amendment Act (No.2) 1968 (“NAA”) which provides:

23 Niuean customs to be recognised

Every title to and estate *or interest* in Niuean land shall be determined under Niuean custom and every Act of the Assembly or other enactment affecting Niuean custom.

(emphasis added)

[45] For completeness I note that s 47(1) NAA also includes general provisions in relation to relative interests of owners, but these do not apply because of the specific provisions in the Land Act 1969.

[46] Once the common ancestor has been identified, determining relative interests requires the Court to ascertain or declare the several members of the magafaoa and their relative interests in order to allocate income.⁵

[47] This Court has not previously considered Niuean custom in the context of relative interests. Previous decisions of the Court have set out the inter-play of the Part 2 provisions and how evidence of customs and usages is assessed by the Court for titling purposes.⁶ Given my conclusion that the overarching language of the Act suggests the same approach should be taken, many of these decisions will also be relevant to how the Court assesses relative interests between magafaoa members.

[48] For instance, in *Paka v Seu*, the Court said:⁷

Under sections 10, 11, and 12 of the Niue Land Act 1969 the Court is required to determine title according to the customs and usages of Niuean people. In doing so the Court shall have regard to the ancestors, cultivations of the land and proof of occupation.

[49] The Court of Appeal in *Tongahai v Tafatu* said:⁸

⁵ Section 13(1)(b), Niue Land Act 1969.

⁶ See *Tuhipa v Hipa – Part Matapa, Provisional Plan 9388, Hikutavake District* [2015] NUHC (20 March 2015) at [31-32]; *Kiole v Taufitu* [2018] NUHC 6; Land Division 11401 (30 November 2018) at [41]; and *Pihigia v Talagi – Part Avatoga Block, Hikutavake Survey District* [2014] NUHC 6 (21 October 2014).

⁷ *Paka v Seu* [2019] NUHC 5; Applications 11419, 11420, 11545 and 11546 (4 July 2019) at [17].

⁸ *Tongahai v Tafatu - Section 3, Block III, Alofi District (Part Tapeu)* [2015] NUCA 3; App No. 1189 (27 October 2015) at [42].

This view is strengthened by the fact that where the Court is required to determine title to Niuean land it is required to do so in accordance with Niuean custom and usage. Ownership is determined by ascertaining and declaring the magafaoa of that land by reference to the common ancestor. Relative interests of the magafaoa in the land can be determined by the Court only for the purposes of allocating money and not it seems for ownership purposes.

[50] In *Misikea v Asekona Family – Part Togonalupo, Section 109C*, the Court said that the “over-riding tenor of the Niue Land Act 1969 is that Niuean custom in relation to magafaoa is inclusive and not exclusive.”⁹

[51] In *Tulehemoana v Fereti – Part Laloai, Avatele*, the Court of Appeal considered evidence of custom and stated that any assertions of Niuean custom must be supported by evidence given in the usual way by the parties, or through recognised experts or supported by recognised written sources, or the minute books of the Court. Mere assertions unsupported by evidence is unlikely to be given any serious weight by the Court¹⁰

Discussion

[52] In order to determine the relative interests of the Foufili magafaoa in the proceeds of the Matavai Resort lease I must firstly ascertain or declare the several members of the magafaoa. Then, I must determine the relative interests of the magafaoa members having regard to the customs and usages of the Niuean people, as far as these can be ascertained. The following questions arise:

- a) Who are the several members of the magafaoa?
- b) What matters of Niuean custom and usage are relevant to relative interests, and what evidence has been given?
- c) What are the relative interests in the land?

Who are the several members of the magafaoa?

⁹ *Misikea v Asekona Family – Part Togonalupo, Section 109C* [2009] NUHC 3 (4 September 2009) at [63].

¹⁰ *Tulehemoana v Fereti – Part Laloai, Avatele* [2015] NUCA 2: App No. 16 of 2014 (30 April 2015) at [54]-[56].

[53] The orders of the Court made in 1995 and 1996 determined Foufili as common ancestor of the four blocks. As per the definition of ‘magafaoa’ in s 2 of the Act the members of the magafaoa are the descendants of the family or group of persons descended from Foufili, including any members legally adopted in.

[54] Section 13 of the Act requires that the ‘several members’ of the magafaoa be ascertained or declared. The applicants have been unable to provide details of all the descendants of Foufili and the question arises whether I can make orders for relative interests when the parties have not identified all the individual descendants of the common ancestor.

[55] The parties are three and four generations from Foufili, and there are likely further generations now in existence. The descendants will number in the hundreds with the membership of the magafaoa constantly changing with births and deaths of members. The respondents submitted that the magafaoa members descended from the four other children of Foufili are part of the Niuean diaspora and their identities and whereabouts are largely unknown as they have not retained their connections to the land and the magafaoa.

[56] The applicants sought to engage with other magafaoa members in Niue with limited success. The application has also been gazetted for hearing on a number of occasions since it was filed in December 2015, and in that time no other members of the wider magafaoa have sought to participate in the proceedings.

[57] I consider that in these circumstances a requirement to identify every individual descendant of Foufili becomes impracticable if not impossible. It is likely to defeat the objective of the provision which is that magafaoa members who can demonstrate through Niuean custom a close connection to the land should benefit from a greater share in income, than a magafaoa member with a lesser or no connection to the land.

[58] The evidence shows that five children of Foufili survived with issue. These were Poikehepule, Lagatauvihi, Hulata, Utamanogi, and Malietoa Kuto.¹¹ The respondents submitted that the several members of the magafaoa could be sufficiently identified by reference to these children. In my view it is a reasonable approach in the circumstances, to

¹¹ As set out in the Department of Justice records and the draft genealogy supplied by the Court

identify the five children of Foufili as a starting point for determining relative interests of their descendants.

[59] Accordingly, the several members of the magafaoa are Poikehepule, Lagatauvihi, Hulata, Utamanogi, and Malietoa Kuto, and their descendants.

What matters of Niuean custom and usage are relevant to relative interests and what evidence has been given?

[60] The Court is required to weigh the claims of magafaoa members according to Niuean customs and usages as far as these can be ascertained. The sources of relevant custom and usage include the legislation, evidence of witnesses, case-law, and authoritative written sources such as Crocombe, referred to below.

[61] Section 11 of the Act sets out a number of customary matters, and the Court may receive evidence of the matters listed there such as ancestral descent, cultivations of the land, and proof of occupation, or connection to the land.

[62] As set out earlier, many decisions of the Court have considered Niuean customs and usages particularly in relation to title.¹² Some of these decisions will be relevant to how the Court should assess relative interests between magafaoa members, particularly those that discuss use, occupation and physical connection with the land.

[63] Ms Gibbons in her submissions for the applicants has sought to downplay the significance of land-based customs and emphasises the importance of descent. The question which arises is whether the applicants and other magafaoa members are entitled to a relative interest by virtue of blood connection alone.

[64] There are two points to be made. First, an application for relative interests can only proceed *after* the magafaoa is identified and ownership has been determined.¹³ A party can only be awarded a relative interest if they are a member of the magafaoa; it is a pre-requisite. So therefore, where there is a contest between magafaoa members, blood

¹² See Paras [48]–[50] of this judgment.

¹³ Section 13(1)(a), Niue Land Act 1969.

connection will not be determinative without evidence of other customary matters required to support the relative interests claim. It is also important to remember that while relative interests determine how magafaoa members share income from the land, it does not change other rights in the land.

[65] The second point in relation to blood connection is about inclusivity and equality. This Court has previously stated that Niuean custom is inclusive,¹⁴ but this does not mean that the customary rights of magafaoa members are necessarily fixed or equal. In *Land Tenure in Niue*, Crocombe says:¹⁵

... the rights of group members are not equal. This important fact is often misunderstood. The rights, powers, benefits and obligations of each member change with age, seniority, sex, personal capacities, number of offspring, place of residence, relationship to other groups, physical need for land, and various other factors.

[66] And also:¹⁶

... house-sites and other forms of land use were adduced as evidence of proprietary right or relationship to right or relationship to right holders, but one of the most common ‘proofs’ was clearing of the road frontage. This was required by local law on Niue for decades during the colonial era. It is an arduous task, and people do not undertake it unnecessarily. To clear someone else’s land would be detected immediately. These evidences of proximity, physical association and the investment of labour were adduced and accepted as appropriate criteria in assessing relative interests of kin.

[67] In my view, the various sources mentioned indicate that the most relevant Niuean customs and usages to determining relative interests are those of use, occupation, and physical connection with the land. Evidence of these matters will assist the Court to assess relative claims of magafaoa members including whether any interests are diminished or even extinguished through long absence.

[68] In this case, it was submitted by both parties that only the descendants of Malietoa Kuto, specifically the descendants of his children Fa’atai and Ekuaki, should be considered for relative interests. The evidence given is that only Malietoa and his descendants occupied the land. There is also no evidence that any of Foufili’s other children or their descendants

¹⁴ *Misikea v Asekona Family – Part Togatupo, Section 109C*, above n 9.

¹⁵ R Crocombe *Land Tenure in Niue*, Crocombe (Institute of Pacific Studies, University of the South Pacific, 1977) at 49.

¹⁶ Crocombe, at 19.

remained on the land. It was argued that the customary interests of these magafaoa members have diminished over time such that they should not receive relative interests in the land.

[69] The parties provided contrasting arguments about what matters of Niuean custom are relevant to their competing claims for relative interests and how the Court should apply those.

[70] For the applicants, their claim is based on entitlement by direct descent from Foufili through her grandson Ekuaki. Ms Gibbons sought to downplay the significance of Ekuaki's departure in 1919, and emphasised Mr Malietoa's return to Niue in the late 1960s and subsequent involvement in magafaoa affairs in New Zealand and Australia. She also points to a wider contribution to Niuean society by Mr Edwards and Ms Asemaga who both live and work in Niue. On this basis, Ms Gibbons submitted that the descendants of Ekuaki should receive a relative interest of 50% of the proceeds of the lease.

[71] The respondents' claim is also based on ancestral connection through Fa'atai, a granddaughter of Foufili. But the respondents also give much stronger evidence of connection to the land, specifically how Fa'atai and her descendants continuously occupied and cared for the land up until Valamaka Meleke and his family moved to New Zealand in the 1970s. It was Mr Meleke who appointed Mr Makani as the customary leveki to care for the land in his absence. Mr Makani was appointed leveki by the Court when the blocks were titled, and he entered into the lease with Matavai Resort Limited on behalf of the magafaoa on the instructions of Mr Meleke and Mr Neki. It is the descendants of these two who have benefitted from the lease since it was entered into.

[72] Mr Toailoa surprisingly submitted that the Act does not set out matters of custom that should apply to relative interests. After referring to several written sources, he set out some weighted criteria which he said resulted in the applicants being entitled to no more than 25% of the lease proceeds, with the respondents retaining the other 75%. I do not accept his interpretation of the law or the submission concerning customary criteria, which although innovative had no authority.

[73] At times, both counsel strayed into making assertions of Niuean custom that were unsupported by evidence, and I am unable to give any serious weight to such submissions.¹⁷

What are the relative interests in the land?

[74] I agree that where there is evidence of long absence from the land over several generations and loss of relationship with the magafaoa, it is reasonable to conclude that the rights of those magafaoa members to share in income from the land will be diminished or even extinguished, as compared to those magafaoa members who have stayed on the land or otherwise maintained a connection with the land.

[75] In the present case, there is no evidence of any of Foufili's other children remaining on the land after Malietoa, and in these circumstances I agree that it is only the descendants of Malietoa Kuto that are entitled to share in the proceeds of the Matavai lease.

[76] As between the descendants of Fa'atai and Ekuaki, it is Fa'atai's descendants who have provided stronger evidence of customary connection to the land and therefore the stronger claim for relative interests. Ms Suamili and Ms Valamaka gave evidence of continuous occupation and maintenance of the land including cleaning the road frontage, titling the land, appointing leveki, and being responsible for arrangements to lease the land and receive income from it.

[77] These two witnesses both gave evidence at the hearing and referred to affidavits they had filed in the related proceedings which dealt with relevant matters of fact. They were both cross-examined by counsel for the applicants and I consider it is just and convenient pursuant to s 43 NAA to take into consideration the evidence provided in their affidavits.

[78] In relation to Mr Neki, the respondents have said that he is not entitled as he was customarily adopted. The draft genealogy compiled by the Court from information provided by the parties and Department of Justice records, notes that he was formally adopted. There is also the evidence from Mr Makani that he acted on instructions from both

¹⁷ See para [50] of this judgment.

Mr Meleke and Mr Neki, and that he paid half the income to Mr Neki. On this basis, there is no serious question of excluding him or his descendants.

[79] By contrast, the evidence is Ekuaki left his family and the land in 1919 and did not return. Aside from ancestral connection, the claims of Ekuaki's descendants are largely based on the actions of Mr Malietoa who lived briefly in Niue in the late 1960s, but there is no evidence that he contributed significantly to the land at that time or subsequently. There is evidence that Mr Malietoa has maintained a relationship with magafaoa members overseas and he has returned several times to Niue, although there is also the suggestion that this has more to do with his own plans to build in Tamakautoga. He has tended to the gravesite of Malietoa when he has returned. In relation to Mr Edwards and Ms Asemaga although they live in Niue and contribute to Niuean society at large, they have not given any evidence that they have contributed to the land or the magafaoa.

[80] I conclude that the customary rights of Ekuaki's descendants have diminished through absence and loss of connection with the land in comparison with Fa'atai's descendants who have the stronger claim. However, the applicants should still receive a relative interest in the lease proceeds, although it will be less than that of the respondents.

[81] In determining the shares of the parties in the Matavai Resort lease proceeds and after considering all the evidence, my view is that the descendants of Fa'atai including her adopted son Mr Neki should receive a 0.70 share and that Ekuaki's descendants should receive 0.30 share. The proportions reflect the fact that Fa'atai's descendants have been able to demonstrate continuous occupation and maintenance of the land for the most part of the last one hundred years.

Leveki and payment of lease monies

[82] During the hearing the applicants criticised the appointment of Mr Makani as leveki saying they were not advised of his appointment and he was not a member of the magafaoa. Mr Makani gave evidence at the hearing and I am satisfied that even though he is not a member of the magafaoa, he is qualified to be appointed per s 14(5) of the Act. There has never been a challenge to his appointment either by rehearing or appeal, and it is not open to the applicants to do so now.

[83] The applicants also requested that the leveki Mr Makani should account for lease monies received. The respondents objected saying this was a separate matter from relative interests, and that Mr Makani had acted within his powers to distribute the income to those magafaoa members he was aware of.

[84] In her closing submissions, Ms Gibbons conceded this issue and confirmed the applicants did not wish to pursue it further.¹⁸ I note Mr Makani's assurance at the hearing that he will manage the interests of the parties going forward based on the outcome of the application and orders of the Court.

[85] The parties will be required to provide details of all the descendants of Fa'atai and Ekuaki and to confirm how payment is to be made in a way that ensures that all descendants who are entitled to receive a relative interest will do so. There was mention of forming a trust to receive and disburse funds, and this would be a sensible solution. Once these matters have been finalised I will direct the Registrar to re-commence payments.

Decision

[86] I make an order declaring that the several members of the Magafaoa Foufili entitled to receive relative interests in the proceeds of the lease of Section 2 Block 1 (Plan 892), Section 3 Block 1 (Plan 866), Section 3 Block 1 (Plan 892), and Section 4 Block 1 (Plan 892) ("the land") to the Matavai Resort are the descendants of Fa'atai Agiagi Malietoa as to 0.70 share and the descendants of Ekuaki Malietoa as to 0.30 share.

[87] I make the following directions:

- (a) The parties are to set out all the descendants of Fa'atai and Ekuaki and provide these to the Court within two months of the date they receive this decision; and

¹⁸ Submissions of the applicant dated 2 July 2018, at 26.

- (b) The parties are to provide the details of arrangements for payment of the lease monies to the descendants, which may be establishment of a trust or trusts to receive and disburse funds to beneficiaries; and
- (c) Once the Registrar is satisfied that these directions have been complied with, and satisfactory payment arrangements made, he may recommence payment of the lease monies.

[88] In my view, costs should lie where they fall. However, if either counsel have a different view, then they have two months from the date they receive this decision to file and exchange submissions.

[89] A copy of this decision is to be sent to all parties.

Dated at Linkwater this 17th day of April 2020.

S F Reeves
JUDGE