SUPREME COURT OF QUEENSLAND

CITATION:	*MacGowan v Klatt* [2019] QSC 222
PARTIES:	**SHERALEE LYN SEULE MACGOWAN (applicant)** **v** **MICHAEL KARL KLATT as administrator of the estate of KENNETH HAMISH MACGOWAN (deceased) (respondent)**
FILE NO/S:	SC No 8674 of 2016
DIVISION:	Trial Division
PROCEEDINGS:	Originating Application for an extension of time within which to commence an application for family provision
DELIVERED ON:	11 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	11 – 13 March 2019
JUDGE:	Holmes CJ
ORDERS:	**1. The originating application for an extension of time is refused.** **2. The respondent's application to strike out the originating application is dismissed.** **3. The respondent's costs of the proceeding, including the strike-out application, are to be paid on the indemnity basis from the estate of the late Kenneth Hamish MacGowan.**
CATCHWORDS:	SUCCESSION – FAMILY PROVISION – PROCEDURE – TIME FOR MAKING APPLICATION – EXTENSION OF TIME – ELIGIBLE APPLICANTS – CHILD – where the applicant seeks an extension of time, pursuant to s 41(8) of the *Succession Act 1981* (Qld), in which to claim family provision – where the applicant's claim is made on the basis that she is the adopted child of the deceased testator as the result of a customary adoption in Vanuatu – whether a ceremony in which the testator took part with the applicant's mother and her extended family amounted to a customary adoption in accordance with the customary law of Tongoa Island and recognised by Vanuatu law – whether the testator as a foreign national could adopt an indigenous child in custom – whether any adoption was effective under Vanuatu law and capable of being recognised under s 293 of the

Adoption Act 2009 (Qld)

SUCCESSION – FAMILY PROVISION – PROCEDURE – ORDERS AND OTHER PROCEDURAL MATTERS – COSTS – GENERALLY – where the applicant was unsuccessful in her application for an extension of time in which to make a claim for family provision – where the applicant was not eligible to make the claim – where the estate's worth is in excess of $5,000,000 – where the applicant had a moral claim arising out of her relationship with the testator, although not a legal one – where the applicant has three young children, limited ability to earn income, and lives in poverty – where an adverse costs order is likely to mean the loss of the modest property devised to her – where the testator in his will had asked that his executors consider the applicant's well-being – whether costs should follow the event or another order should be made

Adoption Act 2009 (Qld), s 293, s 322
Adoption Act 1958 (UK), s 2(3)
Civil Code of the French Republic, arts 343-372
Constitution of the Republic of Vanuatu, art 30, art 47, art 51, art 73, art 74, art 95
Evidence Act 1977 (Qld), s 92(1)(a), s 92(1)(b)
Succession Act 1981 (Qld), s 5, s 40, s 41(8)
Uniform Civil Procedure Rules 1999, r 681, r 700A(2)

Alanson v Malingmen & Ors [2004] VUIC 2; Land Case 02 of 1995 (30 June 2004), considered
Bouton v Labiche [1994] 33 NSWLR 225, applied
In re Estate of Molivano [2007] VUCA 22, applied
In re MM, Adoption Application by SAT [2014] VUSC 78, considered
M v P [1980-1984] Van LR 333, considered
Pentecost Pacific Ltd v Hnaloane [1984] VUCA 4; [1980-1994] Van LR 134, considered
Re M and the Adoption of Children Act [1989] 13 Fam LR 33, considered
Re Milanovic [1973] Qd R 112, considered
Tebahai v Habina [1986] VUSC 9, considered
Tyson v Togomiro [2013] VUSC 178, considered
Underwood v Underwood [2009] QSC 107, cited

COUNSEL: K Wilson QC for the applicant
R Whiteford for the respondent

SOLICITORS: De Groots Wills and Estate Lawyers for the applicant
Mullins Lawyers for the respondent

[1] In these proceedings, the applicant seeks provision from the estate of the late Kenneth MacGowan and also seeks an extension of time within which to make that claim. She asserts standing to make it as an adult child of the deceased testator, contending that she is his adopted child as that term is defined in s 5 of the *Succession Act,* having been adopted by him in accordance with the customary law of Vanuatu; an adoption which, she contends, is effective under Queensland law. An extension of time is needed because the application for further provision was not filed until 25 August 2016, over four years after the death of Mr MacGowan on 11 April 2012.[1] The respondent, the administrator of the estate, has sought the striking out of the applicant's application as having no reasonable prospect of success on the ground that she has no standing to make it; he says that she is not the adopted child of the deceased.

[2] The parties agreed that the extension application and the merits of the applicant's claim that she is the adopted child of Mr MacGowan were to be determined together, so that an adverse decision as to the latter would necessarily resolve the former. If that issue were determined in her favour, the principal considerations in the exercise of the discretion to grant an extension of time would be the satisfactoriness of her explanation for her delay in making it and possible prejudice to the respondent. If she were successful in obtaining that extension, there was no dispute that adequate provision had not been made for her; the only remaining issue would be what further provision should be made. I will commence, then, with the questions of the status of customary adoption in Vanuatu and Queensland law and whether there was in fact such an adoption in this case.

The Queensland legislation

[3] Section 41 of the *Succession Act* permits an application for provision by a "child" of the deceased person, a term defined in s 40 of the *Act* as including an "adopted child". Section 5 defines "adopted child" as meaning

> "… a child that is adopted by [the relevant person] … in accordance with the law of the State or Territory, or country, where the adoption takes place, as in force at the date of the adoption".

The definition appears to require no more (for present purposes) than that the adoption accord with the law of the country in which it occurs, but s 293 of the *Adoption Act* 2009 imposes further requirements in relation to adoptions in a "non-convention country" (which Vanuatu is[2]). Section 293(6) renders such an adoption ineffective "for the purposes of the laws of Queensland", except as s 293 provides.

[4] Section 293(1) gives a non-convention country adoption the same effect as an adoption under Queensland legislation if:

> "(a) the adoption was effective according to the law of that country; and

---

1 Section 41(8) of the *Succession Act* 1981 precludes the hearing of an application not made within 9 months after the death of the deceased "unless the Court otherwise directs".

2 By virtue of the definition of "non-convention country" in Schedule 3 to the *Adoption Act*, since it is neither prescribed by regulation to be a "convention country" within the meaning of s 322 of the Act, nor has it entered into the Hague Convention (the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, opened for signature on 29 May 1993 (entered into force on 1 May 1995)).

(b) at the time at which the legal steps that resulted in the adoption were commenced, the adoptive parent, or each of the adoptive parents, was resident or domiciled in that country and had been resident or domiciled in that country for at least 1 year; and

(c) in consequence of the adoption, the adoptive parent or adoptive parents had, or would (if the adopted person had been a young child) have had, immediately following the adoption, according to the law of that country, a right superior to that of any biological parent of the adopted person in respect of the custody of the adopted person; and

(d) under the law of that country the adoptive parent or adoptive parents were, by the adoption, placed generally in relation to the adopted person in the position of a parent or parents; and

(c) the adoption has not been rescinded under the law of that country."

Section 293(3) creates a presumption that an adoption in a non-convention country is one to which the provision applies, in the absence of evidence to the contrary.

The custom ceremony

[5] Mr MacGowan was a long-term resident of Vanuatu, living on the main island, Efate, in the province of Shefa. He was the sole shareholder of a company which held leases in respect of some 185 hectares of land, making up a property named "Bellevue". He also owned a house property in northern Queensland. The applicant's mother, Rachel Seule, worked as housekeeper for Mr MacGowan. Ms Seule was from Tongoa Island, also in Shefa province. On 3 January 1993, she gave birth to the applicant. The child's biological father seems to have been a local man, from the village of Erakor, in the same province; he had no involvement in the applicant's life, or, after her birth, her mother's.

[6] About a month after the applicant was born, Rachel Seule, because of the difficulty of supporting her, gave her to a family in another area of Vanuatu. When he learned of this, Mr MacGowan intervened and arranged for the baby's return. About that time, a ceremony was performed. Details of what was actually said and done at the ceremony are scant; not surprisingly, given that the witnesses when giving statements about it were recalling events a quarter of a century earlier. Ms Seule and her family were present at the ceremony, as were other members of their community, including a police officer, Mr Maripopongi.

[7] Mr Maripopongi, who was, like Ms Seule, from Tongoa Island, was appointed by the chief of that community as his representative. He regarded himself as responsible for overseeing customary practices involving people from the community. According to Mr Maripopongi, the ceremony took place at the home of the applicant's uncle, Robert Seule, and a bullock was presented to him. Mr MacGowan had engaged in the ceremony to enable him to take the child back to his property; he said that he would be looking after her. He had given her the name "Sheralee" and registered her under his

name. Mr MacGowan was a generous man; in 2009, he had given the community a bullock to assist them.

[8] Although Mr Maripopongi had not been put forward by the applicant (whose witness he was) as an expert, counsel for the respondent elicited some evidence as to the consequences of a custom adoption ceremony from him, without objection. Mr Maripopongi agreed that if Mr MacGowan had adopted the child in 1993, she would have had his surname, MacGowan, from that time. Having adopted the child, Mr MacGowan would have had the right to discipline her; she could not be taken back by her family unless there were some severe mistreatment of her involving police intervention. A child who had been the subject of a customary adoption could visit his or her biological parents to assist them but could no longer reside with them. There were many forms of custom ceremonies, Mr Maripopongi agreed in cross-examination, including ceremonies in which one family might say sorry to another for a wrong done.

[9] Robert Seule said that the custom ceremony involved a bullock given to his family in exchange for the applicant. Mr McGowan had said that he would be looking after her. Giving evidence, Mr Seule said that the family to whom the applicant had been given was not present at the ceremony, but after it, he provided them with some of the bullock meat. He agreed with the proposition that in the ceremony, Ms Seule was saying sorry to that family. After the ceremony, the applicant had been returned to Bellevue, where Ms Seule had looked after her, while Mr MacGowan paid the expenses of her care. Mr Seule did not accept that Mr MacGowan could have returned the child whenever he wanted to, because, he said, "the families respect the … ceremony". He had regarded Mr MacGowan as the applicant's father, because he looked after her.

[10] Mrs Jennifer Crawford was the widow of a retired Australian solicitor, Bruce Crawford, who was a friend of Mr MacGowan and was the godfather of the applicant. Mrs Crawford gave evidence, without objection, that when they visited Bellevue in 1995, Mr MacGowan told her that he had had a sexual relationship with Rachael Seule at around the time the applicant was conceived, and believed her to be his child. He was unable to marry Ms Seule because it was "taboo". After Ms Seule had given the child away, he had negotiated her return, promising Ms Seule that he would pay for her upbringing and education. He informed Mrs Crawford that he had given a bullock to the family who had originally taken the child.

[11] On the balance of probabilities, I find that Mr MacGowan took part in a ceremony with members of the applicant's extended family in which he gave a bullock in exchange for the family's agreement to his taking the applicant to his home, at the same time saying that he would take care of her. There may also have been an element of apology to the family surrendering her, but that is inconsequential. There remain, however, the questions of whether that amounted to a customary adoption and, if so, whether it is capable of being recognised under s 293 of the *Adoption Act*: in particular, whether it was an effective adoption according to Vanuatu law; whether it gave Mr MacGowan, according to Vanuatu law, a right superior to that of Ms Seule in respect of the applicant's custody; and whether it placed Mr MacGowan "generally in relation to the [applicant] in the position of a parent".

The later dealings between the parties to the ceremony

[12] After the ceremony, Mr MacGowan returned with Ms Seule and the applicant to Bellevue, where they lived together in a cottage, and he paid for the applicant's keep. On his account of events to Mrs Crawford in 1995, he named the applicant "Sheralee" after a child in a film, because of her tendency "from the time [she] was crawling" to follow him about. In 1996, Ms Seule left Bellevue to live with an American man, leaving the applicant in the care of Mr MacGowan. Ms Seule's sister, Rita Seule, replaced her as housekeeper.

[13] Two years later, Ms Seule became terminally ill and obtained from Mr MacGowan a promise that he would continue to care for the applicant. During this time, Mr MacGowan proposed a short trip to Australia, taking the little girl, now five years old, with him. He obtained permission from Ms Seule and her brother Robert in the form of a letter, dated 14 September 1998, written in Bislama, a Vanuatu language. In it, Ms Seule said that she was happy for Mr MacGowan to take the child to Australia for six weeks. She expressed her trust in him to look after the applicant. Robert Seule, as uncle, said that Mr MacGowan had helped his family for a long time with their needs so he was, in effect, amenable to a prolonged trip for Mr MacGowan and the applicant.

[14] Mr MacGowan forwarded that letter to the Australian High Commission in Port Vila with his application for a visitor's visa for the applicant. In his accompanying letter, dated 14 September 1998, he noted that Ms Seule was obtaining a passport for the child. He went on to say,

> "Sheralee was unofficially adopted by me when her mother was not expected to live as she suffers from leukaemia. I undertook to act as her godfather and take care of Sheralee's welfare and education … Since [Ms Seule's] illness I have paid Sheralee's education and living expenses and this planned trip to stay with my sister is part of a promise I intend to keep."

On 9 September 1998, Ms Seule registered the applicant's birth, probably to facilitate the passport application. The registration form, the contents of which were declared by Ms Seule to be true, showed the applicant's surname as "Seule"; the column where the name of any father was to be inserted was struck through.

[15] Ms Seule died of her illness on 1 February 1999. Some days later, her brother Robert signed a letter addressed "To Whom it May Concern" in which he declared that it was his late sister's wish, and the wish of the Seule family, that Mr MacGowan "continue as authorised guardian" of the applicant, now aged six. He went on to say that Mr MacGowan had taken care of the applicant since her birth, her paternal father having abandoned her and her mother. Now that Ms Seule had died, Mr MacGowan had offered to continue as the applicant's guardian and to allow her to adopt his surname. He had the full support of the Seule family in raising her. That letter was witnessed by another of the applicant's uncles and two of her aunts. Mr Seule said, under cross-examination, that the letter was intended to reaffirm the effect of the 1993 ceremony.

[16] Thereafter, Mr MacGowan continued to take responsibility for the applicant's upbringing, paying for the cost of her education. According to the applicant, he engaged with her as a father might, reading to her, teaching her how to tidy her bedroom and how to cook, and other practical skills; later he taught her how to drive. Mrs Crawford confirmed the applicant's evidence in that regard and said that he spoke about her as his

daughter. She also said that on an occasion in the early 2000's he had repeated his view that he was the applicant's biological father, because of his prior relations with her mother, and spoke about how some of her characteristics resembled his own.

[17] In late 2001, Mr MacGowan again visited Australia with the applicant. The visa application form bears a signature consistent of that of Mr MacGowan on other documents and there appears to be no dispute that it was his. The form describes him as the applicant's "Guardian" and contains a statement by him that "as Sheralee's accepted guardian" he accepts responsibility for any costs and expenses arising during her visit to Australia. The applicant's family name is given on the visa application as "Seule".

[18] Mr MacGowan took steps to formally change the applicant's name in September 2003. In a letter to the relevant official, he explained difficulties that had arisen because of variations in the applicant's name on different documents. Her birth certificate spelt her Christian name, which he had given her, incorrectly. On the applicant's passport she was known as Seule, while at school she was known as MacGowan "… because of my sponsorship of her education and guardianship since her mother died of cancer".

He went on to say,

> "In order to avoid confusion in her future life at school, in her passport and with her family I have agreed to let her continue to use my sirname [sic] – MacGowan and without having to adopt her I hereby propose that she retain the name Seule as her sirname [sic] and family name and use MacGowan as one of her christian names".

Mr MacGowan proposed that the birth certificate be altered to record the applicant's name as "Sheralee Lyn MacGowan Seule". He continued:

> "I do not intend to adopt the child but did make a promise to her mother just before she died that I would ensure that Sheralee was properly educated. Sheralee's true paternal father was an Erakor man who abandoned them when Sheralee was born".

[19] Robert Seule supported that application with a letter in which he said,

> "This is to advice [sic] that I, Mr Robert Seule as Sheralee Lyn MacGowan Seule parent have agreed that Mr Ken MacGowan will be her future guardian".

(In cross-examination, Mr Seule said that he used the word "parent" because as chief of the family he was responsible for the family's children.) The applicant's birth certificate was altered in accordance with Mr MacGowan's wishes, to show her name as "Sheralee Lyn MacGowan Seule".

[20] In 2005, Mr MacGowan, Robert Seule and the latter's brother Raymond and sister Rita executed a deed prepared by Mr Crawford. The deed described Mr MacGowan as "the Guardian" and recorded in the preamble that at the time of Rachel Seule's illness she had obtained a promise from him that he would care for the applicant "under his protection", in accordance with which he had taken responsibility for the applicant's care, health, education and upbringing. The applicant's extended family had agreed to his appointment, since they were not in a position to look after her "financially or

otherwise". The parties had agreed to formalise their agreement of February 1999 for the purposes of obtaining an Australian visa to enable the applicant to further her education. The body of the deed expressed agreement that it was in the applicant's best interests that Mr MacGowan "be approved as her lawful guardian", to do anything necessary for "her maintenance, education and welfare, but especially her education", while her family agreed to relinquish to him any claims they had as next of kin.

[21] In mid-2006, a further change was approved to the applicant's birth certificate, again at Mr MacGowan's request, so that her name was now shown as "Sheralee Lyn MacGowan", with her "Melanesian Name" recorded as "Seule". During 2007 and most of 2008, the applicant lived with Mr MacGowan at his house in north Queensland and attended a local school. Correspondence between the two at this time is expressed in affectionate terms, with the applicant referring to him as "dad" and him signing letters in the same way. The applicant deposes that they had agreed that she would refer to him in that way in private communications, although she chose to use more formal terms to address him in the presence of her extended family or Mr MacGowan's family members, in order to avoid embarrassing them. In the last term of 2008, the applicant returned to Vanuatu to complete year 10, but then left school because she was pregnant with her first child, born in January 2009.

Mr MacGowan's wills

[22] Mr MacGowan twice made separate Queensland and Vanuatu wills over a three-year period before his death. The first of the Queensland wills was made on 4 March 2008. In it, he appointed his niece, Annette Raff, as executor, and gave her his north Queensland house and other items of personal property. He expressed a wish, however, that she retain the house property for the use of his friends and family, particularly the applicant, and that it be held at least until the applicant reached her majority. He then expressed a wish, but not a direction, that Ms Raff distribute the proceeds of any sale of the property a third to herself, a third to the applicant, and a third to a charitable foundation. The residue of his Australian estate was left half to the applicant. The will appointed Ms Raff and her husband as guardians of the applicant, whom Mr MacGowan described as "the child of my household".

[23] In 2010, Mr MacGowan attended on a north Queensland solicitor, Mr McLean, with the 2008 will, to indicate the amendments he wished to make to it. In the conference with the solicitor, of which the latter made written notes, Mr MacGowan explained that he was the applicant's "guardian only"; the applicant was not adopted and was not his daughter; "he had [taken] her on" until she turned 18 as an obligation to her mother. Her name had been changed to "MacGowan" for ease of her schooling in Australia for two years.

[24] The Queensland will which was admitted to probate contained the substantive amendments made. Executed by Mr MacGowan on 23 February 2011 (soon after the applicant had passed her 18th birthday), it appointed Ms Raff and another niece, Ms Horne, as executors. (Probate of that will was originally granted to them, but was revoked in 2015 and letters of administration granted instead to the respondent.) In it, the north Queensland property is given to the executors with, again, a wish, but not a direction, that it be retained for the ongoing use of friends and family, including the applicant. She is described as

> "…the girl of whom I was formally [sic] guardian until she turned 18…"

The wish is expressed that the property be sold only as a last resort and that the proceeds of sale be distributed in various ways which do not involve any benefit to the applicant. The applicant does not share in the residue of the estate, half being left to a charitable foundation and half to be divided equally between the executors, with a wish that they use the proceeds to further family history interests of the testator. However, Mr MacGowan also asks the executors to consider the future well-being of the applicant (described again as "the girl for whom I was guardian until she turned 18") and her daughter.

[25] Mr MacGowan also provided his solicitors with a copy of a 2009 Vanuatu will which he had similarly annotated, although he gave no instructions to Mr McLean in respect of that will. In the original version of the Vanuatu will he had left three of the lots in the Bellevue property to the applicant, whom he described as "my adopted daughter". In the notes he made on the will, he deleted that description and reduced the devise to two lots. He added the statement:

> "I remain Sheralee's guardian till her 18th birthday, but, apart from the land mentioned above, Sheralee does not have any automatic rights over any other benefits of this Will".

He went on to say that the father of the applicant's daughter was to have no claim over any benefit in the will, and it was his wish that he be forbidden to enter the property devised to the applicant. The annotations indicated that they were made as at 20 December 2010. The original will gave the residue of the estate to the executor of Mr MacGowan's will, to form part of his Queensland estate. The final Vanuatu will, executed in March 2011, was in similar form, except that it devised the two lots to the applicant on her reaching the age of 21 years, and expressed the gift to be conditional on some matters to do with her personal life, which the executors were to judge. Ms Raff and Ms Horne were appointed executors under the Vanuatu will, although Ms Horne is now the sole executor.

The experts called by the parties as to Vanuatu law

[26] The questions which s 293(1) raises in the context of this case (as to the effectiveness of a customary adoption and the parental status it confers) concern the application of Vanuatu law to customary adoption; they are irrelevant if no adoption took place at all. But it is convenient to consider them before considering the significance of the 1993 ceremony, because what occurred then and afterwards can be better understood after an analysis of the content and effect of Vanuatu law in relation to adoption.

[27] Both parties called experts to give evidence about Vanuatu law. The applicant called Ms Sofia Shah, an assistant lecturer in the School of Law at the University of the South Pacific. She holds a Master's degree from the University of Wollongong and is currently undertaking a PhD on the topic of juvenile justice in Vanuatu. An article by Ms Shah titled "Adoption in Vanuatu"[3] was tendered. In the course of conducting research regarding customary adoption, Ms Shah said, she had conducted interviews

---

[3] Journal of Applied Law and Policy, 2012, vol 1, pp 67-75.

with the Chief of the Council Chiefs and other chiefs in relation to the processes of customary adoption.

[28] Professor Corrin, the expert called by the respondent, is a professor in Law and Director of Comparative Law at the University of Queensland Law School. Between 1996 and 2000 she was a senior lecturer and then associate professor in law at the University of the South Pacific, living for three years in Fiji and for the final year in Vanuatu. She has authored a number of books and articles about law in the South Pacific, a number of which concern Vanuatu law, including an article in relation to the law of adoption in Vanuatu.

[29] Of the two experts, I had more confidence in the views expressed by Professor Corrin. Ms Shah repeatedly in her reports made statements swearing the issue in varying respects, asserting that the applicant had been adopted according to customary law; that this was to be recognised in Queensland; and that the applicant was, in her opinion, the legal beneficiary of the estate; all of which suggested a lack of appreciation of her role as an expert giving evidence as to the law of Vanuatu.

[30] The question of what Vanuatu law is in relation to adoption is one of fact, and I have not, therefore, looked beyond the evidence in this case. Accordingly, I have not undertaken any examination of cases decided by Vanuatu courts or of that country's legislation beyond having regard to what was put before me by the parties, directly or through their experts.

Vanuatu law in relation to custom and adoption

[31] Although a Bill dealing with adoption was drafted in 2018, Vanuatu has not enacted any legislation in that regard. Article 95 of the Constitution of the Republic of Vanuatu provides, relevantly, as follows:

> "…
>
> (2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu, immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible, taking due account of custom.
>
> (3) Customary Law shall continue to have effect as part of the law of the Republic of Vanuatu."

The Day of Independence is 30 July 1980. The relevant English and French laws are, respectively, the *Adoption Act* 1958 (UK) and Articles 343-372 of the *Civil Code of the French Republic*.

[32] The distinction (if there is one) between "custom", of which account is to be taken in the application of French and British laws under Article 95(2), and "Customary Law", which is part of the law of Vanuatu by virtue of Article 95(3), is most unclear. There is the obvious fact that they are different words, which would, if one were construing Australian legislation, suggest an intended distinction. No definition of either term is provided in the Constitution. As to other Constitutional references, Article 30 gives the

National Council of Chiefs (or Malvatumauri) "competence to discuss all matters relating to custom and tradition". Article 47(1) says

> "… if there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and wherever possible in conformity with custom".

Article 51 permits Parliament to provide for the way in which "relevant rules of custom" are to be ascertained (although there was no evidence as to whether it had done so). Article 73 says that all land in Vanuatu belongs to "indigenous custom owners and their descendants", and Article 74 provides that

> "The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu".

[33] "Customary Law" is not referred to other than in Article 95(3), although the term might reasonably be regarded as synonymous with the phrase "rules of custom", used in Articles 51 and 74. If "custom" and "Customary Law" do not have different meanings, it is difficult to reconcile the effect given to customary law in Article 95(3), making it part of Vanuatu's law, with the relegation of custom to the status of a possible consideration in Article 95(2) and Article 47(1). Indeed, if the two are identical, it is implicit in Article 47(1) that customary law does not amount to a "rule of law", because it is only where no rule of law exists that custom becomes relevant under that Article.

[34] The experts in this case, however, appeared to use the words interchangeably, and I was not referred to any case in which the Supreme Court or Court of Appeal of Vanuatu considered the significance of Article 95(3). A number of the decisions on which the experts based their opinions referred exclusively to the application of French and British laws (or in some instances British law alone), without any suggestion that customary law had a part to play.[4]

[35] The effect of Article 95(2) was considered in detail in relation to adoption applications in *In re MM, Adoption Application by SAT*.[5] Justice Harrop of the Vanuatu Supreme Court concluded that an applicant for an adoption had to meet the criteria of both British and French statutes. They were now the law of Vanuatu, neither being incompatible with Vanuatu's independent status or having been expressly revoked. Section 2(3) of the *Adoption Act* 1958 (UK) prohibited the making of an adoption order in favour of a sole male applicant in respect of a female child, unless the court was satisfied that there were special circumstances justifying the order as an exceptional measure. The French *Civil Code* contained no equivalent provision. In that case, the applicant was a man living in a same sex-relationship, who sought to adopt a female toddler. Harrop J did not regard the exception in s 2(3) as applicable, and to the extent that there was a conflict between the British and French law considered that the specific prohibition in the British law must prevail over what he regarded as the general position of the French law. Consequently, the application could not succeed.

[36] His Honour went on to give two further reasons for that conclusion. The first was that it was incumbent on the court to take account of custom, and the view of the President of

---

4 See *Banga v Waiwo* [1996] BUSC 5; *In re Child M* [2011] VUSC 16; *In re estate of Molivano* [2007] VUCA 22.

5 [2014] VUSC 78.

the Malvatumauri was that adoption by a homosexual person was not permissible. (It was not suggested that the rule of custom had any independent existence as law under Article 95(3).) Secondly, neither the *Civil Code* nor the *Adoption Act* as they stood at the Day of Independence permitted adoption by a same-sex couple; which, although SAT had applied as an individual, was in reality what he sought.

[37] In her evidence, Ms Shah expressed the opinion that if there were any inconsistency between a statute and a custom, the customary law would prevail, referring, in support of that view, to Article 47(1) of the Constitution. But the superior courts in Vanuatu do not appear to have regarded Article 47 (or Article 95(3)) as in any way altering the effect of Article 95(2). The reading which appears from the cases to which I was referred is that custom gives way to applicable British and French laws. In *Pentecost Pacific Ltd v Hnaloane*,[6] the Court of Appeal of Vanuatu set out the effect of Article 47(1) in relation to contracts of service as that

> "… Courts should make decisions in accordance with substantial justice and if possible with custom, *if there is no legislation* with reference to contract of service". (Italics added.)

Counsel in that case had referred to both custom and customary law as requiring account to be taken of a verbal undertaking which was not reflected in a written contract of service. The court appears not to have distinguished between custom and customary law, but to have regarded both as inapplicable in the face of an existing Vanuatu statute relating to employment. It did not advert to customary law as having any particular status by virtue of Article 95(3); and it certainly did not regard custom, or customary law, as prevailing over statute law.

The elements of customary adoption

[38] Despite the lack of clarity in the case law to which I was referred, I proceed on the basis that there is in Vanuatu customary law in relation to adoption against which the events here can be considered. The experts agreed that there are two forms of adoption in Vanuatu: formal adoption by order of the court and customary adoption; referred to, respectively, in the Bislama language as "adoptmoet" and "keramoet" (which translates as "care of child"). The distinction between them was articulated by the Vanuatu Court of Appeal in *In re Estate of Molivano*:[7]

> "… issues of adoption …can arise in two ways within this Republic. There is an applicable English statute the Adoption Act (UK) 1958 which remains in force pursuant to Article 95(2) of the Constitution which enables the formal relationship of parent and child to be created by a specific mechanism under statute. If in that way, a formal order is made in proper form after proper hearing and with proper consent obtained then the parent and child relationship exists for almost all purposes, although perhaps not for the purposes of succession to custom land. We make no decision on that point.
>
> Equally custom has long recognised the potential for adoption. A mere assertion that it has occurred is insufficient. There must be clear

---

6 [1984] VUCA 4; [1980-1994] Van LR 134.
7 [2007] VUCA 22.

> evidence that what occurred was in accordance with the custom of that place and its traditions and approaches. What may be a recognisable form of adoption on one island or in one village may be quite unacceptable and not worthy of recognition in another."[8]

A valid customary adoption did not, Ms Shah and Professor Corrin agreed, assure the making of a court adoption order, because different considerations such as the best interests of the child would prevail in relation to the latter. In her article on adoption in Vanuatu, Ms Shah had noted the need to register customary adoptions with the court to give them legal recognition; this, she explained in evidence, was in order to facilitate matters such as applications for scholarships, or to enable travel outside the country.

[39] As both Ms Shah and Professor Corrin acknowledged, it is difficult to identify what customary law is in any given context, because it is unwritten; because it differs from location to location, even as between villages; and because members of communities often disagree amongst themselves as to what amounts to a rule of custom. Both experts agreed on the need for evidence from traditional leaders about what the customary law was for any particular area. The consensus between them as to which locality's customs would apply was that the customary law of Tongoa Island, where Rachel Seule was born, would apply, rather than that of Erakor village, from where the applicant's biological father had come, because he had abandoned her and her mother. According to Ms Shah, the two were the same anyway. Ms Shah said that she had spoken to representatives of the councils of Chiefs of both Erakor and Tongoa and was informed by them that what was required was a token of exchange (such as a bullock), with the intention that the child was adopted.

[40] Professor Corrin seems to have relied largely on the decision of the Chief Justice of Vanuatu in *M v P*[9] in identifying, as requirements for customary adoption, the consent of the father, a declaration before the village chief and naming of the child at birth. That case dealt with whether there had been a customary adoption of an Erakor child. The petitioner was the mother of a boy, now 13. She said that she had given him into her brother's care because of her own difficulties, but that it was not an adoption. The brother said that his son had adopted the child. The mayor of Erakor, who was also registrar of births, said that he had been present when the brother made a declaration to the village chief that the child was given in adoption to his son; this was recorded on the register of births. The child's biological parents were not present when the declaration was made. According to the mayor, no feast had occurred, but it was unnecessary in Erakor custom. Normally there would be an agreement with the natural father, but after adoption he could not take the child back without consent.

[41] The Chief Justice, having taken evidence from the President of the Malvatumauri, noted that the evidence of the brother and his son was that the child had been adopted; that there was a declaration of the adoption before a Chief; that the biological parents had not contributed to the child's upkeep; and that

> "… if you give a name for a child [which the brother had done], it is considered as adopted."

---

8 At 4.

9 [1980-1984] Van LR 333.

His Honour concluded that the child had been adopted in custom by both the mother's brother and her nephew. Having regard to the child's welfare, he ordered that he remain with them.

[42] However, the same Chief Justice also decided, with assessors, the case of *Tebahai v Habina*,[10] which concerned a dispute over land in which one party claimed to have rights because he had been adopted by the original landowner. The Chief Justice rejected his account of the adoption, saying

> "This is not an adoption as in custom, there must be a ceremony, pigs and kava. My advisors confirm this and I also know this is fact throughout Vanuatu."[11]

That statement, pronouncing a requirement apparently applicable to the country as a whole, is difficult to reconcile with the acceptance in *M v P* that a feast was unnecessary.

[43] Professor Corrin also referred to unpublished research which established that in Tongoa adoption was carried out with a public ceremony in a ceremonial meeting place, at which the adopting parents presented gifts to the biological parents. In addition, she suggested that registration with the Malvatumauri was necessary, although she acknowledged it was unclear how long that process of registration had been available. In addition, Professor Corrin

Could any adoption have been effective according to the law of Vanuatu?

[44] I accept that as a minimum, a customary adoption on Tongoa Island requires a ceremony which involves an exchange of food, combined with the necessary intention of those involved, both at an individual and communal level. But there may be some further constraints, having regard to the purposes of customary adoption, in the form of limits on who the participants may be. Professor Corrin raised two issues in this regard: she questioned whether a single male could adopt a female child in custom and whether a non-indigenous person could adopt an indigenous child.

[45] Professor Corrin acknowledged that it was unclear whether customary law permitted adoption of a female child by a single male, but pointed to decisions in *Tyson v Togomiro*[12] and *In re MM, Adoption Application by SAT*[13] (referred to earlier). Both were instances in which the Supreme Court refused applications by single men (in *Tyson*, living in a de facto heterosexual relationship, in *MM*, in a same-sex relationship) to adopt female children, in each case on the basis that the *Adoption Act* (UK) prohibited an order in favour of a sole male applicant unless there were special circumstances which justified it as an exceptional measure. Professor Corrin suggested that if it were permissible in custom, the customary law would be contrary to the provisions of the *Adoption Act* (UK), and hence invalid.

[46] I do not think, with respect, that that follows. It is clear that customary adoption is distinct from court-ordered adoption, so there is no necessary conflict in different

---

10 [1986] VUSC 9.
11 At 4.
12 [2013] VUSC 178.
13 [2014] VUSC 78.

considerations applying, although the courts may take the former into account in considering the latter. Indeed, it might well be that a court, considering whether there were special circumstances for the purposes of the United Kingdom legislation, would regard them as constituted by the fact that the arrangement had been accepted for the purposes of customary adoption. Neither expert, though, had identified any instance of a single male having adopted a female child under customary law. Ms Shah considered that it was permissible, on the basis that she had not discovered anything in custom or in her enquiries of the Malvatumauri to say that a male person could not adopt a female child. I would not regard that as a compelling basis for a finding that it was acceptable. The position is simply so unclear that I would not be prepared to conclude that there was any bar in customary law to a heterosexual male's adopting a female child.

[47] I turn to consider the second issue, whether a foreign national can adopt in customary law. Professor Corrin considered, on balance, that custom did not permit adoption by non-indigenous couples or individuals. Adoption of children in custom by persons outside the family was rare and did not accord with the rationale for customary adoption described in a text by Kenneth Brown on the subject of customary adoption in Melanesian law:[14]

> "The principle in non-customary systems that adoption severs biological family and creates a new family has no real imperative in custom where the dominant motives are to maintain family links, assist childless kinfolk or invest a successor."[15]

In the same text, Mr Brown observes that

> "The adoption of children outside the family is generally foreign to customary law",[16]

since it usually involves a "private inter-family arrangement", as opposed to the state control involved in Western adoption.

[48] Professor Corrin accepted, however, that there was no statutory bar on a non-indigenous person adopting in custom, nor any case law directly to that effect. She acknowledged, too, that the rules of the particular community would be very influential and it would also be relevant whether the non-Vanuatu citizen was a long standing resident.

[49] The Malvatumauri has produced the "Custom Policy of the Malvatumauri", [17] described as "the fundamentals of custom and culture in the republic of Vanuatu". Ms Shah said she had not found anything in the Custom Policy to say that foreign nationals could not adopt a child. Customary law did not, however, cater for inter-country adoptions, which were a matter for the courts. That meant that, although in her view a foreign national could take part in a customary adoption, if they were to leave the country, a formal adoption would be necessary. Ms Shah agreed with Mr Brown's identification of the dominant motives for customary adoption. She also agreed that under customary law,

---

[14] Kenneth Brown, "Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu", Charles Darwin University Press, 2005.

[15] At 143.

[16] At 142.

[17] Published 17 August 1983.

property ownership was communal and an adopted child who was not within the bloodlines of the communal owners would not have rights.

[50] I do not consider that the absence of any prohibition on adoption by foreign nationals in the Custom Policy of the Malvatumauri is a positive indication of its permissibility. In my view, the Policy suggests to the contrary. Firstly, it makes it clear that the custom rules formulated in it are concerned with the preservation of the cultural practices of indigenous community members. Secondly, the Policy appears to contemplate adoption only by indigenous persons, because its reference to customary adoption is solely concerned with how it may affect rights of inheritance of communally owned land. It says that if all landowners and "long term guest residents" (families who have lived in a community for several generations and are absorbed by custom into the traditional owners' family) are dead, men who have been adopted from the bloodline of the family which has land rights or adopted into that family from another family in accordance with custom, may assume those rights. None of that is consistent with the notion that customary adoption by foreigners is contemplated.

[51] And if one accepts Mr Brown's description of the primary motives of customary adoption as to "maintain family links, assist childless kinfolk or invest a successor", it is difficult to see how they can be promoted by permitting adoption to a foreigner. The cases to which I was referred suggest that Mr Brown's text is accurate in describing the rationale for customary adoption. *M v P*[18] concerns the effect of an intra-familial arrangement; in that case between sister, brother and nephew. The issue in other cases was as to the effect of customary adoption on traditional indigenous ownership of land: *Tebahai v Habina*;[19] *Alanson v Malingmen & Ors*.[20]

[52] There is no authority or Custom Policy reference which supports the proposition that foreign nationals can participate in customary adoption. I find, firstly, that it is essentially familial in character, often with the purpose of preserving land ownership within family bloodlines, and secondly, that the intent of customary law generally is to preserve the practices of those within the indigenous culture. Consequently, I accept as correct Professor Corrin's opinion that non-indigenous people cannot adopt in custom and conclude that customary law would not have permitted Mr MacGowan, as a foreign national, to adopt the applicant. The evidence displaces the presumption in s 293(3) of the *Adoption Act*, and I find that any adoption would not have been effective according to Vanuatu law.

The legal effect of customary adoption on the relationship between adopter and child

[53] I will address the further questions arising in these circumstances under s 293(1) of the *Adoption Act*, in case my first conclusion is wrong. They are, whether under the customary law of Vanuatu adoption means that the adoptive parent is given a

> "… right superior to that of any biological parent of the adopted person in respect of the custody of the adopted person ..."[21]

and whether he or she

---

18 1980-1984] Van LR 333.
19 [1986] VUSC 9.
20 [2004] VUIC 2; Land Case 02 of 1995 (30 June 2004).
21 Section 293(1)(c).

> "… is placed generally in relation to the adopted person in the position of a parent …"[22]

The enquiry here is not as to what part a putative adopting parent actually played in relation to the child in question, but what entitlement Vanuatu law gave him or her, by virtue of that adoption, to act as parent. I will deal with those questions as they apply where there is a customary adoption, before turning to findings as to the nature and consequences of the ceremony Mr MacGowan took part in.

[54] In *Re M and the Adoption of Children Act*,[23] Young J said of the expression, "placed generally in relation to the adopted person in the position of a parent", used in the New South Wales equivalent of s 293(1)(d), that the words did not mean

> "… that every incident of the parent-child relationship must be present; but in contrast to [the equivalent of s 293(1)(d)], it must mean that the so-called adopter has a greater right with respect to the child than a mere right of custody".[24]

He went on to say that Australian law had inherited the idea of Roman law that adoption entailed severance of the ties with the original family and their replacement by ties with the adopted family. In circumstances where the relevant law had not severed the bond with the birth parents and had not given any right of inheritance to the child in respect of the adoptive parents' estates, the adoptee was not "placed generally" in the position of child to the adoptive parents (and, it seems to have followed, the latter were not in the position of parents to him or her).

[55] That decision was referred to with approval by Kirby P (as he then was) in giving the leading judgment in *Bouton v Labiche*.[25] His Honour observed that the term "placed generally" permitted the court

> "… to make a judgment concerning the post-adoption relationship and the ordinary relationship of parents to children";

This was in

> "… recognition of the inevitability of a large variety in the particular incidents of the adoption relationship as established by the law of other countries".[26]

[56] It is evident that just as customary adoption is not consistent in its requirements from location to location through Vanuatu, it is not consistent in its effect. In her article, "Adoption in Vanuatu", Ms Shah noted that it was

> "… difficult to identify the rights of the adoptive child in relation to inheritance, property and marriage due to the uncertainty and written nature of customary laws."[27]

---

22 Section 293(1)(d).
23 [1989] 13 Fam LR 33.
24 At 334.
25 [1994] 33 NSWLR 225, at 238.
26 At 238.
27 At 72.

Having reviewed practices on various Vanuatu islands, Ms Shah said that in most of the provinces, biological parents could not take their child back once adopted. She had not ascertained, however, whether in Tongoan custom birth parents could retrieve the child if it were mistreated, or whether the child could choose to return to his or her parents.

[57] Professor Corrin described customary adoption as more akin to fostering. It did not, in her view, sever ties between the adopted child and the biological parents, and it was not uncommon for the child to return to his or her biological parents. Under cross-examination, Ms Shah said that she was unable to comment on whether customary adoption was more like what Australians would regard as fostering. (That may have been, however, because she regarded Australian foster practices as outside her expertise.) Professor Corrin acknowledged, in cross-examination, that the gender of the adopted child would also play a part in determining the implications of a customary adoption: a boy could inherit his adopted father's land, but it was unclear that an adopted girl had any such entitlement.

[58] As already noted, however, Malvatumauri policy contemplates inheritance rights only in relation to customary land, and gives adopted children rights only when there are no surviving members of the traditional owners' bloodline. There is no suggestion in the Policy that custom would confer any rights in relation to privately held land. Ms Shah, while taking the view that a child adopted in custom would have a right to privately owned property, identified that right as arising under statute. Both experts agreed that a customary adoption would not enable the adoptive parents to take the child out of the country; that would require the order of a court.

[59] *Alanson v Malingmen & Ors*, [28] although from a different province, suggests a view of customary adoption as more closely aligned with a fostering or guardianship arrangement than a transfer of the parental role. In that case, the Malampa Island Court was considering ownership of land on Malekula. They noted that in that area, land was customarily transferred to the eldest son. Being adopted was not equivalent to being absorbed into the family's bloodline; it was

> "… only a sign of acceptance to live under the guardianship of another family",

which would confer a right to use land, but not ownership.

[60] The case of *Molivano,*[29] referred to earlier in this judgment, is also instructive. It appears to distinguish between formal adoption, which creates the relationship of parent and child, and customary adoption, which was not said to have that effect. The possible area of hiatus in relation to formal adoption was as to entitlement to custom land, the inference being that this is where customary law would have effect. It is noteworthy, too, that in *M v P*, the Chief Justice, having concluded that the child had been adopted in custom by the petitioner's son and nephew, considered the welfare of the child the "paramount question" which led him to order that he remain with the adoptive parents. His Honour does not seem to have regarded the customary adoption of itself as sufficient basis for that outcome.

---

[28] [2004] VUIC 2; Land Case 02 of 1995 (30 June 2004).
[29] [2007] VUCA 22.

[61] Professor Corrin's evidence and the view expressed in Mr Brown's text suggest that generally in customary adoption in Vanuatu, the biological family retains a degree of connection and an entitlement to reclaim control of the child which is inconsistent with the adoptive parent being placed generally in the position of a parent or in a superior position, in relation to the child's custody, to the biological parents. The authorities also suggest that the relationship may be closer to one of fostering. But the situation in relation to Tongoan customary adoption in particular was not clear. Professor Corrin was speaking more generally about the situation in Vanuatu; Ms Shah was unable to assist with relevant detail in relation to Tongoa; and Mr Maripopongi (although he was not expressing an expert opinion) described a state of affairs in which a child adopted in a Tongoan ceremony could not choose to return to or, other than in grave circumstances be retrieved by, its birth family. Had this been the only issue in the case, I would not have considered there to be sufficient evidence as to the relationship created by Tongoan customary adoption to displace the presumption in s 293(3).

Was there a customary adoption?

[62] Thus far I have dealt with the issues in this case in the abstract, having regard to the requirements and effect of customary law: whether it was possible for a foreign national to adopt in custom and what is the parental status conferred by customary adoption. I turn now to make findings on what did occur, in case my conclusion on the first issue is wrong. I have accepted that there was a ceremony at which Mr MacGowan provided a bullock to the applicant's family, saying that he would look after her, and that the family gave its approval to him to take the child back to his property. The question is whether the ceremony and the arrangement made at it amounted to a customary adoption. The fact that a bullock was handed over does not of itself dictate a positive conclusion. Mr MacGowan had on, at least one other occasion, provided the community with a bullock, with no element of exchange or agreement involved. The intent of those taking part in the ceremony is critical.

[63] In making a finding as to that intent, I give considerable weight to the documentary evidence, which I regard as far more reliable in indicating what took place than the witnesses' views given much later in the context of this application. The documents completed by Mr MacGowan and Ms Seule's registration of the applicant's birth were admissible under s 92(1)(a) of the *Evidence Act* 1977 as evidence of the truth of their contents. The statements attributed to Mr MacGowan in Mr McLean's written record of his conversation with him were similarly admissible pursuant to s 92(1)(b) of the Act.

[64] Something should be said as regards the evidence of Mrs Crawford as to conversations she recalled with Mr MacGowan concerning his supposed paternity of the applicant. It is not clear on what basis that evidence was put before the court, but no objection was taken to it. The applicant did not rely on the suggestion that Mr MacGowan believed her to be his daughter as probative of any particular issue. Other evidence, in any case, casts some doubt on Mrs Crawford's recollection. Mr MacGowan does not seem to have conducted himself as though he were under any illusion that he was the applicant's biological father; if he entertained that idea, it does not seem to have been with any confidence or to have lasted for long.

[65] To expand: if Mr MacGowan had believed himself to be the applicant's parent, it is difficult to understand why it was necessary for him to take part in any ceremony in

order to retrieve her when she was given away. Certainly, there was no suggestion by Mr Seule or Mr Maripopongi, who were at that ceremony, that Mr MacGowan made any claim to be her father. It is notable that the applicant's family in subsequent documentation of Mr MacGowan's relationship with the child never suggested anything of the kind; to the contrary, in the letter of 1 February 1999, Robert Seule expressly said that the applicant's paternal father had abandoned her. In his application to change the child's name in September 2003, Mr MacGowan identified her father as the Erakor man. But if Mr MacGowan did believe the applicant to be his child, in my view it would make it less, rather than, more likely that the ceremony in which he took part was for the purpose of adopting her in custom.

[66] Reliance was placed on Mrs Crawford's evidence as to Mr MacGowan having named the child "Sheralee". That would have real significance if it were said that he had done so at the time of the applicant's birth or in the course of the ceremony. But Mrs Crawford's evidence was that it occurred because of the applicant's attachment to Mr MacGowan when she was "crawling"; which suggests that it was at least a few months later. Ms Shah regarded it as significant in the present case that the applicant had been given the name MacGowan on her birth certificate, but she seems to have been under a misapprehension as to when and how that happened, the original registration having shown the applicant as "Seule". Mr Maripopongi similarly seems to have thought that Mr MacGowan registered the child in his name, but it is clear from the documentary evidence that it was Ms Seule who registered the birth, giving the applicant her surname. That Ms Seule undertook the registration and that she gave the child her name both suggest that her parental status was continuing at that time.

[67] What stands out very clearly from the documentary evidence is that at no point did the applicant's family or Mr MacGowan mention customary adoption; nor did they act as though parental control had been delivered to Mr MacGowan. It is certainly the case that the applicant remained in the care of Mr MacGowan after her mother left Bellevue. It was put to Professor Corrin, and she agreed, that this was consistent with a customary adoption; she said that in a patriarchal society she would anticipate that a child, having been adopted, would remain with its father if the mother left home. I do not doubt that is correct, but in the present case, where Ms Seule had once already given the child up, because she did not have the means of supporting her, I do not think it means much more than that she preferred to leave her with Mr MacGowan, who was willing, and had a far greater capacity, to continue to pay for her needs.

[68] Some reliance was also placed on Mr MacGowan's having said, in his letter of September 1998 seeking a visa for the applicant, that she had been "unofficially adopted" by him. But it is significant that Mr MacGowan said that the unofficial adoption had taken place at a time when Ms Seule was not expected to live because of her illness. That clearly post-dated the ceremony by some years. It is inexplicable, if Mr MacGowan thought that the ceremony had constituted the adoption, that he would have attributed it instead to an undertaking given to her mother when the latter became ill. It is also noteworthy that he described himself as having undertaken to act as the applicant's "godfather", taking care of her welfare and education, rather than suggesting any parental role.

[69] At the same time, of course, Mr MacGowan had required permission from Ms Seule and Robert Seule in order to take the applicant abroad. One can see why, for official

purposes, it was advisable for him to have the permission of the child's mother. The permission of her uncle, however, seems only consistent with the view that the applicant still remained within the control of her extended family.

[70] Again, in 1999, when Ms Seule died, Robert Seule on behalf of the extended family, evidently considered it necessary to give their approval for Mr MacGowan's continued guardianship of the applicant. The basis of their doing so is identified as Ms Seule's wish, the family's wish, and Mr MacGowan's preparedness to continue in that role. Mr Seule's description in cross-examination of the letter as intended to reaffirm the effect of the 1993 ceremony is implausible, because it makes no reference to the occurrence of that ceremony, let alone as giving Mr MacGowan any form of parental entitlement. Indeed, the notion of any parental right is contradicted by the focus on the Seule family's wishes and the reference to Mr MacGowan's status as "authorised guardian". Mr MacGowan seems to have accepted that role, describing himself as the applicant's "accepted guardian" in making another visa application later in 2001.

[71] When, in September 2003, Mr MacGowan sought to have his surname incorporated into the applicant's name (but not as her surname) he referred to his sponsorship and "guardianship". He was also at pains to say that he had not adopted her and did not intend to do so, but rather had promised prior to her mother's death to ensure her education. At the same time, giving his agreement to the name change, Mr Seule described himself as the applicant's "parent". His explanation in cross-examination for using that term, that he regarded himself as responsible for the family's children, was a reasonable one: but it was not consistent with Mr MacGowan's being regarded as having a similar level of responsibility.

[72] Again, in 2005, the deed executed by the applicant's family and Mr MacGowan confined his status to that of guardian. One can understand that term may have been used as more readily understood by Australian officials considering visa applications, but it is difficult to see why, if the 1993 ceremony were significant in relation to Mr MacGowan's status, there was no reference to it in the preamble. Rather, the deed predicated his responsibility for the applicant on the promise made to Ms Seule when she was ill. It is also significant that the family expressly relinquished claims as next of kin, which, had there already been a transfer to him of parental rights, would have been superfluous.

[73] Against that evidence, I do not think that much weight can be given to the reference by Mr MacGowan in the 2009 Vanuatu will to the applicant as his "adopted daughter". It is consistent with his description of her as "unofficially adopted" as part of his promise to her mother, rather than as anything arising from the 1993 ceremony. Mr MacGowan made it clear on numerous occasions that it was the promise to Ms Seule which was operative in his taking responsibility for the applicant: in the letter accompanying the 1998 visa application; in his application to change her name in 2003; in the deed executed in 2005; and in the information given to his solicitor, Mr McLean, in 2011. It is also consistent with Robert Seule's description, in his letter immediately after his sister's death, of Mr MacGowan's continued guardianship as the result of his late sister's wish and the wish of the Seule family.

[74] I find that the 1993 ceremony was not perceived by the parties to it, Mr MacGowan and the members of the Seule family, as a customary adoption. Ms Seule had not

surrendered her parental status, as was evidenced by her registering her daughter's birth, giving permission for Mr MacGowan to take the child out of the country and obtaining from him a promise that he would (as the 2005 Deed described it) care for her "under his protection". While, at the ceremony, Mr MacGowan indicated his preparedness to accept some (but not necessarily sole) responsibility for the applicant's practical care and to support her financially for an undefined period, that willingness fell well short of any intention to adopt. His assumption of the obligations of a guardian in relation to the applicant arose from the undertaking given to Ms Seule when she was ill in 1998, rather than from any customary adoption.

[75] Moreover, the agreement was one of guardianship only until the applicant turned 18, not of taking the position of a parent, with the permanency that entails. Mr MacGowan regarded his duties to the applicant as discharged once her minority ended. There clearly was great affection between Mr MacGowan and the applicant, and he regarded her in many respects as a daughter, but the overwhelming evidence is that he did not intend to, and did not, adopt her as his child.

[76] It follows that the applicant's claim for further provision cannot succeed, because, not being the child of Mr MacGowan, she is not an eligible applicant under s 41 of the *Succession Act*. Having considered the matter on its merits, I think that the better course is to refuse the originating application for an extension of time, rather than striking it out on the respondent's application. In order to resolve the strike-out application, I will formally dismiss it.

Costs

[77] The applicant submitted that if she were to fail on the question of her standing to make the claim, there ought to be no order to costs other than that the respondent recover his costs on the indemnity basis from the estate. Reference was made to a number of cases, including *Re Milanovic*,[30] in which no order was made for costs against an applicant who failed because of a lack of standing. The respondent submitted that in the event the applicant's claim was dismissed for want of standing because of a finding that she was not adopted, she ought to be ordered to pay the costs of the proceedings on the standard basis. This would not be an instance of an arguable but borderline case being dismissed on the merits, and the application had been brought well out of time. The estate had originally been put to the expense of DNA testing to disprove the applicant's initial assertion that she was the biological child of Mr MacGowan and then had to investigate the issues concerning the claim of customary adoption.

[78] Rule 681 of the *Uniform Civil Procedure Rules* 1999 provides that the costs of a proceeding are in the discretion of the court but follow the event, unless the court makes a different order. Rule 700A(2), without limiting that discretion, also entitles the court to take into account in (inter alia) a family provision proceeding, the value of the property in question; whether the costs have been increased by various forms of non-compliance or unreasonableness in litigation; and any offer of settlement made. Only the first would appear relevant here.

---

[30] [1973] Qd R 112.

[79] While r 681 represents the general position, other special considerations may apply in the case of family provision claims.[31] There are a number of considerations in this case which lead me to the conclusion that no order for costs ought to be made against the applicant. This was not an unreasonable claim. It seems that the applicant commenced her claim on the basis that she was the biological child of Mr MacGowan (with adoption in custom as the alternative) because the evidence of Mrs Crawford led her to a mistaken but reasonable belief in its accuracy. Neither that claim nor the customary adoption claim presented before me was in any way frivolous. The latter involved difficult questions of law and questions of fact as to which the applicant could not have had direct knowledge, but as to which the evidence of Mr Maripopongi and Mr Seule (but not the more contemporaneous documentary evidence) tended to support her. I do not intend to embark on a consideration of the factors relevant to whether time would properly be extended, had the applicant standing, but it can be said at least that the delay was not the result of any unconscionable conduct on her part. It seems to have had more to do with her lack of education and the extraordinary dilatoriness (at least on the evidence before me) of the lawyers acting for her in Vanuatu.

[80] The estate is a large one, worth something in excess of $5,000,000. There is not, therefore, the imperative of deterring the frittering away of small estates by unsuccessful claims which has been referred to in some of the cases. Although, as I have found, the applicant had no legal claim against the estate, she did have, in my view, a moral claim. She and Mr MacGowan had a strong relationship of affection in which she regarded him very much in the role of a father and he in many ways treated her as a daughter. Although the applicant was left two lots of land, they are unimproved and she presently lives in a house consisting of a single room with a dirt floor, without water, electricity, or sewerage. She is 26 years old, with limited ability to earn income, and has three young children. There was no dispute that if she were found to be an eligible applicant, substantial further provision ought be made for her. As matters stand, should a costs order be made against her, it is likely to very much reduce or even negate the benefit of the devise; an outcome which the testator is unlikely to have desired. Indeed, I regard it as of some significance that in his will, Mr MacGowan had asked his executors to consider the applicant's future well-being.

[81] For those reasons, I do not consider that an order for costs should be made against the applicant. The respondent, should, of course, have his costs, to be paid on an indemnity basis out of the estate.

Orders

1. The originating application for an extension of time is refused.

2. The respondent's application to strike out that application is dismissed.

3. The respondent's costs of the proceeding, including the strike-out application, are to be paid on the indemnity basis from the estate of the late Kenneth Hamish MacGowan.

---

[31] See *Underwood v Underwood* [2009] QSC 107 at [37].