IN THE HIGH COURT OF THE COOK ISLANDS **Application No 485/96**
HELD AT RAROTONGA
LAND DIVISION

IN THE MATTER of Section 409(f) of the Cook Islands Act 1915

AND

IN THE MATTER of the Mataiapo Title of Te Pa

AND

IN THE MATTER of an application by IMOGEN PUA INGRAM

Parties:

1. Imogen Pua Ingram — **The Applicant**
   Represented by Counsel, Mrs T.P Browne

2. Moeroa Brothers — **First respondent**
   To object
   Not represented by Counsel and appearing in person

3. Teau Tamuera, aka Madeleine Teau Metcalfe
   To object — **Second respondent**
   Not represented by Counsel and appearing in person

4. Takiora Ingram
   To object — **Third respondent**
   Not represented in Court

Hearing, Date and Place: 1 May 1997 } 22-23 January 1998 } High Court - Rarotonga

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JUDGMENT OF COURT

McHugh J

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1. Introduction

This is an application brought under section 409(f) of the Cook Islands Act 1915 to determine whether the applicant Imogen Pua Ingram is the rightful person to hold the office of "Tepa Mataiapo". This title was previously held by the late Tepa Teupoko Mataiapo, mother of the applicant, for a period of 43 years from 23rd June 1941 until her death on 14 September 1984.

Following Tepa Teupoko's death her eldest son Vincent Ingram acted as custodian of the title until 1991 when the family agreed that Dr Takiora Ingram, the second eldest child of Tepa Teupoko, should become the holder of the title. Dr Ingram returned to Rarotonga and assumed custodianship of the title but was never formally invested with the title. She left Rarotonga for New Zealand in May 1996 and apparently over the next six months the applicant, who is the fourth child of the previous title-holder, consulted with her family and, apart from Dr Ingram, gained their support to hold the title. The applicant claims she has the support of all the family - save her sister Takiora Ingram - and has been elected by the family to the title. The applicant proceeded to call a meeting of the Te Pa extended family as, in her words, "I thought it only courteous that they be informed of my family's decision".

The meeting was held on 2nd October 1996. A copy of the minutes of that meeting was filed with the application.

The applicant subsequently met with Pa Teariki Upokotini Ariki on 15 October 1996 following a further meeting of the extended family held on 9 October 1996. The applicant produced to the Court as Exhibit "B" a letter from her to Pa Ariki thanking her for her support and declaring the applicant's desire to work together with Pa Ariki "as our parents have done in the past". The applicant extended Pa Ariki an invitation to be present at her investiture. The investiture took place on 25 October 1996. There was an objection by a representative of the Raitara line.

On 7 November 1996 the applicant filed the present application. It was opposed by three persons namely Moeroa Brothers, Teau Tamuera aka Madeleine Teau Metcalfe, and Takiora Ingram. The application came on for hearing in Rarotonga on 1 May 1997. The applicant was represented by counsel Mrs T Browne. Mrs Brothers and Mrs Metcalfe appeared in person and Dr Takiora Ingram, who did not appear, submitted her views in writing.

The Court reserved its decision and requested the parties to present written submissions. On 29 October 1997 the Court issued a decision directing a further Court hearing in Rarotonga and setting out particulars of further evidence and submissions required by the Court. The parties were asked to answer several questions posed by the Court direction to three areas of concern. These related to: firstly - evidence as to the earlier holders of the title; secondly - the relationship and identity of Teupoko Mataiapo; thirdly - the present view of the Koutu Nui and House of Ariki on the custom relating to the election process.

The application came before the Court again in Rarotonga and a two-day hearing ensued. The applicant, represented by Mrs Browne, and the two respondents Moeroa Brothers and Madeleine Metcalfe appeared. Dr Takiora Ingram did not in person appear but later made a further written submission. The Court reserved its decision and the judgment of the Court now follows. This judgment must be read in conjunction with the Court's interim decision of 29 October 1997 and which sets out the grounds of the applicant's claim and the objections of the respondents. These details will not be restated here. The earlier decision also referred to the Court's assessment of the present custom as set out in the various reports and recommendations of the House of Ariki. The Court in the present proceedings must determine what is the custom applicable to the selection of Pa Mataiapo and whether that custom was observed. There is an important preliminary jurisdictional question which relates to the extent of power given to the Court under section 409/1915 to which the Court now turns.

2. Court's jurisdiction under section 409(f)

In its interim decision of 29 October 1997, the Court referred to the well stated view of earlier Courts, including the Appellate Court, that Section 409(f) does not give the Court jurisdiction to appoint an Ariki.

Section 409(f) 1915 provides that the Court shall have jurisdiction:

> "(f) to hear and determine any question as to the right of any person to hold office as an Ariki or other Native chief of any island".

In the 1948 decision of the Native Appellate Court in re Makea Nui Takau it was held:

> "It is not the function of the Native Land Court itself to appoint an Ariki or other Native Chief to the office. Any such appointment can only be made by the persons entitled to make the appointment under the ancient custom and usages of the Natives of the Cook Islands"

At the opening of the renewed hearing of this application on 22 January 1998 the Court noted that it seemed from evidence filed that the applicant had taken all proper steps under customary law to become the title-holder and had taken an unnecessary step in applying to the Court for confirmation. The Court then indicated it favoured dismissal of the application as the matter was one for Pa Ariki and the people to determine and not the Court. The Court after hearing from the parties did not take that action but indicated it would require the parties, and in particular the applicant, to make submissions on this issue.

On the following day Mrs Browne presented written submissions to the Court. Counsel agreed that Section 409(f) did not provide the Court with a jurisdiction to appoint the titleholder as this was the function of those persons entitled to elect. Counsel also argued that the Court had a duty to ascertain and determine the right of a person to hold office. Mrs Browne referred to several cases in which the Court had been called on to carry out its duty to ascertain and determine the right of a person to hold office. Mrs Browne also referred to several cases in which the Court had spelt out its jurisdiction. There is no doubt that the Court is required to

intervene when a dispute arises in connection with an appointment or proposed appointment - in re Makeanui Ariki v MacQuarrie, Nia and Lineen 1995.

The important words in s409(f) are "to hear and determine any question ...". The word "question" clearly suggests that a person has challenged the right of a person in some way such as being a person unsuitable for office or having been improperly elected or having no standing or family connection. There could be a number of circumstances giving rise to a need for questioning.

The Court is grateful to counsel for her careful analysis. In this case there were early signs that there was a dispute as to who was entitled to be appointed. The papers filed in Court by the objectors raised several issues. They were as follows:

1. Moeroa Brothers

   (i) the title was one for decision by the whole family of descendants from Te Pa and Pa Ariki and not by the Ingram family.
   (ii) the title should go to the descendants from Tu Te Unuku's first family namely the Raitara line who had elected Tamaine Atera to hold office.

2. Madeleine Metcalfe

   (i) the title is a Rangiatea title and should return there.
   (ii) Madeleine Metcalfe descends from Te Pa Te Ruaroa and also through Te Pa Patua who were mataiapo prior to Te Ariki Te Amua and she has a prior right to the title.

3. Takiora Ingram

   (i) She is senior to Imogen (the applicant) and has a prior claim.
   (ii) She was elected to the office by her family and kept it alive for several years.

Although these objections were filed subsequent to the application, it would have been apparent prior to 7 November 1996 that the applicant's right was being questioned by three respondents. This was evident from the series of meetings held in September/October 1996.

This Court is satisfied that there are questions which require hearing and determination by the Court and upon reflection the Court is pleased that it proceeded to hear further evidence and submissions. As will be seen shortly, the Court, for reasons it will give, has changed its view that the matter should go back to the people and Pa Ariki for determination. This is a case which calls for the determination of a dispute and clearly is within the jurisdiction given by section 409(f) and in line with the various decisions of previous Courts.

Before leaving this issue the Court would like to make an observation. Counsel for the applicant submitted there was a need for the Court to record the appointment of a title-holder so that this record was available for future generations. The Court appreciates the good sense in such a procedure but as the law presently stands the Court is not empowered to appoint an ariki on an undisputed application where no question as to the right to hold office is raised. The Court referred in its interim decision to the order made by Judge McCarthy on 23 June 1941 appointing Te Upoko Kelly as Te Pa Mataiapo in which it was stated the appointment was done "by agreement with the parties" but when it first came before the Court it was contested (MB 13/317). There was therefore a question for the Court to hear and determine even if subsequently the parties agreed. As the case law presently stands section 409(f) is not a vehicle for every appointment of an ariki or other chief but a jurisdiction to resolve dispute and determine right to hold office. It may be desirable in the interest of future generations for a recording system of some kind to be introduced. That would be primarily a matter for the Koutu Nui and Parliament to consider.

The Court therefore accepts it has a duty in the present proceedings to determine who holds the right and that any further adjournment to allow the matter to be settled is unlikely to be successful.

The Court now proposes to review the question of custom pertaining to the selection of Mataiapo.

3. Customary law applicable on appointment of mataiapo

The Court has carefully examined the various reports by the Koutu Nui on election of title-holders and in particular the selection of a mataiapo consequent upon the death of the title-holder. In its 1977 report to Parliament, the House of Ariki made its recommendations after having debated a paper presented to it by the Koutu Nui. On page 8 of its report the House of Ariki said this about the election of a Mataiapo:

> "It is the privilege of the mataiapo Ngati to elect its own Mataiapo".

The House of Ariki earlier in its report defines "Ngati" as *"a descent group headed by a title-holder"*. That definition read in conjunction with the election provision indicates clearly enough that those persons who descend from the title-holder elect the title-holder. The 1977 report was favourably regarded by the Legislature but Parliament did not proceed to compile and complete a codification of all the Maori customs applicable to land and Maori titles. During its hearing in this case on 1 May 1997 evidence was given to the Court by Mrs Akaiti Tamarua Ama who is secretary of the Koutu Nui. Mrs Ama explained that the Koutu Nui was still in the process of formulating a code of Maori custom and had placed recommendations before the Minister. A copy of the new paper prepared by the Koutu Nui but not yet reviewed by the House of Ariki was produced by counsel for the applicant (see Attachment "G" of Mrs Browne's submissions of 21 May 1997). In this report, referred to by the Court in its interim decision of 25 October 1997, the Koutu Nui accepted that the custom of election and investiture of a mataiapo was not uniform throughout the Cook Islands. In Manihiki the successor to the title is decided by the mataiapo family. In Mangaia the title-holder is decided by the Kawanas.

The Koutu Nui also recognise that on occasions a title-holder will designate by will the next title-holder and when this occurs the contents of the will are disclosed to the family of the holder for consideration and final decision. The Koutu Nui

stipulate that the successor to the title "must be selected and agreed upon by those recognised descendants whose responsibility it is to make the selection who should be the next title-holder".

Mrs Ama, who also gave evidence at the resumed hearing on 23 January, made it abundantly clear that it was the customary right for the children and further descendants of the previous holder to select and elect the new title-holder. She also stated that if the family could not settle the issue the brothers and sisters of the previous holder would make the election. Mrs Ama also stated that Pa Ariki was not involved in the selection process. If there was no will then the children of the holder elected the mataiapo. The witness confirmed that as a matter of courtesy the Ariki was informed of the electing family's selection and also the wider extended family. Counsel pointed out that in the present case the immediate family of the Te Upoko was small - only seven in number, whereas in some other families there might be a large number of descendants from the title.

In summary, there appears to be varying procedures and customs in the selection of mataiapo and this difference may well be one reason why the Koutu Nui, House of Ariki and the Legislature have found difficulty in completing an authoritative code on custom. It is however clear that there is a custom in existence which provides for the title to descend down a senior line either by will of the deceased mataiapo or by election of the Mataiapo ngati descendants. This process has been challenged from time to time in the Courts by issue from a related but secondary line but the Courts have followed the senior family line custom. If the senior line ends and the deceased mataiapo has no issue the secondary line can claim or the Ariki may step in and make an appointment. It is to be noted in the present case that a claim was made by the secondary line namely the descendants of Tu Te Unuku when Te Upoko sought the title in 1941 but the Court appointed Te Upoko an adopted child of the previous Mataiapo Te Pa te Ariki Tamanua who had left a will appointing Te Upoko. In the present proceedings the descendants of Tu Te Unuku are again contesting the title.

The custom of following the senior line is not rigid and indeed has been changed by agreement of all those descending from the original title-holder, i.e the extended

family. This agreed departure from the custom of succession through the senior line was fully detailed in re Makea Nui Title case decided in 1995. Such an agreement must be by consent of all the family lines involved including the senior line.

The Court will return to this question when it gives its findings later in this judgment.

4. The function of Pa Ariki in the selection process of a Mataiapo

There is no dispute that in the first instance mataiapo were appointed by the Ariki either for a particular purpose such as to head a clan within the tribe or to represent a particular tapere. The Ariki may also appoint a mataiapo as a reward for some service to the Ariki or tribe or an outstanding deed. In some cases mataiapo were awarded land to go with their title. The nature of the appointment would determine whether the ariki retained control of the title and could remove or terminate the appointment. Generally, however, the award of a title signalled recognition of the appointee's mana or standing. The 1977 report of the House of Ariki defines a mataiapo as "a chief of a major lineage". Once having been appointed to that position the mataiapo was charged with representing and caring for the particular clan involved. The mataiapo would represent the tapere at meetings of the Puara - a council of all mataiapo. Having appointed a title-holder, the election of a replacement became the function of the mataiapo family. The Ariki would not interfere with that process except in cases when the line was extinct or the question of unsuitable behaviour was raised. It is interesting to note that the recent amended recommendations of the Koutu Nui have now defined grounds for removal i.e having committed (i) incest, (ii) assault, (iii) murder, (iv) cruelty and ill treatment to members of the tribe, (v) overbearing to the people or (vi) being of unsound mind. Absence of the mataiapo from the Cook Islands for some lengthy period may also lead to another title-holder being elected. The Court notes however that Koutu Nui emphasise that removal and selection powers remain with the descendant family.

There is also another custom that the Ariki be informed of the family decision and the Ariki's approval and support be sought as a matter of courtesy. The Ariki is also present generally at the investiture ceremony of the mataiapo. The investiture ceremony of the mataiapo is an important custom in the process of appointing mataiapo although it was held by the Appellate Court in re Tinomana Ariki Title case 1948 that investiture was a step in confirming authority but was not a pre-requisite for election.

5. Holders of the Te Pa Mataiapo Title

5.1 *Genealogies*

The Court has appended to this judgment three genealogies produced during the hearing of this application. The first, Schedule A, was produced by the applicant and traces down five generations to three of the parties in this dispute namely the applicant Imogen Ingram, the first respondent Moeroa Brothers and the third respondent, Takiora Ingram. The second table, Schedule B, is the genealogy produced by the second respondent Teau Tamuera (Madeleine Metcalfe). It is a genealogy which commences with Te Pa Te Ruarau or Ruaroa who is not shown as being connected to Roimata and Te Pa Patua. It is more the genealogy of Roimata. The family involved is a different one from that set out in Schedule A. The Court will return to the relationship between Roimata and Te Pa Ruaroa a little later. The third table, Schedule C, is of the same family as Schedule A. The three genealogies are not in dispute and at issue in these proceedings but what is at issue is the list of previous title-holders and where these title-holders relate to the claims of the parties before this Court.

5.2 *Prior holders of the Te Pa Mataiapo Title*

The Court should comment that this issue is made difficult to untangle and determine because some of the persons claimed to have been holders lived well over 100 years ago. Much of the evidence before this Court centres on the first minute book of the Court and the evidence recorded in those minutes was given in 1905 but relates to a period back in time into the last century. Data recorded in the

early minutes is difficult to interpret and reconcile and indeed the parties before the Court had understandable problems in identifying relationships and the sequence of title-holders.

In counsel for the applicant's first submission of 21 May 1997 four previous holders of the Te Pa Title were listed:

1. Te Pa Manu a Tamaiva
2. Te Pa Teariki Teanua I
3. Te Pa Teariki Teanua II (died 29 December 1938)
4. Te Pa Teupoko Mataiapo (died 14 September 1984)

These persons are shown on Schedule A and were taken from the Court's Title file and MB 29/197.

In a later submission filed on 22 January, counsel submitted that the evidence contained in MB 1/352-367 supported the view that the first holder of the title in the genealogy shown in Schedule "A" was No 2 above. Counsel redefined the possible sequence as follows:

1. Te Pa Teariki Teanua the First
2. Te Pa Tu (daughter of No 1 herein)
3. Te Pa Teariki the Second (brother of Te Pa Tu)
4. Te Pa Teupoko Mataiapo

This change suggesting Teariki Te Anua 1 as the first holder was based on evidence given by Charlie Cowan on 16 September 1940 - MB 13/317 who said

> "I understand only two have held title of TE PA. 1st Teanua. 2nd Te Ariki Te Pa. Only two. This Te Pa title is not from older times. The title was given to cover Mataiapo's functions at Rangiatea. In the Maori custom. Te Pa went to Te Pariki with his big pig. I don't understand that lands went with title, Pariki only gave the Mataiapo title ..."

The inclusion of Te Pa Tu as the second holder was based on evidence given at MB 1/356 that

> "Te Ariki's sister was the mataiapo and she being dead the title devolved on him." (Te Pa Te Ariki).

In summary, the Court observes that the mataiapo listed are all within the one family group set out in Schedule "A".

The first respondent Moeroa Brothers made no submissions on the chronological chain of Mataiapo title-holders.

The third respondent Teau Madeleine Metcalfe submitted that the first Te Pa Mataiapo in Rangiatea was Pa Te Ruaroa Tamarua followed by Matatia Tamarua and Te Pa Patua. Mrs Metcalfe thus claims that the chain of mataiapo office was

1. Pa Te Ruaroa Tamarua
2. Matatia Tamarua
3. Te Pa Patua
4. Te Pa Te Anua

The linkage between this chain of title and the applicant's was established, in Mrs Metcalfe's submission, when Te Pa Patua - No 3 in her list - died and the title went to Te Pa Te Ariki Te Anua. Mrs Metcalfe claims the title was originally a Rangiatea title held by Te Pa Patua and the earlier holders and should go back to Rangiatea. Mrs Metcalfe, who was invested by her Rangiatea people, descendants of Roimata, claims she now holds the title of Te Pa Mataiapo. Mrs Metcalfe agrees that there are two separate families involved.

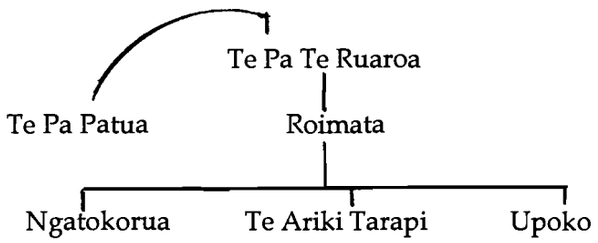
The Court has endeavoured from the evidence presented to it to verify the list of early mataiapo put forward by Mrs Metcalfe namely:

1. Te Pa Te Ruarau or Ruaroa
2. Matatia Tamarua

There is no evidence presented to establish that Te Pa Ruaroa held the title other than the fact the words "Te Pa" are used in his name - MB 4/250 and MB 29/137. In the genealogy given at MB 29/137 Pa Te Ruaroa is shown as the sister of Matatia and both persons died "mdsp". MB 4/252 records that Te Ruarau held the title and "thence it went to Pa Patua".

The evidence offered to support Matatia as having held the title is also brief and recorded in MB 4/254 "Matatia Tamarua an old Te Pa".

The genealogy "Schedule B" given by Mrs Metcalfe is really one commencing with Roimata. The relationship between Roimata and Te Pa Te Ruarau is set out in MB 4/250 on 3rd August 1908. The Court was presented with typed copies of that minute but has sighted the original minute. This minute records Ngatokorua, who is the great grandfather of Madeleine Metcalfe as having presented this genealogy.



This shows Te Pa Patua as a brother of Roimata. Counsel for the applicant has also referred to earlier evidence given by Ngatokorua at MB 1/356 when he said "I saw Te Pa Patua whose daughter was my mother. He had 5 daughters". This evidence confuses the relationship between Te Pa Patua and Roimata even further. It is not helped by the genealogy presented by Madeleine Metcalfe marked "E" and attached to her first submission of 1 May 1997. In this table said to have been prepared by Mr McCauley, Pa Te Ruaroa is shown as a brother of Te Pa Patua and not a son as the minute at MB 4/250 seems to show. Table "E" also shows Te Pa Patua as having issue and in the longer table of Tamarua genealogy Pa Te Ruaroa is shown as a "Deceased Single Person".

From this confusing state of the evidence, the Court is unable to satisfy itself as to the correctness or otherwise of the clan of title going back from Pa Patua. What is certain is that there were two distinct families, one claiming descent through Te Pa

Te Ruaroa and the other through Te Pa Manu a Tamaiva. The linkage between the families may be at the title level where there is some evidence that the mataiapo title went over to Te Ariki Te Anua from Te Pa Patua.

What is also certain is that the Te Pa Mataiapo title has been held in one family for three generations and spanning a hundred years.

Counsel for the applicant referred the Court to MB 1/352 and a genealogy given therein which seemed to show a relationship between a person called Te Patua Kino and Teariki Teanua. For the reasons set out by counsel the Court is unable to accept this table as establishing a family link.

6. Identity of Teupoko Mataiapo

The Court accepts the explanation given by counsel for the applicant that Teupoko although a grand niece fell within customary reference as a grand-daughter or mokopuna.

The Court also accepts that the Teupoko referred to at MB 4/254 is a different person from Teupoko Kelly.

7 Finding of this Court

This is a contest between four claimants for the title. The Court first reviews the respondents' claims.

The first respondent Moeroa Brothers bases her claim through Tu Te Unuku, a sister of Te Pa Te Ariki Te Anua the First and states that descendants from Raitara have the power to select the next holder. This family claims "it is our turn to hold the title now" (emphasis added). The underlined words go to the kernel of this family's claim. The Court does not consider that change for the sake of giving a family a turn to hold the title is sufficient to stand on its own and defeat the stronger claim

of the applicant. There would need to be an agreement in existence such as was established in the Tinomana Ariki case to defeat a claim based on custom. No such agreement for rotation exists.

The second respondent Teau Tamuera, Madeleine Metcalfe claims this was a Rangiatea title which went out of that family when Pa Patua died and the title went over to Te Ariki Te Anua. She claims that the title should revert to descendants to Pa Patua. The Court again does not accept that this is a sufficient reason to defeat the applicant's claim based on custom.

The third respondent is an elder sister of the applicant and claims she has priority to the title. She claims further that the applicant does not have the support of the family in that her sisters Evelyn and Sandie Ingram do not support her. Dr Ingram also claims the applicant does not have the support of the wider family and is also not suitable for appointment because she "operates under a policy of divide and rule". No formal evidence was presented to this Court by the third respondent to support these allegations. The Court has on the record an affidavit from the applicant in which she says that all her siblings except the third respondent support her as the title holder. There are also filed in Court witnessed nomination papers in favour of the applicant signed by Evelyn, Vincent, Rowland and William. The Court is satisfied that the applicant does therefore have the clear majority support of her family. The Court has also received in evidence minutes of a meeting of the extended family held on 2 October 1996 which was called by the applicant to present to them her family nomination. The Court accepts her family nomination. The Court accepts that this meeting represented a large part of the wider family group.

The Court does not propose to deal at length with the suitability issue. The third respondent has expressed her dissenting view and is entitled so to do but the issue of suitability goes to much more serious matters than opinion. The Court is unable to accept there is an unsuitability issue of which it should take judicial notice. The third respondent's objection is dismissed.

The Court now turns to the applicant's case.

The Court accepts that there is recognised custom that the descendants of a deceased mataiapo have the right to select from their family the person to hold office. Evidence of the existence of this custom was presented to the Court by the applicant and has not been countered by the respondents. There is also a custom that a title pass down through a family line until that line is broken by cessation of issue. In this case the title has been in one family for about 100 years; has passed through four members of that family over three generations and in the view of the Court, has established and given cognisance to a custom accepted in Rarotonga. The applicant in accordance with established custom has sought and gained approval of Pa Ariki. The Court must observe that Pa Ariki has very properly endeavoured to remain aloof from involvement in the dispute and has left the election in the hands of the family to settle. The applicant after selection by persons qualified to select her, has, in accordance with custom, followed the courtesy of calling the extended family together to inform them of the selection. Regrettably there has been some acrimony and disagreement coming from certain persons within and even without the extended family which has brought this matter to Court.

The decision of this Court therefore is that the applicant, Imogen Pua, has the right to hold the title office of Te Pa Mataiapo and an order determining that right is now made under section 409(f) of the Cook Islands Act 1915.

8. Costs

No application for costs was made by the applicant or any of the respondents at the conclusion of the hearing on 23rd January 1998. At the end of proceedings on 22 January the Court said it may look at this issue later. The Court, because of the circumstances surrounding this case, is not minded to make an order for costs against the respondents. Because this question was raised during proceedings by the applicant who was concerned at the costs of the proceedings to date, the Court reserves costs. The applicant has 21 days from receipt of this decision to make a

submission on costs and at the same time to serve copies on the three respondents who in turn are given 21 days to file their response. The Court will then determine the matter if necessary.

Dated this 27th day of August 1998.

A G McHugh J