IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA 512/2022

BETWEEN	**MATA-ATUA McNAIR** (for and on behalf of the **DESCENDANTS OF TEPUTIKI** and **TE KATUPU**)
	Appellant
AND	**DOROTHY VON HOFF** (for and on behalf of the **DESCENDANTS OF KAVE ARIKI AKANIA**)
	First Respondent
AND	**TEAIA MATAIAPO** (for and on behalf of the **TEAIA FAMILY**)
	Second Respondent

Coram: White P, Fisher JA, Asher JA

Hearing: 1 November 2022

Counsel: Mr B Marshall for Appellant
Mrs T Browne and Mr A Irwin for First Respondent

Judgment 28 November 2022

JUDGMENT OF THE COURT

A. The Appeal is dismissed.

B. The High Court costs are to be determined by that Court.

C. If the respondent seeks costs, application is to be made by a submission of not more than four pages within 14 days of the issue of this judgment. If the appellant wishes to respond, a submission in reply of no more than the same length should be filed within a further 7 days.

Introduction

[1] This appeal raises the question of what is an effective adoption in the Cook Islands for the purposes of succession to land held by customary title.

[2] It arises out of six competing applications heard in Rarotonga on 9 and 15 July 2021, and the judgment of Isaac J delivered in respect of those applications on 4 April 2022 in the High Court. Three of the applications related to the determination of relative interests and three related to succession. They concerned the relative interests in the land at Nukupure 3C Ngatangiia and Areiti 2K Ngatangiia, (the Nukupure and Areiti lands).

[3] In the end only one aspect of the judgment of 4 April 2022 was challenged in this appeal, namely a finding that the first respondent Mrs Von Hoff's grandfather Te Ariki Akania had been adopted by Tiataia, one of the previous owners of the Nukupure and Areiti lands, thereby entitling the descendants of Te Ariki Akania to an ownership share of the Nukupure and Areiti lands. The appellant Mata-Atua McNair (for and on behalf of the descendants of other owners of these properties whose shares would be accordingly diminished), challenges that finding.

[4] The fact that Tiataia is a proven and accepted part owner of the Nukupure and Areiti lands from the date of their partition on 18 and 19 March 1907 is not in dispute between the parties. Further, the fact that Tiataia legally adopted Te Ariki Akania, is not in contention. It is also common ground that there was no blood connection between Tiataia and Te Ariki Akania. The appellant however disputes whether the adoption had "matured", (as that word is used in relation to Cook Island adoptions), to a degree that Te Ariki Akania and his descendants were entitled to succeed to the interests of Tiataia in the freehold land under custom.

[5] We state at the outset that when rights of succession through adoption are sought to be established, the Court must be satisfied under r 350(3) of the Code of Civil Procedure of the High Court 1981 as to who is entitled to a succession order. Satisfied means it must be satisfied on the balance of probabilities. In respect of the claim of the respondent in this case, the Court had to be satisfied that an adoption had taken place as asserted by the first respondent, and that the adoption has matured in accordance with Cook Islands law. This appeared to be the approach adopted in the High Court, (although the appellant says the judge failed to apply it correctly in assessing the evidence). Before us counsel for both sides agreed that this was the correct approach.

[6] The single issue before us was, therefore, whether the Respondent had provided sufficient evidence for the High Court to reasonably conclude this adoption had matured. The Appellant submitted that the High Court erred in that it could not have reasonably concluded on the evidence before it that the adoption by Taitaia of Te Ariki Akania had matured.

[7] We record that the second respondent took no steps prior to or during the hearing. After the conclusion of the hearing but before the release of this decision, Ms Kainuku Browne for the Kaveariki Rangatira family which is associated with the second respondent, filed a memorandum dated 4 November, which purported to draw certain matters to our attention, and a further memorandum of 18 November 2022. The filing of the first memorandum was opposed by the appellant and first respondent, who submit that it was filed effectively for the second respondent, and is irrelevant. Both of these positions appear to be correct, and would apply also to the second memorandum. Moreover the second respondent has had every opportunity to be heard. It is unusual for submissions to be accepted by the Court after the conclusion of a defended hearing, and we decline to grant leave for the memoranda to be filed.

Factual background

[8] The factual background to the entire case is long and complex, and summarised in the High Court judgment of 4 April 2022.[1] However the background facts relating to this appeal can be summarised shortly and are not in dispute. What follows is an outline of the bare factual landmarks. Other facts will be considered later in evaluating the appellant's submission that the adoption had not sufficiently matured to be recognised by the Court.

[9] Te Ariki Akania (Te Ariki), the grandfather of the respondent, was born on 11 January 1892. He was the child of Henare Nia and Ana Uirangi. He was not related by blood to Tiataia.

[10] On 18 and 19 March 1907, the lands at Areiti and Nukupure were partitioned. This original partition order named 17 owners which included Tiataia. Tiataia, whose entitlement as a part owner is not in dispute, was childless.

[11] Previously in 1892 "at birth" or "in infancy"[2] Tiataia had carried out a Cook Islands customary adoption of Te Ariki.

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1 *Mataiapo v Mareai*, 415/12, 303/20/ 352/20, Isaac J.

2 Quotes from the minute book record of the hearing of Tiataia's application to register the adoption.

[12] Te Ariki Akania was formally adopted by Tiataia on 24 December 1912. This event will be examined in greater detail later.

[13] Tiataia passed away on 2 February 1927 and his death certificate showed no living issue.

[14] In 1988, Te Ariki successfully applied to succeed to the interests of Tiataia in Nukupure 3C and Areiti 2K. On 13 September 2012, an application was brought under s 390A of the Cook Islands Act 1915 to cancel these 1988 orders.

[15] The orders were set aside on 6 May 2016, with Weston CJ finding that there had been a mistake or error in the making of the 1988 succession orders.[3] That order was confirmed by Williams CJ.[4] The decision that is the subject of this appeal arose from the rehearing of the succession applications in July 2021.

The High Court decision

[16] Much of the High Court judgment is concerned with issues that are not relevant to this appeal. In that part of his decision dealing with the adoption, (which was understandably comparatively brief given the multiplicity of issues to be decided), Isaac J first set out the respective positions of the parties, and key statutory provisions and authorities. In the reasoning part of his adoption decision, he noted that much of the evidence put forward by the parties related to events after Tiataia had passed away, and that this was irrelevant. His key reasoning was:

> [48] I do note evidence that the close family accepted the adoption at the relevant time.
>
> [49] Assessing the evidence as at 1927 when Tiataia passed away, I determine there is sufficient evidence that Te Ariki Akania was adopted and the adoption had matured. Of particular note was the acceptance by the immediate family. Therefore, I find the descendants of Te Ariki Akania are entitled to succeed to Tiataia's interests.

[17] He ordered that Te Ariki succeed to the interest of Tiataia.

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3 *Mataiapo v Mataiapo*, App No 9 9/2012.
4 *Mataiapo v Mataiapo*, App No 9/12.

The legal framework

[18] We note at the outset that the existing statutory provisions and relevant authorities use the word "native", which in this context is a word that is from another era and out of date.[5]

[19] The Cook Islands Act 1915 provides:

> "**446. Succession to deceased Natives** – The persons entitled on the death of a Native to succeed to his real estate, and to his personal estate so far as not disposed of by his will, and the persons entitled on the death of a descendant of a Native to succeed to his interest in Native freehold land, and the shares in which they are so entitled, shall be determined in accordance with Native custom, so far as such custom extends; and shall be determined, so far as there is not Native custom applicable to the case, in the same manner as if the deceased was a European.
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> **448. Succession orders** – On the death of a Native or descendant of a Native leaving any interest in Native freehold land the Land Court shall have exclusive jurisdiction to determine the right of any person to succeed to that interest, and may make in favour of every person so found to be entitled (hereinafter called a successor) an order (hereinafter called a succession order) defining the interest to which he is so entitled."
>
> **465. Effect of adoption** – An order of adoption shall have in respect of succession to the estate of any Native the same operation and effect as that which is attributed by Native custom to adoption by native custom."

[20] The Privy Council considered in detail the rights of an adopted child to succeed to the land interests of their adoptive parents in 2018 in *Browne v Munokoa.*[6] In its reasoning process the Board carried out an extensive review of existing Cook Islands case-law and other writings relating to the issue of adopted children succeeding to land, and the conclusions it reached are authoritative.

[21] In that case the Board stated:

> 11. … the Board interprets section 465 [Cook Islands Act 1915] as meaning that where an order of adoption is made, the adoptee is to have whatever right of succession he would have under customary law. In other words, if the right of a non-blood adoptee to succeed is conditional as a matter of custom, it will be conditional as a matter of law.
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> 13. ... by custom the succession right of a non-blood adoptee such as the respondent is conditional. The essential issues are what the condition is and whether it has been satisfied.

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5 *Browne (Respondent) v Munokoa and another (Appellants) (Cook Islands)* [2018] UKPC 18 per Lord Sumption, at [8].

6 [2018] UKPC 18.

> 14. ... The Court of Appeal (Barker, Fisher and Paterson JJA) ... *accepted that maturation was a condition of the right of a non-blood adoptee to succeed, and that the adoptee must have been accepted by the family as one of them for the purpose of succession ... that acceptance for that purpose had to be determined as at the time of the deceased's death and that it did not have to be unanimous. The question whether maturation had occurred called in their view for a value judgment in the light of all the facts, and the views of the adoptee's adoptive parents and siblings were of greater weight than those of more distant relatives.* They found that the respondent satisfied that test. [emphasis added]

It went on to set out eight points[7], which we apply:

> 28. The result is that the following points of customary law may be regarded as settled, so far as the case law goes:
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> (1) The view of customary law on the succession rights of adopted children has stabilised around the account of Cook Islands custom by Chief Judge Morgan in the first Emma case. Subsequent disputes on the points covered by that decision have commonly been resolved by reference to it.
>
> (2) There is no objection in principle to the succession of a non-blood adoptee to the lands of his adoptive parents.
>
> (3) The mere fact of adoption, however, is not enough to confer succession rights on an adopted child who is not of the blood. Unless land has been lawfully set aside for the adopted child, the adoption must be "completed" or "matured".
>
> (4) Restrictions on the right of succession endorsed on the adoption order of a non-blood adoptee are of no legal effect. They may be some evidence of the attitude of the adoptive parents to the adopted child, but they record only the position as at the time of the adoption.
>
> (5) The "completion" or "maturation" of an adoption involves acceptance not only by the adoptive parents but also by the "near family" that the adopted child is to be treated in the same way as a natural child for the purposes of succession.
>
> (6) For this purpose, the "near family" comprises those who would be entitled to succeed in the absence of the adoption. It is not disputed that this includes the deceased's nephews and nieces in the present case. The position of more distant family members is unclear from the material before the Board but does not fall to be decided on this appeal.
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> (7) If completion or maturation of the adoption of a non-blood adoptee is established, there is no wider category of persons whose consent is required or whose objections would be fatal for the adoptee's claims.

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7 *Browne v Munokoa* [2018] UKPC 18, at [28].

> (8) The customs of particular islands or tribes may diverge from these principles, in which case evidence will be produced to prove the divergence.

Discussion

[22] It is necessary to consider whether on the facts available it is clear on the balance of probabilities that the undisputed adoption of Te Ariki by Tiataia had matured sufficiently to give Te Ariki a right of succession. Establishing this "completion" or "maturation" of Te Ariki's adoption involves considering the available evidence relating to not only the actions of the adoptive parent Tiataia, but also Te Ariki's "near family," (see point five in the above quote), to determine whether Te Ariki was treated in the same way as a natural child of Tiataia and is to be treated as his child for the purposes of succession.

[23] This involves the analysis of evidence that is over a hundred years old. An assessment of the evidence and a decision on the maturation will involve an assessment of whether the maturation can be inferred from the material available, to the required standard. Obviously there are no witnesses from the time when maturation would have occurred who could have been called to assist. However as will become apparent, there is a surprising amount of information.

[24] In particular, there are the handwritten minutes of the formal Court adoption hearing of Te Ariki by Tiataia on 23 and 24 December 1912. The minutes directly address the relationship between Te Ariki and Tiataia. These have been transcribed, and there is no dispute as to their contents or admissibility. We are satisfied that they are an actual record of what happened at the hearing. We will refer to them as the "adoption minutes". In the High Court only the second page of the minutes was available. We now have the benefit of both pages.

[25] They show that Te Ariki's mother had died, and that his father Henare was present at the hearing.

Te Ariki's birth/original adoption in 1892

[26] There are formal records including his death certificate that show that Te Ariki was born on 11 January 1892. He was the child of Henare Nia and Ana Uirangi, and it is common ground that neither was related to Tiataia.

[27] It is also clear that Tiataia had no children. A number of genealogies confirm this. The adoption minutes record him as saying "[I] have no children of my own". The genealogies also

show that Tiataia's close blood relatives were two sisters, both of whom were childless, and are shown as having each adopted one child.

[28] Te Ariki was given the name of his adopted father's great-grandfather "Te Ariki Akania". This is relevant to whether the adoption had matured, as it is a sign of a close connection between him and Tiataia[8].

The change in the law of succession in 1904

[29] On 28 October 1904, s 50 of the New Zealand Native Land Claims Adjustment and Laws Amendment Act 1901 was applied to the Cook Islands by Order in Council. Section 50 of that Act as it applied to the Cook Islands provided that no claim could be made by an adopted child to the estate of any "Native Inhabitant" who had died after 31 March 1905 unless the adoption was registered under the Land Act in accordance with regulations to be made. Regulations were made on 8 July 1905. They required a Judge of the Land Court (or the Resident European Magistrate or Agent) to inquire into the circumstances and be satisfied that it "was a *bona fide* adoption according to Native custom and ought to be given effect to", (original emphasis). The inquiry was to be made "in open Court" after notice was given[9].

[30] On 17 December 1912, Tiataia applied to register the adoption of Te Ariki under s 50 of the 1901 Act. We accept Mr Irwin's submission that it is reasonable to assume that Tiataia applied to register the adoption for the purposes of succession because that appears to be the only reason for Tiataia's application that followed in 1912, when Te Ariki was a grown young man of 20. But for a successful application by Tiataia, Te Ariki could not succeed to his adopted father's estate and interests in land.

[31] Tiataia's application recorded that Te Ariki was his "adopted child according to Native custom". That in itself indicates that in 1912, Tiataia considered that the adoption was effective in accord with custom and was accepted by his immediate family.

[32] The change of law that Mr Irwin submitted is likely to have prompted the formalisation of the adoption by Tiataia, did not feature in the submissions in the High Court, and does not feature in the judgment. Before us Mr Marshall for the appellant submitted that the maturation

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8 In *Browne v Munokoa* [2018] UKPC 18, at [46(2)], it was a noted relevant point relating to maturation that the adopted child took the family name of his adopted parents.

9 See regs 7 and 8 of the Additional Regulations under s 50 of the Native Land Claims Adjustment and Laws Amendment Act 1901 (13 July 1905) *New Zealand Gazette* No 66, at 1681.

case is weakened by the time lapse between the change of law and the 1912 application. There are a myriad of possible explanations for the delay, but one might have been that Tiataia just did not see it as necessary until Te Ariki's twenty-first birthday approached and he needed to finalise the adoption for succession purposes before Te Ariki having turned 21, became ineligible to be adopted under s 50 of the 1901 Act.

[33] Given that maturation can only be a matter of inference in this case, we see the change of law and the timing of the adoption application shortly before Te Ariki turned 21, as another strand which can be legitimately taken into account in the assessment of maturation. To this extent it is an extra consideration beyond those listed by the PC in *Browne v Munukoa*[10]. The 1904 law was not mentioned by the Privy Council because it had been repealed in 1915, long before the adoption in that case occurred in 1964.

Evidence of the acceptance of Te Ariki by Tiataia from the 1912 Court minutes

[34] The first page of the adoption minutes records that Tiataia had Te Ariki "from birth". It records Tiataia saying "[Te Ariki] always been with me". The minute taker also records Tiataia as having said about Te Ariki "Never been back to his own people". It records Tiataia saying "My sisters know of the adoption". It is recorded that "Henare Nia the father consents".

[35] The first page of the 1912 Court minutes was discovered by Counsel for the First Respondent in the course of preparation for the appeal so was not in evidence in the High Court. This meant that Mrs Browne did not know about the first page when she made her "concessions," referred to later, and it was not taken into account by Isaac J in his judgment. Nor was it mentioned by Counsel for the Appellant in his original submissions in the High Court. Before us he referred to it without any real objection in his submissions in reply, and it was accepted during the hearing of the appeal that it was part of an official record which we should receive in evidence.

[36] The second page of the adoption minutes records that Ia Era, "Sister of Tiataia. Know Te Ariki. He was adopted in infancy by Tiataia. The kopu-tangata knew of it & approved".

10 *Browne v Munokoa* [2018] UKPC 18, at [28].

[37] These entries plainly show that:

(a) Te Ariki lived with Tiataia from birth for twenty years from his birth or thereabouts, to the hearing.

(b) Te Ariki's father was involved and approved the adoption in 1912.

(c) Tiataia, in 1912 when Te Ariki was 20, wanted to legally adopt him. As we have set out, it seems likely that this was because of the change of law in 1904 making this a necessary prerequisite to succession.

(d) His near family being his sisters had known of their brother's relationship with Te Ariki and knew him, and approved of the adoption, even though it must have affected their succession rights as his next of kin. It is recorded on the first page of the Court minutes, "My sister's know of the adoption".

(e) In particular his sister Ia Era said the "kopu tangata" (which means in English the "extended family") knew of the adoption and approved. Counsel for the respondent Mr Irwin's submission that this was the "extended family group" was not contested. It includes relatives of both parents, as distinct from the nuclear family of the mother father and children. We accept his submission that this indicates that Tiataia's wider family beyond just that of the near family approved of the adoption for succession purposes.

[38] These factors show that after twenty years Te Ariki was regarded by Tiataia and his immediate family as Tiataia's son. It is evidence that his near family being his sisters, and indeed most of his wider family approved Te Ariki's succession. That inference is even stronger given the law of succession context in which this adoption hearing took place.

[39] The minutes went on to record one objector, Teaia, who was a distant relative of Tiataia. Teaia is recorded as admitting that the adoption took place, but opposing Te Ariki's succession to the Te Aia lands. The minutes state "This is a matter to be decided when the time comes".

[40] The exact relationship of Teaia to Tiataia is not clear, but it appears to have been very removed, with him being at least a third or fourth cousin. There would have been many others of the same relationship who did not contest the succession. Mr Irwin's submission that Teaia would not have succeeded to Tiataia's interest but for the adoption in 1912 was not contested.

[41] The 1912 Court's decision to defer succession issues until they actually arose was understandable, and not indicative of any doubt about the adoption. Plainly Teaia was not part of Tiataia's "near family", the level of closeness required for relevance to maturation[11]. We are satisfied that this recorded objection to succession by Teaia does not weaken the strength of the acceptance of the adoption by the near family, and the case for maturation. Indeed to an extent it strengthens it, because Tiataia's sister who supported the adoption and said that the extended family approved of it, was in the Court when Teaia's objection to succession was put forward. Therefore she must have been aware of the succession implications of her support.

[42] The Privy Council noted in *Browne v Munokoa* that restrictions on the right of succession endorsed on the adoption order are of no legal effect[12]. If an endorsement is of no legal effect, then the note in the present case deferring succession issues must be of even lesser effect.

Signing of the death certificate

[43] Te Ariki signed the death certificate of Tiataia after he died in 1927. This is something that would usually be done by the next of kin. It is further evidence that the adoption had matured.

Events after the death of Tiataia in 1927

[44] It was stated by the Court of Appeal in *Browne v Munokoa* that the right to succession "must be capable of objective determination as at the date of the deceased's death".[13] There would be real practical difficulties if this were not so, because there would be a lack of clarity as to when the investigation would end.

[45] Further, events that happen after the death of the relevant deceased can only be relevant to maturation insofar as they objectively assist in the determination of maturation in the deceased's lifetime. They may have evidential relevance, for instance evidence that immediately after the death of the deceased the adoptee behaved as if he was hostile or uncaring towards the deceased, indicating a lack of maturation. But if they relate only to events that happened in the life of the adoptee in the years that followed, not inconsistent with maturation

11 *Browne v Munokoa.*
12 At [28](4).
13 [2017] CKCA 1, at [43], the approach being approved by the PC in [2018] UKPC 18, at [44].

during the deceased's lifetime but indicating that the adoptee had moved on to other family relationships, that is not in any objective sense relevant. Maturation which was complete on the deceased's death, cannot be somehow retrospectively cancelled by later events.

[46] The appellant relies on various events after the death of the deceased.

[47] On 17 July 1941, 14 years after Tiataia's death, Te Ariki applied to succeed to Tiataia on blocks Te Tuiao 8C and Poreo 8B. However, he asked for the application to be struck out, and is recorded as saying "I go back to my parents' lands". On the same day he applied to succeed to his adopted mother, Matam (being Tiataia's wife), but again asked that application to be struck out. He is recorded as saying "Deceased is my adopted mother. I go back to my parents lands. Application can be struck out". No further attempts to succeed to his adoptive parents' land were made. Te Ariki was invested with the title of Uirangi Mataiapo in the Uirangi Family, that family being the family of his natural mother.

[48] In 1949, an application was made to succeed to Kave Ariki, a title previously held by Tiataia. Evidence was given that Tiataia's bloodline had died out. The record says that Tiataia has no issue "but adopted Te Ariki Nia who has remained on Uirangi side". Te Ariki agreed to another person succeeding to the title.

[49] Te Ariki Akania passed away on 6 March 1954 and his death certificate records his parents as Henry Nia and Ana Uirangi (his natural parents).

[50] In 1954 and 1955, an application was made by a member of Ngati Te Aia to succeed to the interests of Tiataia on Vaimaanga 2. The Court made succession orders in favour of Te Putiki and Te Katupu family lines. It may have been that an argument was made that there was a third line of succession, that being through Te Ariki Akania (who by then was dead) as the adopted child of Tiataia. In any event no relevant order was made.

[51] None of these events cast any doubt on the maturation of the adoption by 1927. They indicate that in the years after Tiataia's death Te Ariki aligned himself with his natural rather than his adoptive family, but that means nothing in regard to the relationship Te Ariki had with Tiataia during his lifetime. It only shows that Te Ariki had moved back to his natural family after he has lost his adoptive father. That move back, given that it happened well after Tiataia's death, is unsurprising and not at all inconsistent with maturation. New relationships after the loss of a loved one are part of life's natural cycle.

Further matters

[52] On a different point, we accept Mr Marshall's claim that no land was set aside by Tiataia for Te Ariki. The setting aside of land can be an indication of an adoption's maturity. However it is not a requirement for maturation, and we do not see the absence of this as particularly material.

[53] We also record that Mr Marshall relied on some alleged concessions made by the respondents at the High Court hearing. We do not propose to go into these in detail, but observe that they are not so much concessions as part of the give and take of question and answer between the Bench and counsel. Further, at that time only the second page of the minutes was available, which weakens the significance of any "concessions". In any event we would not hold counsel to any concessions on facts as complex as these. We put that aspect of the submissions to one side.

Conclusion

[54] We have more evidence before us than did the Land Court. That further evidence supports the Land Court conclusion. Given that the events in question arose so long ago, which explains the absence of the sort of detail that could be expected if the events happened in recent times, there is still a surprising amount of reliable evidence. That reliable evidence supports only one conclusion. It is clear on the balance of probabilities that Te Ariki had the benefit of a matured adoption by Tiataia. The conclusion of Isaac J was correct.

Result

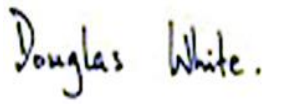
[55] The appeal is dismissed.

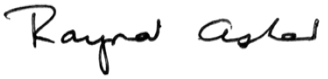
Costs

[56] Cost orders were not made in the High Court. They are a matter for the High Court to determine if an application is made.

[57] In this Court, Mr Marshall for the appellant thought costs should follow the event, while Mr Irwin for the respondent asked for an opportunity to make submissions on quantum.

[58] The respondent is the successful party. If the respondent seeks costs, application is to be made by a submission of not more than four pages **within 14 days** of the issue of this judgment. If the appellant wishes to respond, a submission in reply of no more than the same length should be filed **within a further 7 days**.





Douglas White, P **Robert Fisher, JA** **Raynor Asher, JA**