IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20180003035
APPEAL 2018/5

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	an appeal by Phillip Taueki pursuant to s 58 of Te Ture Whenua Māori Act 1993 against a decision of the Māori Land Court made on 19 May 2016 at 354 Aotea MB 54-88 relating to Horowhenua 11 Part Reservation Trust
	PHILLIP TAUEKI Appellant

Hearing:	7 August 2018, 2018 Māori Appellate Court MB 492-507 (Heard at Wellington)
Court:	Judge P J Savage (Presiding) Judge C M Wainwright Judge S R Clark
Appearances:	P Taueki in person
Judgment:	12 September 2018

JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] This appeal concerns the Horowhenua 11 Part Reservation Trust ("Lake Horowhenua Trust"). Mr Phillip Taueki appeals a decision made by Judge Doogan on 19 May 2016 to appoint trustees to that trust.[1] Mr Taueki argues that Judge Doogan ought to have, but did not, recuse himself when appointing the trustees.

[2] Mr Taueki relies upon a decision this Court made on 8 March 2018 when we found that Judge Doogan should have recused himself from enforcement of trust proceedings concerning Mr Charles Rudd and the Lake Horowhenua Trust.[2] That case raised the issue of apparent bias. We held that a fair-minded, impartial and properly informed observer could reasonably have thought that Judge Doogan might not bring an impartial mind to the matters before him, because:

(a) Judge Doogan formerly acted for the Muaūpoko Tribal Authority,[3] in litigation where Mr Rudd was the litigant;

(b) Judge Doogan's instructing solicitor at that time, Mr Matthew Sword, was the chairperson of the Lake Horowhenua Trust, whose actions Mr Rudd challenged; and

(c) Other persons then active within the Muaūpoko Tribal Authority were also trustees of the Lake Horowhenua Trust.

[3] Shortly after releasing that decision, Mr Taueki filed an appeal on 20 April 2018 seeking to challenge Judge Doogan's decision of 19 May 2016.

[4] In the judgment that follows, we first set out the background. We then address the fact that Mr Taueki filed his appeal out of time. Finally, we come to the merits of the appeal, and decide in Mr Taueki's favour.

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[1] 354 Aotea MB 54-88 (354 AOT 54-88).
[2] *Rudd v Hurunui – Horowhenua 11 (Lake)* [2018] Māori Appellate Court MB 123 (2018 APPEAL 123).
[3] An Incorporated Society.

Background

[5] On 26 November 2012, Judge Harvey appointed 11 trustees to the Lake Horowhenua Trust for a term of three years.[4]

[6] On 13 January 2016, Mr Taueki filed an injunction application on the grounds that the trustees' three-year term of office had expired on 26 November 2015.[5]

[7] On 18 January 2016, Judge Harvey presided over an urgent hearing of the injunction.[6] Mr Taueki made wide-ranging allegations about matters that included the actions of the Muaūpoko Tribal Authority and its officers such as Matthew Sword and Jonathan Procter, both of whom were also trustees of the Lake Horowhenua Trust.

[8] In his decision of 2 February 2016, [7] Judge Harvey upheld Mr Taueki's contention that the trustees' three-year term had expired on 26 November 2015, and they should have ensured that elections were held prior to the end of their term.[8] This did not automatically mean they ceased to be trustees once that term expired; it was orthodox for trustees to maintain the trust in a "holding pattern" until an election.[9] Judge Harvey adjourned the application and directed the Deputy Registrar to oversee an election of trustees.

[9] On 9 April 2016, an AGM was held for the purpose of elections. 14 persons were nominated for 11 trustee positions. The results of the voting, from the highest polling candidate to the lowest, were made available to the Court.[10]

[10] The injunction application returned to Court on 19 May 2016.[11] During that hearing:

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[4] *Procter – Horowhenua 11* (2012) 293 Aotea MB 165 (293 AOT 165). The Trust Order provides that there shall be 11 trustees. See 293 Aotea MB 165-174 (293 AOT 165-174), First Schedule, cl 2.3.
[5] Application A20160001071.
[6] 347 Aotea MB 143-168 (347 AOT 143-168).
[7] *Taueki v Horowhenua 11 Part Reservation Trust – Horowhenua 11 (Lake)* (2016) 347 Aotea MB 269 (347 AOT 269).
[8] At [37].
[9] At [56] and [61].
[10] Record of Appeal at 541-547.
[11] 354 Aotea MB 54-88 (354 AOT 54-88). As an aside we note that the only application then before the Court was the injunction application. The proceedings had not been amended to include an application to appoint trustees, nevertheless it proceeded in that fashion on that day.

(a) Mr Taueki objected to the appointment of three people as trustees: Jonathan Procter; Robert Warrington; and Marakopa Matakatea. He alleged that they were disqualified by various conflicts of interest;[12]

(b) Mr Rudd objected to Timothy Tukapua's appointment because of his lack of availability. Mr Rudd also pointed out that his enforcement proceedings had yet to be concluded;[13]

(c) Vivienne Taueki objected to the appointment of any trustees. She was particularly critical of Jonathan Procter and Matthew Sword, pointing to their ongoing involvement with the Muaūpoko Tribal Authority.[14]

[11] Judge Doogan appointed the highest-polling 11 candidates as trustees, including those against whom there were objections.

[12] On 1 August 2016, Mr Rudd appeared before Judge Doogan in relation to his enforcement proceedings.[15] On that day, in response to a memorandum filed by Mr Rudd, Judge Doogan spoke in court about his previous professional involvement with the Muaūpoko Tribal Authority and Matthew Sword. He then went on to hear that matter, and released his decision on 19 July 2017.[16]

[13] Mr Rudd appealed that decision on 11 September 2017. We heard Mr Rudd's appeal on 21 February 2018. In our decision of 8 March 2018, we agreed with Mr Rudd that Judge Doogan should have recused himself from the enforcement proceedings.

[14] Against that background, Mr Taueki filed this appeal on 20 April 2018.

[15] Initially, Mr Taueki challenged a number of Judge Doogan's previous decisions concerning Lake Horowhenua and the Lake Horowhenua Trust, but later filed a

[12] 354 Aotea MB 54-88 (354 AOT 54-88) at 58-71.
[13] At 71-75.
[14] At 76-81.
[15] 358 Aotea MB 173-215 (358 AOT 173-215).
[16] *Rudd – Horowhenua 11 (Lake)* (2017) 372 Aotea MB 171 (372 AOT 171).

memorandum clarifying that he was appealing Judge Doogan's 19 May 2016 decision to appoint trustees.[17]

Appeal out of time

[16] Mr Taueki filed his appeal outside the time allowed to appeal a Māori Land Court decision. Appeals must be brought within two months of the date of any final decision, but the Māori Appellate Court has discretion to grant leave to appeal out of time.[18] In deciding whether to grant leave, the Māori Appellate Court is likely to consider these factors:[19]

(a) The length of delay;

(b) The reasons for the delay;

(c) The conduct of the parties, particularly of the applicant;

(d) Any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome;

(e) The significance of the issues raised by the proposed appeal, both to the parties and more generally; and

(f) The merits of a proposed appeal.

[17] Mr Taueki appeals on the basis that Judge Doogan should have recused himself from sitting on 19 May 2016. Theoretically, Mr Taueki could have filed his appeal much earlier than he did, as he was present in Court on 1 August 2016 when Judge Doogan spoke about his previous relationship with the Muaūpoko Tribal Authority and with Matthew Sword.

Mr Taueki is a layperson, not a lawyer. He submitted, and we accept, that although he attended that sitting, he understood that it was for Mr Rudd, as the applicant in those proceedings, to initiate any appeal. That is what Mr Rudd subsequently did. It was not until

[17] Supplementary Record of Appeal at 10-23.
[18] Te Ture Whenua Māori Act 1993, s 58.
[19] *Almond v Read* [2017] NZSC 80; *Skelton v Howcroft* [2018] NZCA 140 and *Rafiq v Attorney-General* [2018] NZCA 292.

the release of our reserved decision on 8 March 2018 that Mr Taueki knew, or could have known, what our decision would be. It was in reliance on that decision that Mr Taueki promptly filed this appeal on 26 March 2018. We accept that this was the material date, although the court record shows the date as 20 April 2018. We regard the difference as immaterial, especially as over this period Mr Taueki was dealing with ill health, eviction from his residence, consequential loss of his papers, and Lake Horowhenua proceedings of various kinds in the Māori Land, District, Environment and High Courts. Finally, we note that no one has objected to his appeal being heard out of time.[20]

[18] Under these circumstances, we consider that the interests of justice require us to exercise our discretion in Mr Taueki's favour. Having found that Judge Doogan should have recused himself from proceedings involving the Lake Horowhenua Trust and representatives of the Muaūpoko Tribal Authority, it is appropriate that we hear Mr Taueki's appeal. It involves the same trust, the same judge, and arguments similar to those that Mr Rudd pursued before us.

Should Judge Doogan have recused himself from sitting on 19 May 2016?

[19] The test for judicial recusal is set out in the *Saxmere* cases.[21] Those tests are captured in the High Court recusal guidelines.[22] They are:

(a) A judge should recuse him or herself if, in the circumstances, a fair-minded, fully informed observer would have a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide;

(b) The standard for recusal is one of "real and not remote possibility", rather than probability;

(c) The test is a two-stage one. The judge must consider:

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[20] 2018 Māori Appellate Court MB 496-497 (2018 APPEAL 496-497).
[21] See *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 and *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.
[22] *High Court of New Zealand Recusal Guidelines* (2011) www.courtsofnz.govt.nz.

(i) First, what it is that might possibly lead to a reasonable apprehension by a fully informed observer that the judge might decide the case other than on its merits; and

(ii) Second, whether there is a "logical and sufficient connection" between those circumstances and that apprehension.

[20] On 19 May 2016, a fair-minded fully informed observer would have known that:

(a) There was a long history of litigation involving the Lake Horowhenua trustees;[23]

(b) Mr Taueki had filed injunction proceedings with the Māori Land Court on 13 January 2016. At the heart of his complaint was that the trustees' period of office had expired;

(c) During the hearing before Judge Harvey on 18 January 2016, Mr Taueki made various complaints against the trustees including those who were involved with the Muaūpoko Tribal Authority;[24]

(d) Judge Harvey directed an election of Lake Horowhenua trustees. Among the 11 highest-polling candidates were a number involved with the Muaūpoko Tribal Authority;

(e) When the application came before Judge Doogan on 19 May 2016, Mr Taueki, Mr Rudd and Vivienne Taueki were all objecting to one or more of the proposed trustees, with particular criticism being directed at candidates with previous or ongoing involvement with the Muaūpoko Tribal Authority.

[21] The fully-informed observer would also have known – although Mr Taueki did not – that Judge Doogan formerly acted for the Muaūpoko Tribal Authority, and that Matthew

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[23] *Taueki v Horowhenua 11 Part Reservation Trust – Horowhenua 11 (Lake)* (2016) 347 Aotea MB 269 (347 AOT 269) at [8] – [13] and [67] – [69].
[24] 347 Aotea MB 143-168 (347 AOT 143-167) at 164.

Sword, who had since become chair of the Lake Horowhenua Trust, was Judge Doogan' instructing solicitor.

[22] These proceedings started by way of application for injunction – an immediate indication of heightened tension. Judge Harvey heard the matter on an urgent basis on 18 January 2011, and his reserved decision of 2 February 2016 essentially upheld Mr Taueki's position. The fact that the judge directed the deputy registrar to oversee the election of trustees is another indication that the situation was fraught. After a trustee election at an AGM on 9 April 2016, the injunction application came back to court on 19 May 2016 before Judge Doogan. It was his job to appoint the new trustees. Fourteen persons were nominated for 11 positions.

[23] In court, the situation remained contentious, because Phillip Taueki, Charles Rudd and Vivienne Taueki objected to the appointment of some proposed trustees – among them a number who had previous or ongoing involvement with the Muaūpoko Tribal Authority, Judge Doogan's former client.

[24] When Judge Doogan sat that day, 19 May 2016, Judge Doogan, Matthew Sword (chair of the Lake Horowhenua Trust), and members of the Muaūpoko Tribal Authority knew of the judge's former professional relationship with them and the Muaūpoko Tribal Authority. Phillip Taueki, Vivienne Taueki, and possibly also Charles Rudd, did not.

[25] Against this background, our answer to the question of whether a fair-minded fully informed observer would have a reasonable apprehension that the judge might not bring an impartial mind to the matters before him is 'yes'. The judge formerly acted for the Muaūpoko Tribal Authority; the judge's instructing solicitor at that time had become chair of the Lake Horowhenua Trust; and persons active in the Muaūpoko Tribal Authority were seeking appointment as trustees of the Lake Horowhenua Trust although subject to objection from Mr Taueki and others.

[26] Before concluding, there are a couple of aspects of this case that were not present in the *Rudd* appeal that we think warrant some discussion.

[27] First, was the judge in a situation where he could infer that his order appointing the trustees was by consent? In the hearing before Judge Doogan, Mr Taueki expressed support for some of the new trustees, Neddy (Ned) Nahona, Timothy Tukapua, Caroline O'Donnell and Kerehi (Mungu) Wi Warena.

[28] Nevertheless, we do not think Mr Taueki's support for certain candidates should be taken as consent to Judge Doogan's orders. The minutes reveal that Mr Taueki raised concerns about three candidates, Jonathan Procter, Robert Warrington and Marakopa Matakatea.[25] Nor, as we have seen, was Mr Taueki alone, because Mr Rudd[26] and Vivienne Taueki[27] also expressed opposition to appointment of proposed trustees. Consent cannot be inferred in such a situation.

[29] Then we asked ourselves whether apparent bias did not really arise here, because Judge Doogan did no more than any other judge would have done faced with the outcome of the elections held on 9 April 2016 – that is, appoint the top 11 polling candidates. The beneficial owners had been asked to choose their trustees, and had done so. Why would the judge go beyond or behind those choices?

[30] When appointing trustees, the court must take into account those matters set out in section 222(2) of the Act:

> **222 Appointment of trustees**
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> …
>
> (2) The court, in deciding whether to appoint any individual or body to be a trustee of a trust constituted under this Part,—
>
> (a) shall have regard to the ability, experience, and knowledge of the individual or body; and
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> (b) shall not appoint an individual or body unless it is satisfied that the appointment of that individual or body would be broadly acceptable to the beneficiaries.

[31] The Court of Appeal has endorsed remarks made by the Māori Appellate Court, and have themselves observed, that when the Māori Land Court appoints trustees, the discretion

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[25] 354 Aotea MB 54-88 (354 AOT 54-88) at 58-71.
[26] At 71-75.
[27] At 76-81.

given to the court is not broad and unfettered: it will be guided primarily by the view of the beneficial owners.[28]

[32] That said, a judge's appointment of trustees is not merely a rubber-stamping exercise. Although the court will ordinarily give substantial weight to the owners' views, it is not bound to appoint leading candidates if they are unsuitable through lack of ability, experience, lack of knowledge or because of conflicts of interest.[29]

[33] Commenting in court on the objections to the trustee candidates before him, Judge Doogan said the objectors should bring trustee removal proceedings.[30] We think the proper course for a judge in this situation is usually to enquire into the objections, and decide objectively upon their merit.

[34] Given the troubled history of this trust and the objections raised, the appointment as trustees of the 11 highest-polling candidates cannot be regarded as a *fait accompli*.[31] Judge Doogan exercised judgement not to inquire into the objections, and proceeded to appoint strictly in accordance with the poll. This was not an inevitable, nor indeed necessarily a desirable, course. There was enquiry to be made, and Judge Doogan, given his former professional relationship with key players, was not the judge to undertake that enquiry.

Outcome

[35] Our conclusion is that Judge Doogan should have recused himself from sitting on 19 May 2016. It follows that his decision to appoint trustees at 354 Aotea MB 54-88 (354 AOT 54-88), should be quashed.

[36] We direct a rehearing before the Māori Land Court pursuant to s 56(1)(e). The purpose of the rehearing is to (1) consider the results of the 9 April 2016 election; (2) enquire into any objections to trustee candidates; and (3) appoint trustees. The Lake Horowhenua Trust will be without trustees in the meantime, so the re-hearing should occur soon.

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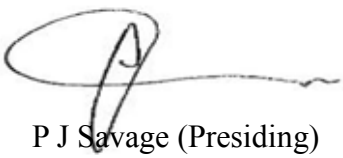
[28] See *Pukeroa Oruawhata Trustees v Mitchell* (2006) 11 Waiariki Appellate MB 66 (11 AP 66) at [38] and *Clarke v Karaitiana* [2011] NZCA 154 at [53].
[29] *Clarke v Karaitiana* [2011] NZCA 154 at [52].
[30] 354 Aotea MB 54-88 (354 AOT 54-88) at 70, 72.
[31] An accomplished fact; an action which is completed (and irreversible) before affected parties learn of its having been undertaken.

Pronounced at 2.50pm in Wellington on this 12th day of September 2018.



P J Savage (Presiding)
JUDGE

C M Wainwright
JUDGE

S R Clark
JUDGE