I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TE TAIRĀWHITI
In the Māori Appellate Court of New Zealand
Tairāwhiti District

[ ]

WĀHANGA *Under*	58 and 115 of Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Hemaima Reti
I WAENGA I A *Between*	HAZEL PUHERIA RETI, ISOBEL LANGE ROBERTSON AND MOREHU MARISE SNELL Kaitono pīra *Appellant*
ME *And*	ALICE BEVERLY RETI-STEEL, RACHAEL RAHERA TUPENE, HEMAIMA JEMIMA RETI FOR TE RUAPANI BUNNY RETI, MOHI MOSES RETI, HENRIETTA MCROBERTS, LOVINA RUAHINA KING AND WILLIAM MCROBERTS Kaiurupare pīra *Respondent*

Nohoanga: *Hearing*	9 November 2023, 2023 Māori Appellate Court MB 220-261 (Heard at Gisborne)
Kooti: *Court*	S F Reeves (Presiding) M J Doogan A M Thomas
Kanohi kitea: *Appearances*	L Watson, for the Appellants K Dixon and A Chesnutt, for the Respondents
Whakataunga: *Judgment date*	22 December 2023

TE WHAKATAUNGA Ā TE KOOTI
Reserved Judgment of the Court

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Hei Timatanga

Introduction

[1] Hemaima Reti (Hemaima) had fourteen natural children, and a whāngai son named Te Ruapani Bunny Reti (Te Ruapani). Hemaima died in October 2008. Two years before she died, she established a whānau trust and transferred to it nearly all her Māori land interests. Succession to further interests in 2009 raised an issue about whether or not Te Ruapani was entitled to succeed. This question has divided the whānau ever since.

Te Horopaki

Background

[2] This appeal is from the most recent decision concerning Te Ruapani's entitlement. On 19 November 2020 Chief Judge Isaac (as he then was) issued a decision on a s 45 application brought by Hemaima's son Jerry Reti (Jerry). Jerry complained that previous orders which said that Te Ruapani was entitled to succeed were in error because Te Ruapani does not whakapapa to Hemaima. Judge Isaac rejected that argument and found on the basis of evidence previously heard that it would be contrary to the interests of justice and the wishes of the majority of the whānau to deny Te Ruapani's entitlement. He did, however, amend the orders he had previously made to make specific findings determining Te Ruapani was recognised as whāngai and entitled to succeed. The fact that Judge Isaac heard and determined the s 45 application in his capacity as Chief Judge from his own previous decision sitting as a Māori Land Court Judge, is also one of the matters raised on appeal.

[3] The appeal was filed on 12 May 2023 by three of Hemaima's children, Hazel Reti, Isobel Robertson, and Morehu Marise Snell. Jerry Reti and another of Hemaima's children Ramarihi Sainsbury died in 2020, before the decision under appeal was issued. The appeal is opposed by Hemaima's daughter's Rachael Tupene and Alice Reti (who are also trustees and executors of her Will) and by Te Ruapani's daughter, Hemaima Jemima Reti on behalf of her father, Te Ruapani.

Ngā Take

The Issues

[4] The overriding consideration, having reviewed the history of the proceedings is that it is in the interests of justice that the substantive matters raised by this appeal now be addressed. The reasons we have come to that view will be apparent from the outline of the proceedings that follows. A key problem as we see it, is that the question of Te Ruapani's status as a whāngai, and his entitlement to succeed was not fully addressed when it first arose in 2009 and neither was it resolved, before succession orders were made in 2010.

[5] The appeal was filed well out of time. Whether we should grant leave to hear the appeal out of time and whether we should allow a relatively late amendment to the grounds of appeal were among preliminary issues argued before us. We indicated, after hearing from counsel, that we would grant leave to hear the appeal out of time and we would also accept the grounds of appeal as set out in submissions filed on 1 August 2023. We record our reasons for doing so now before addressing the substantive issues of the appeal.

Out of time

[6] Section 58 of the Act grants the Māori Appellate Court the discretion to hear an appeal filed out of time.

> 58 Appeals from the Māori Land Court
>
> (3) Every such appeal shall be commenced by notice of appeal given in the form and manner prescribed by the rules of court within 2 months after the date of the minute of the order appealed from or within such further period as the Māori Appellate Court may allow.

[7] Both parties relied on Matchitt v Matchitt and the relevant considerations in determining whether to grant an extension of time, as follows:[1]

a. The length of the delay and the reasons for it;

b. The parties' conduct;

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1 *Matchitt v Matchitt* – Te Kaha 65 Block [2015] Māori Appellate Court MB 433 (2015 APPEAL 433).

c. The extent of prejudice caused by the delay;

d. The prospective merits of the appeal; and

e. Whether the appeal raises any issue of public importance.

[8] We adopt those principles and also have regard to the observations of the Court of Appeal in Robertson v Gilbert, where it was held that the overarching consideration when determining whether or not to grant an extension of time is where the interests of justice lie:[2]

> [24] As confirmed recently by this Court in My Noodle Ltd v Queenstown-Lakes District Council and in Barber v Cottle the overarching consideration in determining whether to grant an extension is where the interests of justice lie. This is a long standing and settled principle. Relevant considerations assisting in that inquiry are the length of delay, the reasons for the delay, the parties' conduct, the extent of prejudice caused by the delay, and the prospective merits of the appeal. Leave will be declined where the appeal has no legs. But the interests of justice may require that leave be granted, not necessarily simply because the merits appear strong, but where there is insufficient material before the Court to exclude the possibility that there is merit.

[9] This appeal was filed 2 and half years after the 2-month deadline for filing an appeal. The delay was not insignificant. The appellant has said that she relied on her lawyer to progress the appeal and recognises that there does not appear to be sufficient evidence to explain the nature of the delay.

[10] An affidavit was provided by the appellants lawyer at the time setting out the nature of the management of the case prior to the appeal being filed. There does not seem to be a specific reason for the delay in filing, other than the change in staff being responsible for the file. We have not found anything in the material before us that constitutes disqualifying conduct by the appellants.

[11] As to prejudice, the respondents have said there has been a mental and physical toll from the prolonged delay and not having finality and certainty in moving forward with the objects of the trust. We have material before us from both parties concerning the emotional and mental stress this matter has caused. While we acknowledge that some further delays associated with hearing this appeal will be stressful, we do not see this as a significant

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2 *Robertson v Gilbert* [2010] NZCA 429 (CA) at [24].

prejudice to the respondents that would justify denying leave. We consider greater prejudice would arise from a denial of the hearing, given the history of this proceeding.

[12] In deciding to grant leave, we acknowledge that the length of the delay was significant and that the appellants have failed to provide a specific reason for the delay, however, the ultimate and overarching question in determining applications of this kind is whether the interests of justice warrant the grant of an extension.

[13] There is a significant issue raised in this appeal concerning the status of whāngai and entitlement to succeed, issues which were not fully addressed or resolved by the lower court. The issues raised by the appellants are legitimate and have merit. It is in the interests of justice that these matters now to be addressed.

Amended grounds of appeal

[14] On 1 August 2023, counsel for the appellant filed legal submissions that included four grounds of appeal. These were not the same as the grounds of appeal filed in May 2023. Mr Watson sought leave to amend "to the extent that these particularised grounds of appeal are worded differently." The appeal was adjourned from an August hearing to enable counsel to be appointed to assist the respondents. Ms Dixon was appointed on 28 September 2023 although the record of appeal had been provided to her office on 11 August 2023. Unfortunately Mr Watsons legal submissions dated 1 August 2023 were not sent to Ms Dixon until 13 October 2023, approximately 1 month before the hearing of the appeal on 9 November 2023.

[15] Ms Dixon and Ms Chesnutt for the respondents argue that the appellant seek to expand the grounds of appeal, rather than further particularise the original grounds. This they say is prejudicial to the respondents and should be denied. It was submitted in response by Mr Watson that the particularisation falls broadly within the original grounds of appeal and did not raise new issues, and that no prejudice arises to the respondents.

[16] Rule 8.17(2)(c) of the Māori Land Court Rules 2011 allows the Presiding Judge to determine an application filed before the hearing for leave to amend the grounds of appeal.

> **8.17 Preliminary and Interlocutory Matters**
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> **(2)** The Chief Judge, or the presiding Judge following consultation with other members of the Māori Appellate Court, as the case may be, may do any of the following:
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> (c) determine an application filed before the hearing for leave to amend the grounds of appeal:

[17] As per r 8.21(2) of the Rules, the appellant cannot rely on a ground of appeal unless it is in the notice of appeal, without leave of the Court.

[18] The rule does not set out what must be taken into account by the Presiding Judge when determining an application for leave to amend grounds of appeal. This issue was addressed in Ratu v Marshall – Wangape Lot 65B Sec 2A and we adopt that approach:[3]

> When deciding whether to grant leave, we have to consider whether the amendment is in the interests of justice, whether it would cause significant prejudice to the respondent, and whether it would cause significant delay.

[19] We consider that the arguments concerning where the interests of justice lie with respect to the granting of leave to appeal out of time, are also applicable to this issue.

[20] We do not consider that allowing the amended grounds of appeal would cause significant prejudice to the respondents or delay to the proceedings. While there was a delay in the respondent's counsel receiving the amended grounds of appeal the respondents had the opportunity to provide submissions in response to and did so on 30 October 2023. Counsel for the respondents argued that the grounds of appeal went beyond the scope of the notice of appeal. No compelling reasons were given as to how the respondents would be prejudiced if we were to grant the amendments sought.

[21] While we accept that the amended grounds of appeal go beyond of the scope of the original grounds to some extent, there was sufficient time for parties to consider them and to provide responses prior to the 9 November 2023 hearing. There is also some merit in Mr Watsons argument that the amendments are not entirely new grounds, they are in substance a particularisation of the original notice of appeal. We do not consider there to be an issue of

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[3] *Ratu v Marshall – Wangape Lot 65B Sec 2A* [2023] Māori Appellate Court MB 115 (2023 APPEAL 115) at [8].

significant prejudice. We also consider the amendments taken as a whole provide helpful clarification of the key issues for determination.

[22] For those reasons, we grant the leave sought to amend the grounds of appeal. We turn now to the substantive issues.

Relevant law as at 2009

[23] It is necessary to start with the law as it was at the time the matter first came before the Court in July 2009.

[24] As at July 2009 and up until its replacement by the provisions of Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020, Section 115 Te Ture Whenua Māori Act 1993 provided:

> **115 Court may make provisions for whāngai**
>
> (1) In the exercise of its powers under this Part of this Act in respect of any estate, the Court may determine whether a person is or is not to be recognised for the purposes of this [part] as having been a whāngai of the deceased owner.
>
> (2) Where, in any such case, the Court determines that a person is to be recognised for the purposes of this [Part] as having been a whāngai of the deceased owner, it may make either or both of the following orders;
>
> (a) An order for the whāngai shall be entitled to succeed to any beneficial interests in any Māori freehold land belonging to the estate to the same extent, or to any specified lesser extent, as that person would have been so entitled if that person had been the child of the deceased owner;
>
> (b) An order that the whāngai shall not be entitled to succeed or shall be entitled to succeed only to a specified lesser extent, to any beneficial interest in Māori freehold land to, or than that, which that person would otherwise be entitled to succeed on the death of that person's parent's or either of them.
>
> (3) Every order under subsection (2) of this section shall have effect notwithstanding anything in section 19 of the Adoption Act 1955.

[25] There are two steps. The first question was whether or not an order should be made determining that a person is recognised as being a whāngai of a deceased owner. If a person is so recognised, the second question is whether the Court should make an order recognising that the whāngai would be entitled to succeed as if they

had been a child of the deceased owner, or alternatively an order that the whāngai would not be entitled to succeed, or only entitled to a specified lesser extent.

I ahatia?

What happened?

[26] On the 8th of July 2009 at Wairoa, Judge Isaac heard an application for succession to Hemaima's Māori land interests that had not been placed into the whānau trust before she died. It had been agreed by the whānau that these would go to the whānau trust. Four of Hemaima's children were present including the appellants Isobel Robertson and Hazel Reti along with a nephew Wiremu Taurima. Mr Taurima spoke for the whānau, and after confirming the orders sought, he raised a question concerning Te Ruapani. The following exchange took place: [4]

> **W Taurima:** Number three Bunny Ruapani Reti. Just pertaining to the Will, he would rather have a discussion pertaining to him because he has connections to the lands with his father and I think that it is the thought that there are two bites of the same apple Your Honour.
>
> **Court:** Yes
>
> **W Taurima:** Our family would like to discuss that further and come back to the Court.
>
> **Court:** In terms of that, is this discussion taking place because he was a whāngai of the late Jemima and he is also the son of whom?
>
> **W Taurima:** Our Uncle Turuki Reti
>
> **Court:** Has he succeeded to your uncle?
>
> **W Taurima:** Only to his father
>
> **Court:** To his natural father? So he has already succeeded?
>
> **W Taurima:** Yes. He has openly said that he wishes no claims to any of our auntie's lands. He has told his children so at the night of her tangi
>
> **Court:** I can certainly adjourn this application for you to have that discussion. The other way that we can do it is if we get a letter to that affect.
>
> **W Taurima:** Thank you Sir
>
> **Court:** The whānau trust can reflect that, that he would not be a beneficiary of that whānau trust. I can adjourn the application to chambers and you get the written confirmation from him that he does not wish to benefit or be a beneficiary of this

[4] 128 Wairoa MB 242-245 (128 WR 242-245).

> whānau trust and then the orders can be made so that you do not have to come back to Court. Shall I adjourn it that way?
>
> **W Taurima:** Yes Sir
>
> **Court:** If you cannot get that agreement from him let the Court know and then we can set it down for another hearing because there could be issues for him around his whāngai status around being a beneficiary in terms of the whānau trust, all those sorts of things if you are not able to get the letter.
>
> So I will adjourn it to chambers, you get the letter and then I will make the orders and those orders will reflect that he will not be a beneficiary of the whānau trust
>
> **W Taurima:** Thank you very much

[27] Te Ruapani's father was Maurice Reti's brother (Turuki or Sonny Reti). Te Ruapani was amongst those who succeeded to the interests of his natural father Turuki or Sonny Reti in 2003.[5]

[28] Following that hearing, Court staff followed up by correspondence with Mr Taurima in March 2010 seeking his response to the matters discussed at the July 2009 hearing. When Mr Taurima failed to respond, the matter was set down for hearing at Wairoa on the 6th of October 2010. Te Ruapani was present at this hearing, as were a number of Hemaima's children including once again Isobel Robertson and Te Puaheria Hazel Reti. Judge Isaac began the hearing noting that when the matter had become before the Court the previous year, the only issue remaining was whether or not Te Ruapani (Bunny) was to be included. After establishing that Te Ruapani was present, the following exchange took place: [6]

> **Court:** Kia ora, Do you want to be included in this whānau trust?
>
> **B Reti:** It's not up to me. Its up to my sisters. I wish that my brothers were here too but…I was brought up from when I was a little baby from both of my parents but if they are going to go that way then I will get up and walk out of this Courthouse and they can have everything. That is what I am going to do.
>
> **Court:** The question was raised by Mr Taurima
>
> **B Reti:** Yes, and he is not even here.
>
> **Court:** That is why I am asking you because you are listed as one of the children.
>
> **B Reti:** On paper it is but not according to some of my sisters

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5 173 Napier MB 274-277 (173 NA 264-277).
6 9 Tairāwhiti MB 249-254 (9 TAI 249-254), at 251-252.

> **Court:** The question that I want to put to you is, do you want to be included in this whānau trust or not?
>
> **B Reti:** If I say yes, then what are they going to say?
>
> **Court:** I can hear a few yes's coming.
>
> **B Reti:** Yes, I will then. Yes.
>
> **Court:** That was the only issue raised and I said that I will adjourn it and try and get some information from you. You are sitting here telling me "yes". Is there any reason, because you talked about being a whāngai, as to why Mr Taurima said what he said?
>
> **B Reti:** To tell you the truth Your Honour, he came round to my place one day telling me to sign this paper for the house. It was for the house, not the land. I went along and signed it but I thought that it was for the house. Later on, I got a letter saying that some people wanted to know what we are doing with the land.
>
> **Court:** Where does Mr Taurima fit into this?
>
> **B Reti:** He is a cousin of ours. His mother is our father's sister.
>
> **Court:** So, he is not a child of Jemima?
>
> **B Reti:** No
>
> **Court:** Right**.**
>
> **W McRoberts:** He was a spokesperson.
>
> **Court:** But you want Bunny included in this whānau trust?
>
> **H McRoberts:** Yes.
>
> **…**
>
> **Court:** What I can do today is make an order vesting the shares of Jemima Reti into the whānau trust and the beneficiaries of that whānau trust will be all of the children, including Bunny.

[29] Judge Isaac then made orders determining that those entitled to succeed to Hemaima's additional interests were the fifteen children listed in the 8 July 2009 minute.[7] Te Ruapani was listed as number 3 on that list. No reference was made in that minute as to whether or not Te Ruapani was a whāngai of Hemaima's. We infer this because the applicants for this succession, Rachel Tupene and Alice Reti, did not provide that information to the Court when they lodged the application. Had they done so, it would have appeared in the draft submissions and minute. Although Te Ruapani's status as a whāngai was raised with the court at the first hearing, Judge Isaac did not make an order in terms of s. 115 recognising

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7 128 Wairoa MB 242-245, above n 4, at 242-243.

Te Ruapani as a whāngai and confirming whether or not he was entitled to succeed. Orders were made varying the terms of the whānau trust to include the additional interests and vesting those additional interests into the Hemaima Reti nee Ataria Whanau Trust.

[30] Clause 3(b)(1) of the trust order provides that the trustees may apply the land and assets of the trust for various purposes 'for the descendants of Hemaima Reti nee Ataria'. The ordinary meaning of descendants or descended is to be a blood relative of an ancestor.[8] No order was made amending the terms of the whānau trust to specifically include Te Ruapani as a beneficiary.

[31] The orders made on 6 October 2010 meant that Te Ruapani succeeded to a 1/15th share of those of Hemaima's Māori land interests, then before the Court. They were then transferred into the whānau trust meaning that should the trust be terminated a 1/15th interest would revert to Te Ruapani. As there was no amendment to the way beneficiaries of the trust are defined, Te Ruapani would not be a beneficiary despite indications at the hearing that that was the intent of the orders being made.

[32] Orders were made largely on the basis of Te Ruapani's wishes and the absence of opposition from those whānau members present when the orders were made. When the issue was first raised in 2009 the indication was that the whānau wanted to discuss Te Ruapani's entitlement. It is noteworthy that the appellant Hazel Reti spoke up at the 2010 hearing asking if a trustee could be removed because he is not blood. She did not at that time raise any question about Te Ruapani's entitlement.[9]

[33] Subsequent events show that the whānau did not or could not agree, and that Te Ruapani became caught up in the debate and has felt hurt by it.

[34] It is necessary to briefly review some relevant context concerning Hemaima's Will and how succession proceeded with respect to her husband Maurice Reti. This shows that Hemaima and her husband Maurice and a number of their children were familiar with how the Court approached the question of whether or not a whāngai was entitled to succeed.

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8 See *Concise Oxford Dictionary* (11th ed, Oxford University Press, New York, 2008, 2009).
9 9 Tairāwhiti MB 249-254, above n 6, at 253.

Succession to Maurice Morehu Reti

[35] Maurice Reti died in December 1999 and an application to succeed to his Māori land interests came before Judge Isaac at Gisborne on the 31st of March 2000. Hemaima was present at Court along with her son Jerry Reti and her daughter Rachel Tupene.[10]

[36] The minutes of the hearing record that Maurice did not leave a Will and that he had fourteen children. Te Ruapani is not listed as a child or referred to in the succession. However, a granddaughter of Hemaima and Maurice named Serena Rangikahiwa Snell is referred to as a whāngai and orders are sought and granted recognising Serena as a whāngai and entitled to succeed as if a natural child. At the hearing, there was a fairly detailed discussion about Serena's status, with Hemaima confirming to the Court that she had brought her up from the age of 3 months. The following exchange then took place:[11]

> **Court:** is she recognised in your family as being a child of your family, like one of your brothers and sisters or not?
>
> **J Reti:** She actually calls me uncle. She calls all of us either uncle or aunty.
>
> **Court:** The reason I ask that is that there are two things we have to do here – one is we have to either say that Serena is a whāngai of Morehu and if we say that then we have to determine whether or not Serena takes an equal share along with the rest of you in his Māori land interests. That is where I am coming to. Is that what is anticipated? Is she to take an equal share or is she to wait for Marise and will Marise include her in her land? Does she call Marise mum?
>
> **H Reti:** yes, she does.
>
> **Court:** You see if I left her out here then she's got to come in through Marise. Will that happen?
>
> **H Reti:** We will leave it up to you.
>
> **R Tupene:** No, because I believe that she should be included in there because she has been brought up by Mum and Dad. I know what you are saying.
>
> **Court:** The trouble with that is that she might come in here and then when Marise dies, she will get Marise's shares from here, so she gets more than all of you. That's open to discussion.
>
> **R Tupene:** We have all these papers here that were signed by every one of those children about Serena being included. *Produced.*
>
> **Court:** that makes a lot of difference.

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10 102 Wairoa MB 71-74 (102 WR 71-74).
11 Above, at 72-73.

[37] Orders dated 31 March 2000 were then made confirming succession to the fourteen named children and to also include Serena and establishing the Reti Whānau Trust. The name of that trust was varied in September 2003 to the Maurice Morehu Snr. Reti Whānau Trust and additional trustees were appointed at that time.[12]

Hemaima's Will

[38] Hemaima executed a Will dated 15 February 2000. She appointed her daughters, Rachael Tupene and Alice Reti trustees, gave her trustees her house in Wairoa on trust for all of children living at her death and authorised her trustees to transfer the house to 'any whānau trust created by my family for the holding of any interests in Māori land owned by me. She made a specific bequest "for my grandchild" Serena Snell (any money remaining) upon her reaching 18 years of age. No other specific provisions were made for any of her other children including Te Ruapani.

[39] The Will provided that Hemaima's Māori land interests were to go to trustees under her Will to hold them upon the terms of a whānau trust to be set up pursuant to section 214 Te Ture Whenua Māori Act 1993.

[40] While she was still alive, Hemaima constituted a whānau trust in August 2006 and transferred nearly all her Māori land interests into that trust.[13]

The section 45 application and hearing (2018)

[41] In September 2017, Jerry Reti and Marise Morehu Snell lodged the first s 45 application against the orders arising from the July 2009 and October 2010 hearings. In May 2018, that application was withdrawn and was then dismissed by the Court in June 2018. On the 14th of August 2018, a further s 45 application was filed by Jerry Reti and it is the outcome of this application that is the subject of the appeal.

[42] The application was heard on the 1st of November 2018. At the hearing, Marise Morehu-Snell referred to the way her daughter Serena Snell had been included in the succession to her father Maurice, she wondered why Te Ruapani was not included like that

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12 106 Wairoa MB 188-191 (106 WR 188-191).
13 112 Wairoa MB 24-28 (112 WR 24-28).

in her mothers' shares. Jerry Reti noted that at Hemaima's tangihanga Te Ruapani said that he did not want to have anything to do with Hemaima's lands, and that somewhere along the line things changed and he may have been encouraged by someone to be included.

[43] Te Ruapani was present and said he had been encouraged by Hemaima saying she had included him in the Will.[14]

[44] Te Ruapani said he loved all his brothers and sisters but he did not know why they were arguing over this:[15]

> The old lady left me in the Will, and all of a sudden now they start arguing about it.

[45] He was asked about what he had said at Hemaima's tangi: [16]

> **The Court:** So, Jerry made mention that at the tangihanga for your mother you said you didn't wish to be included?
>
> **TR Reti:** But the thing is, they were all saying that I'm their brother, they more or less wanted me out of there.
>
> **The Court:** Alright.
>
> **TR Reti:** They didn't want me to have anything to do with it. It wasn't up to them; it was up to our mother. If she didn't put me in there, I would have accepted it but she put me in there for a reason so I'm going to accept it just to hurt them. They hurt me all the way through right up to now. Not all of them, several of them, so they only way to get them back is I'll just take it, I've got to accept it, take what my mum has given to me.

[46] Subsequent to that exchange, Jerry Reti noted that if his mother wanted Te Ruapani to succeed to shares she would of mentioned it in her Will, but nowhere in the Will does she say that. He notes that Serena Snell is mentioned but Te Ruapani is not. Ramarihi Sainsbury said:

> I know what my mother and father told me and they stuck with tikanga. We identify to the whenua through our blood. [17]

[47] Chief Judge Isaac established that there was no dispute that Te Ruapani had been brought up within the whānau as a brother. He then clarified for the parties that if a person

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14 2018 Chief Judge's MB 805-816 (2018 CJ 805-816) at 807.
15 Above, at 808.
16 Above, at 808.
17 Above, at 813.

is not related by blood what normally happens is that such a person receives a life interest and upon their death the interests are passed back to the blood family. He also noted that in other cases where there is no blood connection a whānau trust can be set up and a beneficiary without a blood connection can receive a life interest. In other cases, where there is no blood connection a person is recognised as a whāngai but receives no interest. Te Ruapani then expressed a concern about what would happen to his children in the case of the life interest.

[48] The proceeding was adjourned to allow the whānau to meet and to discuss whether or not Te Ruapani should receive a life interest, also whether his children should receive the life interest. At the request of the whānau, Court staff convened the meeting.

[49] The meeting took place in Wairoa on the 5th of February 2019. There is dispute as to whether the minutes provided by the court staff accurately record what was discussed and agreed. With regard to whether or not Te Ruapani was to receive the life interest, the minutes say:[18]

> The meeting then discussed 4 above and the options regarding provisions for whāngai. Hemaima Reti, daughter of Te Ruapani 'Bunny' Reti responded and speaking on behalf of her father that Te Ruapani would not accept the life interest.

[50] Hazel Reti in an affidavit in support of the application to file the appeal out of time contends that the minutes are incorrect as the hui definitely decided by majority that Te Ruapani was only entitled to a life interest. She goes on to say:[19]

> I accept that Bunny was my mums whāngai, and I am happy that he has a life interest in my mother's land shares.

[51] After the whānau hui in February 2019, the s 45 application was referred back to Chief Judge Isaac for decision. For reasons that are not clear from the record, it was not until 19 November 2020 that judgement was delivered. After the whānau hui there was considerable correspondence to the case manager concerning the minutes and then later requesting updates as to when a decision would issue. It is not clear that these matters were ever drawn to Chief Judge Isaac's attention or whether directions were sought from the Chief Judge. We note this because if in fact the correspondence was not referred to the Chief Judge in a timely way, then the practice needs to change to ensure that this happens.

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18 Meeting of Beneficiaries, 5 February 2019, Wairoa Tai Whenua Office.
19 Affidavit of Hazel Puheria Reti, 12 May 2023, at [29].

The Section 45 Judgment under appeal

[52] In his decision of 19 November 2020, Chief Judge Isaac made the following key findings:

(a) There was no error in fact or in the presentation of evidence at the 6 October 2010 hearing as the court was aware at all times that Te Ruapani was a whāngai of the deceased and took this into account in making the order.

(b) In the order complained of, there is no reference to s 115 of the Act. The undisputed evidence is that Te Ruapani was a whāngai of Hemaima. The Court was then in error by not exercising its jurisdiction in terms of s 115, and in terms of evidence given an order should have been made determining that Te Ruapani was a whāngai of Hemaima in terms of s 115 (1).[20]

(c) Hemaima's Will did not specify who her children were, however, one of her executors Rachel Tupene in a letter to the Court stated that Hemaima gifted Te Ruapani the same rights, powers, and privileges as each of her children and that is the meaning of 'whāngai' from our mother. As an executor, she had carried out her mother's wishes that Te Ruapani was to be included in equal benefits with her other brothers and sisters.

(d) At the Court sitting in October 2010 which followed the family meeting no one contested that Bunny was a whāngai of Hemaima and entitled to succeed to the Hemaima's interests as an actual child.[21]

(e) Eight years later there appears to be a change of heart from some of the siblings and Te Ruapani's entitlement has come into question. However, I rely on evidence given when this matter came before me in 2009 and 2010. That evidence was that the deceased wanted his inclusion, so did his siblings.[22]

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20 *Reti – Succession to Jemima Reti* [2020] Chief Judges MB 1243 (2020 CJ 1243), at [18] and [20].
21 Above, at [23]-[24].
22 Above, at [25]-[26].

[53] On the basis of these findings, Chief Judge Isaac then made orders pursuant to section 115(1) determining that Te Ruapani is recognised as a whāngai of Hemaima Reti, and pursuant to section 115 (2)(a) determining that Te Ruapani is entitled to succeed to the Māori land interests of Hemaima.

Te Pīra

The Appeal

[54] The amended grounds of appeal dated 1 August 2023 are as follows:

(1) The first ground of appeal is that Chief Judge Isaac erred in law and principle in hearing the section 45 application when it concerned a review of his own 2010 decision.

(2) The second ground of appeal is that Chief Judge Isaac erred in law and principle in failing to apply the principles of section 115 of the Act, by not seeking expert opinion of the tikanga relating to whāngai of the relevant hapū, and, in making a determination without that information, failed to take into account relevant considerations.

(3) The third ground of appeal is that Chief Judge Isaac was plainly wrong in reaching the following conclusions:

   (a) That no one contested that Bunny was a whāngai of the deceased and entitled to succeed as a natural child (para [24]);

   (b) That to deny Bunny's entitlement would "be contrary to the wishes of the majority of the whānau" (para [27])

   (c) That in 2009 and 2010 the evidence was that the deceased wanted his inclusion and so did his siblings (paras [23] and [26]);

   (d) That because Bunny had whakapapa to Maurice Reti, he has whakapapa entitlement "on that side of the newly amalgamated Whānau Trust." (para [29]).

(4) The fourth ground of appeal is that Chief Judge Isaac erred in law when he made an order at paragraph [30](b) of his decision by failing to apply section 115(2)(a) which required the Judge to determine whether Bunny was entitled to succeed to any beneficial interest or to any specified lesser extent.

Kōrerorero

Discussion

[55] Given the length of time the question of Te Ruapani's entitlement has been before the Courts, and in light of the ongoing division this question has caused within the whānau it is not without regret that we conclude that the appeal must be allowed (at least in part) and that further process will be required in order to finally settle this matter.

[56] Considering the history of the proceedings set out above, we can state our reasons succinctly.

[57] The jurisdiction of the Chief Judge on a s 45 application is one aimed at correction of court orders where the order is erroneous in fact or law due to mistakes and omissions on the part of the Court (or registrar) or in the presentation of the facts to the Court. Section 44 of the Act provides that on a s 45 application, the Chief Judge, if satisfied that an order made by the Court (or registrar) was erroneous in fact or in law may cancel or amend the order or make such other order as the Chief Judge considers necessary in the interests of justice to remedy the mistake or omission.[23]

[58] Chief Judge Isaac concluded that there was no error in fact or in the presentation of evidence at the 2010 hearing as the Court was always aware that Te Ruapani was a whāngai of Hemaima and took this into account when making the order. The basis for that conclusion was that when the matter first came before the Court in July 2009 it was made known that Te Ruapani was a whāngai and his entitlement to succeed was questioned. The Court adjourned, directed Mr Taurima to have a discussion with the whānau and confirm that Te Ruapani did not wish to benefit or be a beneficiary of the whānau trust. In October 2010, the court heard from Te Ruapani who confirmed that he wished to be included and there was no objection. On this basis the orders were made.[24]

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23 Section 44(1), Te Ture Whenua Māori Act 1993.

24 *Reti – Succession to Jemima Reti* [2020], above n 20, at [16]-[18].

[59] With respect, we cannot accept that there was no error in fact or in the presentation of evidence at the 2009 and 2010 hearings. The original application for succession to Hemaima's additional interests brought by Hemaima's daughters and executors Rachel Tupene and Alice Reti did not identify Te Ruapani as a whāngai child of Hemaima. The fact that Te Ruapani is not a biological child of Hemaima only came to the Court's attention when raised by Mr Taurima at the first hearing in July 2009. The questions raised by Mr Taurima at that time were legitimate having regard to the fact that Te Ruapani had succeeded to his biological father and in light of statements he had made at the time of Hemaima's tangi. Granting the request for an adjournment so the whānau could have further discussions was appropriate. It was also appropriate to adjourn so that Te Ruapani's views could be sought and made known to the Court.

[60] At the conclusion of the 2009 hearing, Judge Isaac indicated that if Mr Taurima was unable to get confirmation from Te Ruapani that he did not wish to be a beneficiary of the whānau trust then he would set the matter down for another hearing:[25]

> Because there could be issues for him around his whāngai status, around being a beneficiary in terms of the whānau trust, all those sorts of things if you are not able to get the letter.

[61] When the matter returned to Court on the 6th October 2010 the hearing proceeded simply on the basis of establishing whether or not Te Ruapani wished to be included in the whānau trust. Once that was established, and in the absence of any objection, orders were made vesting the shares into the whānau trust and declaring that the beneficiaries will be all the children including Te Ruapani. No further inquiry was made into Te Ruapani's status as a whāngai or into his entitlement to succeed. In fact, it was not until the hearing of Jerry Reti's s 45 application in November 2018 that more detailed inquiry into these matters was made and evidence on the issue received. At its highest, evidence presented to the Court in 2009 and 2010 may have provided a basis for the Court to make an order under section 115(1) recognising Te Ruapani as a whāngai of Hemaima. We do not believe that there was sufficient evidence or evidence of consent before the Court to make the order under section 113 determining that Te Ruapani was entitled to succeed along with Hemaima's fourteen other children.[26]

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25 128 Wairoa MB 242-245, above n 4, at 245.
26 9 Tairāwhiti MB 249-254, above n 6, at 253-254.

[62] When turning to consider whether as a whāngai Te Ruapani was entitled to succeed to Hemaima's land interests Chief Judge Isaac noted the Will and the fact that it did not specify who her children were. He then cited a letter from one of the executors Rachel Tupene which asserted that Hemaima had gifted to Te Ruapani the same rights, powers and privileges as each of her children, and this is the meaning of whāngai from Hemaima. As executor, she says she has carried out her mother's wishes.[27]

[63] Chief Judge Isaac then went on to find: [28]

> Based on the evidence provided and the fact that at the Court sitting on 6 October 2010 which followed the family meeting, no one contested that Bunny was a whāngai of the deceased and entitled to succeed to the deceased's interests as a natural child.

[64] We do not think the record of proceedings and evidence supports the view that Te Ruapani's entitlement had ever been settled or agreed upon within the whānau. While it seems clear that Rachel Tupene and Alice Reti as executors to Hemaima's Will had a view as to Te Ruapani's status and right to succeed, there is little or no corroborating evidence as to what Hemaima's wishes may have been (the Will is silent on this), and there is countervailing evidence in both Hemaima's Will and in the way succession to her husband proceeded, that shows she and her husband had on occasion considered the question of whāngai entitlement (in relation to Serena), and made provisions for it. In Te Ruapani's case, the situation is not so clear.

[65] Neither do we consider that the evidence supports the conclusion that to deny Te Ruapani's entitlement would be contrary to the wishes of the majority of the whānau.[29]

[66] There is contested evidence on the record as to what occurred at the February 2018 whānau hui facilitated by court staff. This was the only (and best) opportunity to ascertain the wishes of all Hemaima's surviving children. Unfortunately, the minutes are brief and somewhat cryptic. The minutes simply report that the question of Te Ruapani receiving a life interest did not proceed because his daughter indicated he would not accept it.

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27 *Reti – Succession to Jemima Reti* [2020], above n 20, at [23].
28 Above, at [24].
29 Above, at [27].

[67] The term 'whāngai' is defined in the Act as a person adopted in accordance with tikanga Māori. Tikanga Māori is in turn defined as meaning Māori customary views and practices.

[68] Both counsel cited the case of *Hohua – Estate of Tangi Biddle* as a leading authority on Section 115. The Māori Appellate Court said: [30]

> To establish what the relevant Māori customary values and practices relating to an application under section 115/93 may be, the Māori Land Court hears a range of evidential material including inter alia whakapapa to determine whether a blood relationship exists, the length of the relationship between the whāngai and the adopting parents, whether there has been an ohaki, the customary values and practices of the iwi or the hapu associated with the land in question and whether those values and practices permit a whāngai with or without a blood relationship to their matua whāngai to take interests in land. In the end, however, it is a judgement call to be made by the judge after considering all the evidence and having regard to the Preamble, sections 2, 17, and 115/93.
>
> Even if a person is a whāngai, the Court still has a discretion under section 115(2) as to the extent of the interest it may award, if any. This is a matter for consideration by the Court and could extend to the award of a life interest in appropriate circumstances.

[69] After considering the particulars of that case and additional expert evidence provided to the Appellate Court by Professor Wharehuia Milroy, the Appellate Court concluded: [31]

> Where whāngai are involved and their right to succeed is dependent upon their relationship to the deceased, the position should be made clear to them and they should be given suitable opportunities to establish their relationship.

[70] At the hearing of this appeal, counsel for the respondents sought leave to introduce substantial whakapapa evidence. This evidence was said to be relevant to the question of Te Ruapani's relationship to Hemaima. We declined to allow the late introduction of such evidence, largely on grounds of procedural fairness. The fact that its introduction was sought reinforces our view that the whānau have not been provided proper opportunity to have the issue of Te Ruapani's status as whāngai and entitlement to succeed to be fully addressed by the Court.

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30 *Hohua – Estate of Tangi Biddle* or *Re Hohua* (2001) 10 Rotorua Appellate MB 43 (10 APRO 43), 10 Waiariki Appeal MB 43.

31 Above.

[71] Counsel for both parties emphasised the stress this issue had caused the whānau and registered concern about further process given the already protracted nature of the proceedings. We therefore gave the parties through counsel the opportunity to confer and advise us whether agreement or partial agreement could be reached on a process to resolve the issues. We gave counsel 2 weeks to file joint memoranda. On 24 November 2023 counsel for the respondents advised that agreement was not possible. Later that day Mr Watson for the appellants confirmed this and sought specific directions including the commissioning of expert tikanga evidence in relation to whāngai. We return to those matters at the conclusion of this decision.

Should Chief Judge Isaac have recused himself from hearing the section 45 hearing?

[72] In an affidavit in support of the appeal, Hazel Reti says:

> I also cant understand how it is fair for the same Chief Judge who made the original decision to later rule whether or not that decision was correct.

[73] The legal principle raised is generally known as the rule against bias. It is captured in the phrase:

> No man may be a judge in his own cause.

[74] The principle operates to disqualify a judge from determining any case in which they may be, or may fairly be suspected to be, biased.[32]

[75] The learned authors of *Wade and Forsyth* note as a particularly clear case of irregularity a situation where a person sits with an appellate body to hear an appeal against a decision of their own. In a footnote to this passage, however they note that Judges may however do this and often did so in earlier times. The two English cases referred to (Hamlet and Lovegrove) concerned a judge or decision maker at first instance sitting (with others) on the appellate body that heard an appeal. [33]

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[32] For general discussion of the principles see William Wade, Julian Ghosh and Christopher Forsyth "Chapter 13" in *Wade and Forsyth's Administrative Law*, (12th edition, Oxford University Press, London, 2023), at 367.

[33] *Hamlet v General Municipal Boiler Makers* [1987] 1 WLR 499; *R v. Lovegrove* [1951] 1 ALL ER804 as cited in *Wade and Forsyth's Administrative Law*, above n 32, at 383.

[76] There is nothing in the record that suggests that Chief Judge Isaac turned his mind to this issue and it was not raised during the hearing of the s 45 application in 2018. Counsel was not able to cite any relevant case law concerning the Chief Judges s 45 jurisdiction and neither are we aware of any precedent on the question.

[77] There is no specific provision in the Act or rules that requires a Chief Judge to stand aside from an application to correct an alleged error or mistake in one of his or her previous decisions sitting as a Māori Land Court judge.

[78] At the hearing we did nonetheless observe to counsel that while there is no specific statutory or other requirement concerning the constitution of a panel of the Māori Appellate Court, it has long been the practice of the Chief Judge when constituting an appellate bench that the judge whose decision is under appeal is not appointed to the appellate panel.

[79] The law does recognise situations where necessity means that a Judge otherwise disqualified must sit because no one else can do so. The authors of Wade and Forsyth express the principle in the following way:[34]

> In most of the cases so far mentioned, the disqualified adjudicator could be dispensed with or replaced by someone to whom the objection did not apply. But there are many cases where no substitution is possible since no one else is empowered to act. Natural justice then has to give way to necessity, for otherwise there is no means of deciding and the machinery of justice or administration will break down.

[80] Prior to 2006, this appears to be the case with respect to the Chief Judges jurisdiction under sections 44 and 45, as only the Chief Judge could hear such applications. However, in December 2006 section 48(A) was enacted. It provides: [35]

> The Deputy Chief Judge has and may exercise, subject to the direction of the Chief Judge, the powers, functions, and duties of the Chief Judge under Sections 44 to 48.

[81] There is nothing in the record that indicates one way or the other whether Chief Judge Isaac considered a delegation of Jerry Reti's s 45 application to the Deputy Chief Judge. We are aware of a number of cases where a delegation has been made, though the resulting decisions are silent on the reasons for delegation.[36] Assuming there was no impediment to

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34 William Wade, Julian Ghosh and Christopher Forsyth "Chapter 13" I *Wade and Forsyth's Administrative Law*, above n 38, at 379.

35 Section 48A, Te Ture Whenua Māori Act 1993.

36 See *Beniston v Subritzky* [2016] Chief Judge's MB 178 (2016 CJ 178); *Tito – Mangkahia 2B2 No*

such a delegation, we are of the view that it ought to have been made in a case such as this. We consider it sound practice as a matter of principle and prudent as a matter of practicality so that issues of the kind raised on this appeal do not arise and that parties (whatever the result) have no reason to question the fairness of the process.

[82] For completeness, we do not accept the submission of counsel for the respondents that the s 45 jurisdiction is so distinct or particular so as to displace the application of these general principles. The s 45 jurisdiction is a power to correct errors of fact or law and there are clear parallels with an appellate jurisdiction. It is an important part of the Courts jurisdiction given the fact that after 10 years the Courts orders are deemed conclusive.37

Kupu Whakatau

Decision

[83] By memorandum dated 24th of November 2023, counsel for the respondents advised that counsel for the parties had conferred following the adjournment of the 9 November 2023 hearing but have been unable to resolve matters between them. The respondent's preference therefore was for the Court to determine the application for leave and substantive appeal application. Counsel says that in the event the appeal is granted, and the proceedings are submitted back to the Māori Land Court for rehearing, the respondents intend to seek leave to file evidence from a tikanga expert regarding Mr Reti's interests as a whāngai of Hemaima Reti.

[84] Mr Watson for the appellants responded by way of memorandum also dated 24 November 2023 indicating that on the 15th of November he had written to solicitors for the respondents with proposals for settlement and had only that morning received a response saying that the respondents did not agree with the proposals. In the event that the Court allows the appeal, Mr Watson asks that the following be included in the Court's directions:

> 5.1 That a referral back to the Māori Land Court to hear the application concerning further interests should be assigned such urgency in the Court system as is appropriate so as to expedite a hearing;

21A1A [2016] Chief Judge's MB 398 (2016 CJ 398)*; Morrell v Wairoa-Waikaremoana Trust Board – Lake Waikaremoana [2017]* Chief Judge's MB 342 (2017 CJ 342).

37 Section 77, Te Ture Whenua Māori Act 1993.

> 5.2 That pursuant to section 56(1)(f) and section 56(2) the Court direct an expert report on the relevant hapū tikanga on whāngai and whāngai entitlements to land, as arising from the facts of this case, with the parties invited to comment on who might be the expert appointee;
>
> 5.3 That the Māori Land Court hearing the application be directed to consider the following:
>
> (a) That the expert tikanga report be filed and served on the parties;
>
> (b) That the parties have an opportunity for a facilitated hui to allow wānanga on that report, with the outcomes of that hui conveyed to the Court, and
>
> (c) That, given the subject matter and the long period of time over which this matter has been in dispute, the Court consider mediation or alternative dispute resolution processes under Rule 8.17(2)(a).

[85] At the hearing on the 9th of November 2023, we questioned Mr Watson closely as it appeared that his client's position had shifted from acceptance that Te Ruapani was a whāngai to a denial that he was a whāngai child of Hemaima. Mr Watson confirmed that his instructions were that Te Ruapani's status as a whāngai was at issue. Given very clear statements by the appellants in the record of proceedings recognising that Te Ruapani is a whāngai, we found this position surprising. We infer that it is an unfortunate outcome of the ongoing division within the whānau over Te Ruapani's entitlement to succeed to Hemaima's Māori land interests. We do not, however, consider it to be a tenable argument. We note that as recently as May this year, the appellant Hazel Puheria Reti said in an affidavit filed in support of the application to leave to appeal out of time: [38]

> "My mum had fifteen children including one whāngai who is the subject of this appeal namely Bunny Ruapani Reti;"
>
> …
>
> "I accept that Bunny was my mums whāngai and am happy that he has a life interest in my mother's land shares."

[86] We also take it as implicit from Mr Watson's latest memorandum that the core issue remaining between the parties is not whether Te Ruapani is a whāngai, but whether or not he should be entitled to succeed to Hemaima's land interests. The orders that follow reflect this.

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[38] Affidavit of Hazel Puheria Reti, above n 21, at [4] and [29].

[87] We have considered the directions requested by Mr Watson on behalf of the appellants and on balance consider that they are matters better dealt with by the Court below. We will allow the appeal (in part) and refer the matter back to the lower Court for hearing.

[88] While it would be open to us to refer the matter back to the Chief Judge, we are of the view that the preferable course is to refer the matter back to the Māori Land Court for re-hearing. The focus of that hearing will not be on the question of whether Te Ruapani is a whāngai child of Hemaima but will be an opportunity for the whānau to be heard on the question of the extent of his entitlement to succeed to Hemaima's Māori land interests. Because the orders we make constitute a referral back of the original proceeding, the applicable law will be the provisions of s115 as operative in 2009 and 2010, not as amended in 2020.

[89] The appeal is partially upheld.

Ngā Ōta

Orders

[90] Orders are made pursuant to Te Ture Whenua Māori Act 1993:

a. Section 56(1)(a), affirming the order granted on 19 November 2020 pursuant to s115(1) of the Act at 2020 Chief Judge's MB 1243-1253 determining Bunny Ruapani Reti also known as Ruapani Reti to be a whāngai child of Jemima Reti also known as Hemaima Reti;

b. Section 56(1)(b), revoking the order made on 19 November 2020 pursuant to s115(2)(a) of the Act at 2020 Chief Judge's MB 1243-1253 determining that Bunny Ruapani Reti also known as Ruapani Reti is entitled to succeed to the Māori land interests of Jemima Reti also known as Hemaima Reti alongside her natural children; and

c. Section 56(1)(e), referring the matter back to the Māori Land Court for a rehearing to determine what (if any) orders should be made pursuant to the provisions of s 115(2)(a) and (b), being the relevant provisions in force when

succession to Jemima Reti also known as Hemaima Reti's further land interests came before the Court in July 2009.

I whakapuaki i te wā 11:00am ki Te Whanganui-a-Tara, i te rā rua tekau mā tahi o Hakihea i te tau 2023.

S F Reeves (Presiding)	M J Doogan	A M Thomas
JUDGE	**JUDGE**	**JUDGE**