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

A20190011273
APPEAL 2020/2

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Waima C8 Block
I WAENGA I A *Between*	MIHA MAIHI MOKARAKA, ANABEL EDITH THOMPSON, IDA MORGAN, BARNEY PANI MOKARAKA, DAVID RUDOLPH MOKARAKA, JOHN ROBIN MOKARAKA AND MARTHA WAITI Nga Kaitono Pīra *Appellants*
ME *And*	BESSIE PINE MOKARAKA AND CAROLINE MOKARAKA Nga Kaiurupare Pīra *Respondents*

Nohoanga: *Hearing*	6 August 2020, 2020 Māori Appellate Court MB 290-294 (Heard at Whangarei)
Kooti: *Court*	Judge C T Coxhead (Presiding) Chief Judge W W Isaac Judge D H Stone
Kanohi kitea: *Appearances*	R Welsh for Appellants R Park for Respondents
Whakataunga: *Judgment date*	22 February 2022

TE WHAKATAUNGA Ā TE KOOTI
Judgment of the Court

Copies to:
R Welsh, WRMK Lawyers, 9 Hunt Street, Whangarei ryan.welsh@wrmk.co.nz
R Park, Watkins Law, P O Box 147, Kaikohe 0440 roslyn@watkinslaw.nz

Hei tīmatanga kōrero
Introduction

[1] The appellants originally applied for the Chief Judge to exercise the jurisdiction under s 44(1) of Te Ture Whenua Māori Act 1993 ("the Act") to amend orders made on 31 March 1993, for succession to Pani Mokaraka pursuant to s 78A of the Māori Affairs Amendment Act 1967 and determining ownership of a house located on land known as Waima C8 block pursuant to s 30 of the Māori Affairs Act 1953.

[2] In a decision dated 1 November 2019, Deputy Chief Judge Fox (acting under delegation from the Chief Judge) granted the amendments relating to the succession orders. However, she declined to cancel the order determining ownership of the house, noting that she did not consider it in the interests of justice to cancel the 1993 ownership order made in favour of Bessie Henare (Mokaraka) nor the subsequent occupation order made in favour of Tahi Mokaraka.[1] In her view, to find otherwise would be contrary to the interests of justice as it would allow the other members of the family to claim the benefit of the improvements made to the house (such as they were) by Tahi and his family.

[3] The present appeal challenges Deputy Chief Judge Fox's decision to decline to exercise her jurisdiction under s 44(1) of the Act to cancel the 1993 order determining that Bessie Henare (Mokaraka) owns the house and the subsequent occupation order in favour of Tahi Mokaraka.

Kōrero whānui
Background

[4] This appeal was heard at Whāngarei on 6 August 2020.[2] Early in the hearing, an adjournment was granted to give parties an opportunity to discuss matters, with a view to resolving the issues by agreement.

[5] The hearing was reconvened later in the day and counsel for the parties advised that the following terms had been agreed to:

---

1 *Mokaraka – Waima C8* [2019] Chief Judge's MB 1137 (2019 CJ 1137).
2 2020 Māori Appellate Court MB 290-294 (2020 APPEAL 290-294).

(a) A whānau trust would be formed to own the house and hold any right to occupy that house for the descendants of Pani Mokaraka;

(b) From 1 January 2021, Harawai Allen-Mokaraka, a son of Tahi Mokaraka, would be given occupation rights to the house for a period of five years. Formal terms concerning rent of the house and other conditions would be put in place and, once the five-year period had expired, the right to occupy the house would be determined by the trustees of the whānau trust; and

(c) The appellants would support any application made by the children of Tahi Mokaraka to obtain a licence to occupy or an occupation order to build on Waima C8.

[6] The appeal was adjourned and parties were required to make either a joint application, or an application that was supported, to the Māori Land Court to constitute a whānau trust. Once the Registrar had confirmed that orders had issued, the appeal was to be referred back to the Appellate Court for dismissal.

Te tono mō te tū anō
Request to reconvene

[7] Counsel for the respondents subsequently sought a direction that the appeal be reconvened and determined by the Māori Appellate Court.[3] Counsel submitted that:

(a) When the agreement was made, the appellants had control of the house and were receiving rent from a tenant;

(b) Prior to the hearing, the respondents had made several attempts to regain control of the house;

(c) The house is still being occupied by the appellants' tenant. In light of the agreement, the respondents anticipated that the appellants would give the tenant notice and prepare the house for Harawai to occupy;

---

3 Memorandum of Counsel dated 30 April 2021.

(d) As far as the respondents are aware, no steps have been made to constitute a whānau trust;

(e) The respondents have attempted to contact the appellants through their counsel to find out what is happening but have had no response;

(f) The respondents wish to withdraw their agreement to the occupation order being transferred to a whānau trust. They consider the appellants have not honoured their part of the agreement to have the house ready for Harawai to occupy by 1 January 2021; and

(g) They wish to enforce the decision made at 2019 Chief Judge's MB 1137-1161 confirming the occupation order in their favour.

Ngā tohutohu a te 22 September 2021
Direction of 22 September 2021

[8] On 22 September 2021, we directed the parties to file submissions on the jurisdiction of the Court to consider an appeal challenging a decision of the Chief Judge to decline to exercise jurisdiction under s 44 of the Act.

[9] In our direction, we noted:[4]

> [6] In reviewing the matter the coram have determined that the issue of jurisdiction, in regards section 44(5) of Te Ture Whenua Māori Act 1993, needs to be addressed prior to hearing the matter.

[10] Counsel for the respondents filed submissions dated 11 October 2021. However, despite being notified, the appellants did not file any submissions.

Te take
The issue

[11] The issue for determination is whether the Court has jurisdiction to proceed with the present appeal, given s 44(5) of the Act. The central issue arises from the Court of Appeal's

---

4 2021 Māori Appellate Court MB 323 (2021 APPEAL 323).

recent interpretation of s 44(5) in *Inia v Julian*.[5] To provide context, it is necessary to deal now with s 44(5) and the Court of Appeal's interpretation.

[12] The Chief Judge has a special jurisdiction to correct mistakes and omissions with prior Court orders or certificates of confirmation. The jurisdiction is conferred by s 44(1), which provides:

> **44 Chief Judge may correct mistakes and omissions**
>
> (1) On any application made under section 45, the Chief Judge may, if satisfied that an order made by the court or a Registrar (including an order made by a Registrar before the commencement of this Act), or a certificate of confirmation issued by a Registrar under section 160, was erroneous in fact or in law because of any mistake or omission on the part of the court or the Registrar or in the presentation of the facts of the case to the court or the Registrar, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

[13] Section 44(5) allows the Chief Judge to decline to exercise the s 44 jurisdiction. It is also an ouster provision, as it expressly disallows appeals to the Māori Appellate Court if the Chief Judge dismisses an application under s 44. Section 44(5) provides:

> **44 Chief Judge may correct mistakes and omissions**
> …
> (5) The Chief Judge may decline to exercise jurisdiction under this section in respect of any application, and no appeal shall lie to the Maori Appellate Court from the dismissal by the Chief Judge of an application under this section.

[14] The decision *Inia v Julian* concerns s 44 of the Act and the relevant facts are simply expressed. Under s 44, the Deputy Chief Judge identified an error in Court orders made in 1995 because disinherited parties were not notified. However, she declined to cancel the orders. The Māori Appellate Court annulled this decision for various reasons, but agreed that the 1995 Court orders were erroneous because disinherited parties were not notified. The appellants in the Court of Appeal argued that the Māori Appellate Court had erred in this respect, because it failed to have regard to a lack of jurisdiction under s 44(5) of the Act. They argued that, because the Deputy Chief Judge had refused to cancel the 1995 orders, s 44(5) applied, meaning there was no appeal right to the Māori Appellate Court.

---

5 *Inia v Julian* [2020] NZCA 423.

[15] The Court of Appeal considered the Chief Judge's jurisdiction and confirmed that the power under s 44(1) falls into two parts:[6]

(a) Firstly, an evaluative decision as to whether the order made was "erroneous in fact or in law because of any mistake or omission on the part of the court or the Registrar or in the presentation of the facts of the case to the court or the Registrar"; and

(b) Secondly, a power, which is likely in most cases to involve discretion, to "cancel or amend the order… or make such other order… as, in the opinion of the Chief Judge, is necessary in the interest of justice to remedy the mistake or omission".

[16] In further comments on the meaning and scope of s 44(5) the Court of Appeal noted:[7]

> [12] Thirdly, we do not accept Mr Pou's argument that the Judge's determination regarding the notice error fell within s 44(5) of the Act, precluding appeal to the Appellate Court. While the Judge said, "I decline to exercise my jurisdiction under s 45 of the Act to cancel the succession order", that observation was remedial in nature. It did not fall within the limited scope of s 44(5). **We consider that provision applies only where the Chief Judge has not entered at all upon the exercise of examining whether there was a mistake or omission or whether to exercise his or her discretion.** That is not so in this case, for either error.
>
> (Emphasis added)

[17] Therefore, the Court of Appeal's view is that s 44(5) is of limited scope. It applies only if the Chief Judge has not entered at all upon the exercise of examining whether there was a mistake or omission. This finding is relevant here because the Deputy Chief Judge declined to cancel the order determining ownership of the house in favour of Bessie Henare (Mokaraka). On the Court of Appeal's analysis, s 44(5) would not apply because the Deputy Chief Judge entered upon the exercise of examining whether there was a mistake or omission. If that interpretation were accepted, it would mean that we have jurisdiction to hear the appeal now before us.

---

6 *Inia v Julian* [2020] NZCA 423, at [10].
7 At [10].

Ngā kōrero a ngā Kaiurupare Pīra
Respondents' submission

[18] Counsel for the respondents, in summary, submitted that:

(a) In *Inia v Julian*, the Court of Appeal indicated that s 44(5) only applies where the Chief Judge takes no steps to remedy a mistake or error discovered. In that case, the Deputy Chief Judge considered that it was not in the interests of justice to remedy the error of law by cancelling the succession order complained of but went on to amend the order constituting a trust which had succeeded to the relevant land (and others) in order to include the applicant and her children and mokopuna as beneficiaries;

(b) Section 44(1) provides a mechanism for the Court to rectify errors and mistakes discovered in previous orders or certificates of confirmation;

(c) The approach to s 44(1) is twofold, as noted in *Inia v Julian*;

(i) Where the jurisdiction to make a further order is exercised, appeal rights attach under s 49;

(ii) Where the Chief Judge declines to exercise his or her jurisdiction, there are no appeal rights under s 44(5). The decision not to exercise jurisdiction is not a decision in itself that would attract appeal rights under s 49; and

(d) The present appeal challenges Deputy Chief Judge's decision to decline to exercise her jurisdiction under s 44(1) and therefore s 44(5) applies and the appeal should be dismissed.

Te Ture
The Law

[19] We have traversed ss 44(1) and 44(5) of the Act. In summary, s 44(1) sets out the jurisdiction of the Chief Judge (or in this case the Deputy Chief Judge acting under delegation), being to cancel or amend an order made by the Court or make such other order,

if satisfied there was an error because of any mistake or omission on the part of the Court or Registrar or in the presentation of the facts of the case, and where the Chief Judge considers it is necessary in the interests of justice to remedy the mistake or omission.

[20] When the Chief Judge or the Deputy Chief Judge make orders pursuant to s 44 then appeal rights attach pursuant to s 49, which states:

> **49 Appeal**
>
> (1) Every order made by the Chief Judge or the Deputy Chief Judge under section 44 shall be subject to appeal to the Maori Appellate Court.
>
> (2) On the determination of any such appeal by the Maori Appellate Court, no further application in respect of the same matter shall be made under section 45.

[21] However, where the Chief Judge declines to exercise jurisdiction under s 44 and dismisses an application, s 44(5) confirms there is no appeal right.

Kōrerorero
Discussion

[22] We must determine the meaning of s 44(5). To do so, we:

(a) Consider the nature of the Chief Judge's jurisdiction under ss 44 – 49;

(b) Identify and apply the relevant statutory interpretation approach we must follow;

(c) Consider how the courts have previously construed the Chief Judge's jurisdiction; and

(d) Assess whether there are any other factors that assist in determining the meaning of s 44(5).

Te mana motuhake o te Kaiwhakawā Matua o te Kooti Whenua Māori
The special and unique jurisdiction of the Chief Judge

[23] Section 44(5) is contained in Part 1 of the Act under the Special Powers of the Chief Judge, comprising ss 44 – 49. The special powers of the Chief Judge in the context of the wider legislative provisions was considered by the Court in *Estate of George Amos – Horahora 1A4B*, where the Court stated:[8]

> 3. Review and Appeal Provisions
>
> 3.1 Before an application is made pursuant to s 45 /93 to the Chief Judge, an applicant has the right to apply to the Court for a rehearing within 28 days after the order was made or such further time as may be granted by the Court. Also any party to the proceedings has the right to appeal against a final order of the Court to the Maori Appellate Court. Furthermore, any Court is restricted from annulling, quashing, declaring or holding invalid any Maori Land Court order if proceedings are instituted more than 10 years after the date of the order.
>
> 3.2 The above provisions set out the normal process available to a party to proceedings to object to an order of the Court. This shows the intent of the legislature that orders of the Court should be binding and conclusive on the parties. Notwithstanding these review provisions, section 77(3) /93 provides an exception, and allows applications to the Chief Judge pursuant to section 45 /93 to review decisions of the Court without any time restrictions. Applications can therefore be brought well outside the 10 year period provided for in section 77 /93. However, applications for the Chief Judge pursuant to section 45 /93 are the exception, rather than the rule and the other review provisions in the Act should be utilised if possible prior to an application to the Chief Judge. Furthermore, such applications to the Chief Judge are unique to the Maori Land Court's jurisdiction and demonstrate the importance and care required by the Chief Judge when exercising that jurisdiction.

[24] The nature of the Chief Judge's jurisdiction was further considered by the Court in *Rameka – Papamoa 2 Sec 2B3C3B1*, where it was stated:[9]

> [10] Section 45 of Te Ture Whenua Maori Act 93 is a unique section amongst the Courts of New Zealand. As a titles Court, the principle of indefeasibility was extremely important and consequently orders should not be easy to overturn. The exceptions contained in s 45 explicitly refer to situations where the Court has not made a correct decision because of a flaw in the evidence presented, or in the interpretation of the law, and it is necessary in the interests of justice to correct this. For this reason s 45 applications must be accompanied by proof of the flaw, identified through the production of evidence.

---

8 *Estate of George Amos – Horahora 1A4B* [2002] Chief Judge's MB 54 (2002 CJ 54). See also *Smith – Nikora Whānau Trust* [2013] Chief Judge's MB 302 (2013 CJ 302).

9 *Rameka – Papamoa 2 Sec 2B3C3B1* [2016] Chief Judge's MB 457 (2016 CJ 457). See also *Morell v Wairoa-Waikaremoana Trust Board – Lake Waikaremoana* [2017] Chief Judge's MB 342 (2017 CJ 342).

[25] The special powers of the Chief Judge therefore represent a unique jurisdiction amongst the Courts of New Zealand. Their purpose is an attempt to strike a balance between allowing orders, often historical, to be amended or cancelled where it is necessary in the interests of justice, against the need for orders to be binding and conclusive to provide finality and certainty, recognising the importance of the principle of indefeasibility.

[26] This purpose is evident from the powers themselves, which on the one hand allow the Chief Judge to inquire into alleged errors, amend or cancel orders and make consequential amendments (ss 44-47), and on the other hand provide that orders shall not take away or affect any right or interest acquired for value and in good faith under any registered instrument of alienation and that where an order made under s 44 is appealed, then on determination of that appeal no further application in respect of the same matter can be made per s 45 (ss 48-49).

Me pēhea a s 44(5) e whakamārama ana?
How should s 44(5) be interpreted?

The general approach

[27] The general principles of statutory interpretation are set out in s 10 of the Legislation Act 2019, which replaced s 5 of the now repealed Interpretation Act 1999.[10] Section 10 of the Legislation Act 2019 is very similar to s 5 and provides that the meaning of legislation must be ascertained from its text and in light of its purpose and context.

[28] The Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd* made the following comments regarding this statutory interpretation exercise:[11]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate

---

10 The Interpretation Act 1999 was repealed on 28 October 2021 by s 6 of the Legislation (Repeals and Amendments) Act 2019.

11 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767. Although this decision deals with s 5 of the Interpretation Act 1999, it continues to be the leading authority on s 10 of the Legislation Act 2019. See, for example, *Paul v Mead* [2021] NZCA 649; *Borrowdale v Director-General of Health* [2021] NZCA 520.

> and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

The text of s 44(5)

[29] On a plain reading of s 44(5), the meaning of the text appears clear and unambiguous; the Chief Judge can decline to exercise jurisdiction under s 44 and there is no right of appeal against such dismissals.

[30] For our purposes, the key phrase in s 44(5) is that the Chief Judge "may decline to exercise jurisdiction under this section". The jurisdiction is that conferred by s 44(1). Importantly, that jurisdiction allows the Chief Judge to "cancel or amend" an order or certificate of confirmation, or "make such other order or issue such certificate of confirmation" as is necessary. The jurisdiction includes both the evaluative decision as to whether there was an error and the discretionary decision as to whether the interests of justice require the Chief Judge to intervene. It is difficult to infer from this statutory language that s 44(5) only applies in very limited situations where the Chief Judge has not entered at all upon the exercise of examining whether there was a mistake or omission or whether to exercise his or her discretion.

[31] Rather, we see three potential junctures at which the Chief Judge could decline to exercise the s 44 jurisdiction. The first juncture is before any evaluation occurs at all. This is the juncture contemplated by the Court of Appeal in *Inia v Julian*. We have some doubts as to whether this juncture exists at all, which we address later. The second juncture is after the evaluation exercise is completed. The Chief Judge may decline to exercise the jurisdiction to cancel, amend or make another order or certificate of confirmation because the Chief Judge is not satisfied there is an erroneous order or certificate. The third juncture is at the discretionary decision stage. The Chief Judge may decline to exercise the jurisdiction to cancel, amend or make another order or certificate of confirmation because the Chief Judge does not consider it necessary in the interests of justice to remedy an identified error. A plain reading of s 44(5) encapsulates all of these potential junctures and does not support an interpretation that limits s 44(5) only to the first juncture.

[32] This view is supported by the specific ouster wording in s 44(5). The wording makes it clear that no appeal right lies from a *dismissal* by the Chief Judge of a s 44 application.

The Chief Judge could dismiss an application at multiple junctures. The reference to dismissal, without any limiting language, does not support an interpretation that restricts s 44(5) to only one of those junctures, being when the Chief Judge has not entered upon the exercise contemplated by s 44 at all.

The purpose of, and context for, s 44(5)

[33] Section 44(5) is an ouster provision. It removes a right of appeal. It is generally presumed that a party should not be deprived of a right to appeal.[12] Rights of appeal should not ordinarily be removed or impaired, except under clear legal authority.[13] Ouster provisions are to be viewed with caution.[14] Based on these general principles, we accept the proposition that s 44(5) should be given the most limited interpretation it is capable of bearing.

[34] However, s 44(5) must be read in the context of the unique and special jurisdiction conferred by ss 44 to 49 of the Act. As noted, the discernible purpose of these provisions is to strike a balance between allowing orders, often historical, to be amended or cancelled where it is necessary in the interests of justice, against the need for orders to be binding and conclusive to provide finality and certainty, recognising the importance of the principle of indefeasibility. This balance is achieved through a number of mechanisms. Section 44(3) is an illustrative example. In recognition of the principle of finality, s 77 of the Act provides that Court orders with respect to Māori land are conclusive after 10 years. However, to allow historical orders to be amended or cancelled in the interests of justice, s 44(3) provides that the Chief Judge's special jurisdiction can apply to orders deemed conclusive pursuant to s 77. Section 44(5) is one of these balance striking mechanisms.

[35] With this purpose and context in mind, it is clear that the purpose of s 44 is to provide an opportunity for an aggrieved party to seek changes to historical and erroneous Court orders. In this context, it is not surprising that the Chief Judge should be allowed to dismiss an application and for no appeal right to lie. This strikes the appropriate balance between the interests of justice and finality. Moreover, this context supports the proposition that

---

12 *Investors in Industry Commercial Properties Ltd v Norwich City Council* [1986] AC 822; and *R v Emmett* [1998] AC 773.

13 Diggory Bailey, Francis Alan Roscoe Bennion and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, United Kingdom, 2020) at 27.8.

14 *Pyx Grantie Co Ltd v Ministry of Housing and Local Government* [1960] AC 260.

appeal rights should not apply to every decision of the Chief Judge to dismiss a s 44 application, not just when the Chief Judge has not even engaged on the substantive issue.

Statutory interpretation conclusion

[36] In considering the meaning of s 44(5), both from its text and in its context, it is clear to us that it applies to all situations where the Chief Judge (or Deputy Chief Judge) declines to exercise jurisdiction and dismisses a s 44 application. Such decisions are not capable of appeal. This aligns with the purposes of the special powers of the Chief Judge to allow a limited power of correction while upholding the need for finality and certainty of orders by ensuring that orders are not easily overturned.

[37] We do not consider that an interpretation that narrows the scope of s 44(5) to only apply in situations where the Chief Judge "has not entered at all upon the exercise of examining whether there was a mistake or omission or whether to exercise his or her discretion" can be justified when properly considering the provision in context.

Ngā whakataunga o mua mo tēnei take
Previous court decisions on this issue

[38] The meaning of s 44(5) has been considered previously by this Court. The sole issue in the Māori Appellate Court decision of *Haimona v Taiatini – Te Karaka No 1A* was whether there was a right of appeal against a dismissal by the Chief Judge under s 44(5).[15]

[39] The Court considered the meaning of s 44(5) and whether the Chief Judge exercised his jurisdiction under s 44 by simply hearing and determining the merits of an application. The Court examined equivalent provisions of earlier legislation along with relevant authorities that had considered the scope and meaning of the Chief Judge's special powers.[16] The Court found:

> [42] We agree that the powers granted to the Chief Judge are a special discretionary jurisdiction. The scope of the Chief Judge's jurisdiction under section 45 is exceptional, and accordingly, must be exercised with care.

---

15 *Haimona v Taiatini – Te Karaka No 1A* [2016] Māori Appellate Court MB 390 (2016 APPEAL 390).

16 See *Raroa – Hahau B2* (1993) 33 Gisborne Appellate Court MB 164 (34 APGS 164); *Grant v Raroa – Ngamoe A1B1B* (1993) 33 Gisborne Appellate Court MB 35 (33 APGS 35); and *Ratahi v Oke – Rangitaiki 28B12B2B2A* [2009] Chief Judges MB 410 (2009 CJ 410).

> [43] To trigger the exercise of those powers the Chief Judge must be satisfied that there has been a mistake, error or omission on the part of the Court or in the presentation of the evidence. In order to be satisfied the Chief Judge will need to undertake due inquiry before coming to a decision. If the Chief Judge is satisfied that a mistake or error has been made he can then continue on to exercise his discretion as to whether or not to remedy the mistake or error.
>
> [44] Section 44 cannot be exercised unless there is an error; the finding of an error is a prerequisite to the exercise of the jurisdiction. It must first be established whether there is in fact a mistake or an omission in fact or law that has been made by the Court or the Registrar. Then it must be demonstrated that it is necessary in the interests of justice to remedy the mistake or omission.
>
> [45] In the present case Chief Judge Isaac referred the application for inquiry and report. Following the release of that report the Chief Judge issued his decision adopting the recommendation of Judge Coxhead that he decline to exercise his jurisdiction to amend or cancel the order. He also decided that the application should be dismissed.
>
> [46] We find that the Chief Judge was not satisfied that there had been an error or omission such as to warrant the exercise of his powers per s 44 of the Act. So he declined to exercise his discretion to exercise of his powers per s 44. In doing so the Chief Judge dismissed the application and consequently, per s 44(5), no appeal lies from that decision.

[40] The Court of Appeal in *Inia v Julian* has indicated that s 44(5) applies *only* where the Chief Judge has not entered at all upon the exercise of examining whether there was a mistake or omission or whether to exercise his or her discretion. However, the Māori Appellate Court has concluded that, to exercise the s 44 jurisdiction, the Chief Judge must first be satisfied that there has been an error or omission. This requires the Chief Judge to undertake due inquiry. Only then can the Chief Judge exercise the s 44 jurisdiction. Where the Chief Judge is not satisfied there has been an error or omission such as to warrant the exercise of his power per s 44, he can decline to exercise his discretion and dismiss the application. Consequently no appeal lies from such a decision.

[41] It is not clear from the decision in *Inia v Julian,* whether the Court of Appeal considered *Haimona v Taiatini* or any other Māori Appellate Court decisions regarding s 44(5). The Court of Appeal does not refer to any Māori Land Court or Māori Appellate Court authorities, other than those decisions under appeal. It is therefore possible that the Court of Appeal did not have before it the detailed analysis of the legislation and relevant authorities previously undertaken by the Māori Appellate Court in relation to s 44(5).

Ērā atu take
Other factors

[42] Applications seeking the exercise of the special powers of the Chief Judge must be filed pursuant to s 45 of the Act by or on behalf of a person who claims to be adversely affected by the order the application relates to, or by the Registrar.

[43] When an application pursuant to s 45 is received, r 8.3 of the Māori Land Court Rules 2011 ("the Rules") specifically requires that the Chief Registrar or Registrar "must" without delay prepare a preliminary report and forward it to the Chief Judge.

[44] The report must comply with r 8.4 as to content. Rule 8.4 states:

> **8.4 Content of preliminary report**
>
> The preliminary report must contain the following:
>
> (a) a concise history of the order or certificate sought to be corrected:
>
> (b) details of the mistake or omission alleged by the applicant:
>
> (c) details of any evidence or findings by the Court in which the mistake or error is alleged to have occurred:
>
> (d) details of any other evidence or findings by the Court that might be material to the application:
>
> (e) details of subsequent orders of the Court affecting land to which the application relates:
>
> (f) details of any payments made as a result of the order or certificate sought to be corrected, whether by the Māori Trustee or by any other person:
>
> (g) particulars of any moneys currently held in trust that might be affected by an order made as a result of the application:
>
> (h) consideration as to whether the matter should go to a full hearing or whether the mistake or omission alleged is clearly apparent from the Court's own record:
>
> (i) a recommendation as to the course of action to be taken, including whether an injunction should be issued to protect moneys currently held in trust.

[45] Accordingly, rr 8.3 and 8.4 dictate that a preliminary report is provided for all s 45 applications, which contains details of the alleged error; evidence from the Court records; consideration of whether the alleged mistake is clear from those records; and

recommendations for progress of the application. As the Rules require that the report "must" be completed and forwarded to the Chief Judge, this therefore begins the exercise of examining whether a mistake or omission has occurred. The Chief Judge in considering the report enters upon an examination of whether there was a mistake or omission. Even if the Chief Judge decides not to convene a hearing of the parties, in considering the report the Chief Judge immediately enters upon an examination.

[46] The point here is, if we were to read s 44(5) as proposed by the Court of Appeal in *Inia v Julian*, that it applies *only* where the Chief Judge does not enter at all upon the exercise of examining whether there was mistake or omission or whether to exercise discretion, then the automatic requirement for the Chief Registrar or Registrar to produce an extensive report pursuant to the Rules, would render s 44(5) meaningless. Section 44(5) would never apply because the Chief Judge will always receive and must consider the report that must be provided by the Registrar under the Rules.

[47] Given the Rules require that the report "must" be completed and forwarded to the Chief Judge, some type of examination of the application is contemplated. Further, where a report recommends dismissal of the application, natural justice would deem it fair that parties be given a copy of the report. In *Bennett v Māori Land Court*, the High Court dealt with judicial review proceedings brought, inter alia, against the refusal of the Deputy Chief Judge to amend orders of the Court in 1994 per s 45.[17] The Deputy Chief Judge had received a report from the Deputy Registrar and agreed with its recommendation for dismissal, finding there was no error justifying intervention. That application was dismissed without hearing. The applicant relied on several grounds including a breach of the requirements of natural justice as there was no opportunity to be heard following the report. As to the Chief Judge's powers, the High Court stated:

> [34] The powers of the Chief Judge when dealing with an application under s 45 are set out in s 46. He may refer an application to the Court or the Maori Appellate Court for enquiry and report. He may deal with the application without holding formal sittings or hearing the parties in open Court (s 46(1)). He may state a case to the High Court on a point of law (s 46(2)). There is no right of appeal against the dismissal of an application (s 44(5)), although there is a right of appeal against an order made under s 44 (s 49(1)). There is no impediment to a further application being made to the Chief Judge if an application is dismissed.

---

17 *Bennett v Māori Land Court* HC Whangarei, CP5/99, 11 August 2000.

> [35] In this case the Chief Judge chose not to hold a hearing. He asked the Registrar to carry out an enquiry and to report. It was submitted on behalf of the plaintiffs that that task should not have been delegated to the Registrar but I see no reason why the enquiry should not have been carried out by him. It seems to have been an appropriate way of dealing with the application in the first instance. It called for no more than an examination of the records of the Court. The report's findings were confined to matters disclosed by the record -and the Registrar's opinion as to whether, on the basis of the information disclosed, the order was rightly made.

[48] In finding the rules of natural justice had been breached and remitting the application back to the Chief Judge, the High Court stated:

> [38] I consider that the absence of any right of appeal against the dismissal of an application supports the implication of a right to be heard in this case. Where the Chief Judge obtains and proposes to adopt a report which recommends dismissal, I think fairness requires that the report be referred to the applicant for comment.

[49] In addition, we note that s 46(1) of the Act allows for the Chief Judge to refer any application under s 45 to the Māori Land Court or the Māori Appellate Court for inquiry and report, and may deal with such applications without holding formal sittings or hearing the parties in open Court. It is also implicit in this section that the Chief Judge will examine and consider any such reports he or she receives. Section 46 states:

> **46 Powers of Chief Judge in respect of applications**
>
> (1) The Chief Judge may refer any application under section 45 to the court or the Māori Appellate Court for inquiry and report, and may deal with any such application without holding formal sittings or hearing the parties in open court.
>
> (2) The Chief Judge may state a case for the opinion of the High Court on any point of law that arises in relation to any application made under section 45; and the provisions of section 72 shall, with all necessary modifications, extend and apply to any case so stated.
>
> (3) The Chief Judge shall have and may exercise in respect of any application under section 45 the same power as the court possesses under section 79 to make such order as it thinks just as to the payment of costs; and the provisions of that section shall, with any necessary modifications, apply accordingly.

[50] The Court of Appeal reading of s 44(5) is problematic, in terms of s 46(1). On the Court of Appeal interpretation, if the Chief Judge examines a report received after referral under s 46 then declines to exercise jurisdiction, either because he is not satisfied there is an error or it is not in the interest of justice to remedy such error, s 44(5) would not apply as he would have entered into the exercise of examining the merits of the application.

[51] As we have noted, r 8.3 requires that a detailed report of the Registrar be completed and forwarded to the Chief Judge for every application made pursuant to s 45. The referral of an application to the Māori Land Court for inquiry and report under s 46 is also a common occurrence, particularly for complex or contested matters. As a result, the Chief Judge will invariably enter into the exercise of examining whether there was a mistake or omission or whether to exercise discretion, prior to any dismissal. If s 44(5) could only apply where the Chief Judge had not entered at all into such an exercise then, as we have stated, it would essentially be rendered meaningless.

[52] We are further supported in this view by the extensive research we have undertaken to ascertain whether the Chief Judge has previously dismissed a s 44 application before undertaking any kind of examination of the matter. The only decisions we could locate were applications that were withdrawn by an applicant and the dismissal was therefore by consent.[18]

[53] The question therefore arises: could the Chief Judge ever dismiss a s 44 application without entering into the examination exercise? It has been argued previously in this Court that s 44(5) only applies in situations such as where the Chief Judge may decline to exercise jurisdiction for procedural reasons, for example where an application under s 45 does not relate to an order made by the Court; where the application does not otherwise come within s 44 of the Act; where the applicant does not have standing; where an applicant cannot claim to have been adversely affected by the order as required under s 45(1); where an applicant has not complied with any direction under s 45(2) or an application that comes within s 44(4).[19] Those arguments did not succeed then and cannot succeed now. While we accept that it may be theoretically possible for the Chief Judge to dismiss a s 44 application on procedural grounds, we have found no examples of this ever occurring. Indeed, a decision by the Chief Judge to decline to exercise the s 44 jurisdiction without undertaking any assessment or examination could be criticised as arbitrary. Moreover, there is no basis for limiting the application of s 44(5) to these procedural grounds only.

---

18 *Terekia – Waihirere 3D1A* (1993) Chief Judge's MB 650 (1993 CJ 650); and *Hayes – Estate of Pera Putete* (1994) Chief Judge's MB 174 (1994 CJ 174).

19 *Haimona v Taiatini – Te Karaka No 1A* [2016] Māori Appellate Court MB 390 (2016 APPEAL 390) at [17].

Kupu whakatau
Decision

[54] The meaning of s 44(5) is plain from its terms and in light of its purpose and context. Section 44(5) applies, without qualification, where the Chief Judge (or Deputy Chief Judge) declines to exercise discretion under s 44 and dismisses an application. In such circumstances there is no right of appeal. An interpretation which would narrow the application of s 44(5) to apply only to dismissals where the Chief Judge has *not* entered at all upon the exercise of examining whether there was a mistake or omission or whether to exercise his or her discretion is inconsistent with the purpose of the Chief Judge's special jurisdiction. It would also render s 44(5) almost meaningless, given that the provisions relevant to the Chief Judge's special powers contemplate the necessity of an examination or inquiry prior to the Chief Judge deciding to either dismiss an application or grant orders.

[55] In the present case, Deputy Chief Judge Fox declined to cancel an order vesting ownership of a home on Waima C8 solely in favour Bessie Henare or to unsettle an occupation order made in favour of Tahi Mokaraka. In doing so, Deputy Chief Judge declined to exercise jurisdiction pursuant to s 44. The appellants appeal this part of Deputy Chief Judge Fox's decision.

[56] We agree with the respondents that the appeal challenges Deputy Chief Judge's decision to decline to exercise her jurisdiction under s 44(1) and therefore s 44(5) applies. The appellants are precluded from appealing the decision.

[57] Therefore, the appeal is dismissed.

I whakapuaki i te 1:00pm i Rotorua, rua tekau mā rua o ngā rā o Hui-tanguru i te tau 2022.
Pronounced at 1:00pm in Rotorua on this 22nd day of February 2022.

C T Coxhead	W W Isaac	D H Stone
JUDGE	**CHIEF JUDGE**	**JUDGE**
(Presiding)		