IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20170005519

UNDER	Section 58 Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An appeal by Charles Rudd pursuant to section 58 of Te Ture Whenua Māori Act 1993 against a decision of the Māori Land Court made on 19 July 2017 at 372 Aotea MB 171-178 relating to HOROWHENUA 11 PART RESERVATION TRUST
BETWEEN	CHARLES RUDD Appellant
AND	THE TRUSTEES OF THE HOROWHENUA 11 PART RESERVATION TRUST Respondents

Hearing:	21 February 2018 (Heard at Wellington)
Court:	Judge S R Clark (Presiding) Judge P J Savage Judge C M Wainwright
Appearances:	Linda Thornton for the Appellant David Sheppard for the Respondents
Judgment:	08 March 2018

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

Introduction

[1] On 11 September 2017, Charles Rudd filed a Notice of Appeal under section 58 of Te Ture Whenua Māori Act 1993. The notice alleged a number of grounds of appeal relating to decisions of the Māori Land Court about the operation of the Horowhenua 11 Part Reservation Trust. This trust applies to the land known as Horowhenua 11, which is Lake Horowhenua. We will refer to it as the Lake Horowhenua Trust.

[2] One of Mr Rudd's grounds of appeal was "the perceived conflicts of interests in the Aotea District Maori Land Court". Counsel for the appellant subsequently made clearer what he meant by this when she filed a memorandum responding to directions of this court:[1]

> 10. One ground for appeal arises from the conflict of interest of Judge Doogan based on his representation of Muaūpoko Tribal Authority in the matter entitled Charles Rudd v. Muaūpoko Tribal Authority (CIV2011-454-749) just before he was appointed to the bench. The individuals who were responsible for and involved in that litigation were many of the same people who were adverse to Mr Rudd in this case. Of most significance was the role of Mr. Matthew Sword who was the instructing solicitor of Mr. Doogan (as he then was) and headed the presentation of the responding trustees in this matter.

[3] Thus, one of Mr Rudd's grounds of appeal was an allegation that Judge Doogan ought to have, but did not, recuse himself in the enforcement of trust proceeding before the Māori Land Court. We will consider this ground of appeal first, because if we uphold it, we will not have to consider the others. It follows from a determination that a judge ought to have recused himself that his or her decisions in the case are quashed.

The facts

[4] Lake Horowhenua and the Lake Horowhenua Trust have had a long and troubled history, in which the Māori Land Court has been much involved.

[5] Evidence contained in the Record of Appeal about the subject matter of this ground of appeal goes back to 2016. Judge Doogan was sitting to hear Mr Rudd's application concerning enforcement of obligations of trust in Horowhenua 11 Part Reservation Trust.

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[1] Memorandum of Counsel responding to 8 December 2017 Directions of the Presiding Judge, 4 January 2018, Appeal 2017/17, at 2.

The minute of the Māori Land Court sitting that took place on 1 August 2016 at Levin records that the Judge, right at the beginning, said there was "just a preliminary point I need to raise with you".[2] He recounted how, prior to the hearing, Mr Rudd had filed material in which he "raised a question about whether I may have a potential conflict because of a previous role in terms of advice to the Muaūpoko Tribal Authority."[3] We have not seen a copy of the material that Mr Rudd filed, but we infer that he raised the question about the Judge's conflict of interest in the memorandum he filed in the Māori Land Court on 12 July 2016. We know no more about its content than is contained in the Judge's reference to it quoted in the previous sentence.

[6] Judge Doogan had by this time been sitting since at least January 2014 on matters in which Mr Rudd was an applicant to the Māori Land Court alleging that the Lake Horowhenua Trust was not conducting its business according to law.[4] In the minutes of the hearing that took place on 30 January 2014,[5] Mr Rudd appears to be introducing himself to the Judge. From this, we infer that January 2014 was their first encounter.

[7] The application for enforcement of trust remained before the court for some time. On 12 and 19 March 2015, Judges Doogan and Harvey sat together to hear the application. However, it appears that Mr Rudd did not raise the issue of Judge Doogan's having what Mr Rudd called a conflict of interest until mid-2016. When Judge Doogan came to address the issue at the hearing on 1 August 2016, he said that he "had completely forgotten about" his role advising the Muaūpoko Tribal Authority.[6] Now, however, he recalled that:[7]

> Prior to my appointment as a Judge in 2013 I had been in practice as a barrister in Wellington and in or about 2009 or '10, possibly even 2011, Tuia Legal, the Wellington Firm that Mr Sword previously worked for, instructed me for a brief period in relation to an issue that was then current with the MTA. As I recall it, I do not think the MTA had received a mandate at that time.
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> I would need to check to find out in more detail, but my recollection was that my involvement was relatively brief in relation to some ongoing process or proceeding. You are correct to raise it and I do need to disclose that because it establishes the fact that I did have a relationship as an advisor to the MTA for a brief period on instructions from the law firm Tuia Legal. In the course of that work I met Mr Sword

[2] 358 Aotea MB 174 (358 AOT 174).
[3] Above n 2.
[4] The minute records that in November 2013, Mr Rudd had advised the Court by letter that he had filed his application for enforcement of obligations of trust and supporting documents on his fellow trustees.
[5] 315 Aotea MB 113 (315 AOT 113).
[6] Above n 2.
[7] Above n 2.

> as he was one of the instructing solicitors to me. That particular instruction as I recall was fairly brief and the matter was resolved ultimately without my continued involvement... from what I can recall of the relatively brief nature of that role I believe I can carry on and continue with the matter, notwithstanding Mr Sword's current involvement in the Lake Trust.

Mr Sword was by this time the Chair of the Lake Horowhenua Trust, whose processes Mr Rudd was impugning.

[8] The Judge went on:[8]

> However, it obviously gives rise to a concern on the part of yourself and possibly others who support your application that there is a perception of 'too close', therefore it is only right that I offer to step back. If you would prefer that, I totally respect that and I am happy to assign the matter as quickly as possible to a Judge who can bring it to conclusion.

[9] Mr Rudd did not take up the Judge's offer to assign the case to another Judge. He referred to the intermeshed membership of the Muaūpoko Tribal Authority and the Lake trustees, saying "half the time we didn't know if they were talking as MTA or Lake trustees." He continued:[9]

> To me, I have no slight on your personage and it's good that you've said it. I don't expect you to stand down now, if that is what you are saying to me.

[10] The Judge did not leave the matter there, though. He asked Mr Rudd questions about the High Court proceeding that he had earlier embarked on – when it was, and whether it was in relation to that that he had been instructed as a barrister. After Mr Rudd responded that the time period was 2009-2010, the Judge turned to Mr Sword, the chair of the Lake Trust and previously his instructing solicitor. He quizzed Mr Sword about whether it was in relation to that High Court matter that he had been instructed, and asked about the nature of his instructions. Mr Sword said that yes, there had been "preliminary instructions" at that time, and that there was a "brief interaction". The Judge inquired whether Mr Sword saw any issue with his continuing to sit on the matter then before him.[10] Mr Sword said no. The Judge apologised for not recalling his former involvement "when this application first came before me when Judge Harvey and I sat together. I had completely forgotten that had been a

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[8] Above n 2.
[9] Above n 2.
[10] 358 Aotea MB 175 (358 AOT 175).

role." He apologised for not having raised it at the outset, and told Mr Rudd that he "was right to have raised it".[11]

[11] The Judge then proceeded as though the matter of his 'conflict of interest' was at an end. He pressed on with the case, asking the registrar to call the matter formally.

[12] The entity for which Judge Doogan formerly acted was the Muaūpoko Tribal Authority. One of Mr Rudd's criticisms of the way the Lake Horowhenua Trust conducted itself was that he considered that a conflict of interest arose from the fact that some of the trustees on that trust also held positions on the Muaūpoko Tribal Authority. In his Provisional Determination of 24 April 2017, Judge Doogan explained the situation like this:[12]

> [34] Another matter of context arises from steps taken by Muaupoko Iwi to prepare for Treaty settlement negotiations with the Crown and for hearings before the Waitangi Tribunal. An entity known as the Muauapoko Tribal Authority (MTA) obtained a Crown-recognised mandate to enter treaty negotiations on behalf of Muaupoko in September 2013. A number of trustees [on the Lake Horowhenua Trust] are members of, or hold positions on, the MTA. I infer from the tenor of Mr Rudd's submissions that he is not supportive of the MTA mandate. He also sees the dual role of some of the Lake trustees who are active in the MTA as giving rise to a conflict of interest.
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> [35] Beneath this is the more general issue of the respective roles of the [Lake Horowhenua] Trust and the MTA as an authoritative representative of Muaupoko Iwi. Some who support Mr Rudd such as Phillip Taueki have strong views about these matters and generally oppose positions taken by either the Lake Trust or the MTA.

[13] There is nothing before us that clearly indicates the extent of Judge Doogan's involvement as a barrister with the Muaūpoko Tribal Authority, and accordingly with the parties opposing Mr Rudd in his application before the Māori Land Court. The Judge called his involvement "brief" and "relatively brief",[13] and Mr Sword said "[t]here were preliminary instructions but it was around the time that you were appointed to the bench and the matter was handed off to another legal advisor."[14] We do not know what meetings the Judge attended with these parties as a barrister, nor the extent of his knowledge about the issues affecting Muaūpoko, or its internal politics.

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[11] Above n 9.
[12] 368 Aotea MB 211 (368 AOT 211).
[13] Above n 2.
[14] Above n 9.

The law relating to judicial recusal

[14] Precedent requires us to apply the Supreme Court's articulation of the test for judicial recusal in the well-known *Saxmere* case.[15] The Court said that in order to know whether a situation has arisen such that a judicial officer must recuse him or herself, it is necessary to ask "whether a fair-minded, impartial, and properly informed observer could reasonably have thought that the Judge might have been unconsciously biased in favour of the party...".[16] This was captured in the High Court Recusal Guidelines promulgated in June 2017 in clause 1.2, under the heading General Principles.[17] Those Guidelines were not yet available to the Judge when the question of his recusal came before him in this case, but in fact the Guidelines draw heavily on the principles laid down in the *Saxmere* case and in the authorities upon which the Supreme Court relied in that judgment. The Guidelines bring together, for our purposes, what the law currently requires of judicial officers faced with a decision about their own recusal.

[15] Whereas some relationships give rise immediately to a reasonable apprehension of bias, other situations are not so clear cut, as the Guidelines observe.[18] A relationship that may give rise to the apprehension of bias includes the situation where a witness of disputed facts is someone known to the judge, or someone about whom he or she has formed a view, such as a former client.[19] On the face of it, Mr Sword was such a person. He was the Judge's former instructing solicitor, and was now, as chair of the Lake Horowhenua Trust, contesting the view of the conduct of the Trust for which Mr Rudd was arguing before the court.

[16] The Guidelines emphasise that a past professional association with lawyers engaged in the case will not generally be sufficient to require recusal.[20] The parties before us accepted that proposition. However, counsel for the appellant emphasised that in addition to the role of Mr Sword, persons influential in the Muaūpoko Tribal Authority were also trustees of the Horowhenua Lake Trust that Mr Rudd was seeking to review.[21]

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[15] *Saxmere Company Limited v Woold Board Disestablishment Company Ltd* [2009] NZSC 72; *Saxmere Company Ltd v Wool Board Disestablishment Company Limited* (No 2) [2009] NZSC 122.
[16] *Saxmere Company Limited* [2009] NZSC 72 at [37].
[17] High Court of New Zealand Recusal Guidelines (2017) <www.courtsofnz.govt.nz>
[18] Above n 17 at cl 2.3.
[19] Above n 17 at cl 2.3.2.
[20] Above n 17 at cl 2.4.
[21] Synopsis of Submissions dated 7 February 2018, paragrah 10

[17] Under the heading 'Recusal arising from legal practice', the Guidelines say:[22]

> If the matter in issue was dealt with by the firm at a time when the judge was a member of the firm, the judge may need to consider recusal even if the judge had no personal involvement in providing advice about it if the judge obtained relevant knowledge about the matter in issue or had formed a view of the parties.

[18] Although not precisely analogous to the present situation, it is apparent that the underlying concern is apposite: namely, the possibility that the judge knew about the matter in issue before it came before him in his judicial capacity, or had formed a view of the parties.

[19] We do not consider that the Judge can rely on his loss of memory about his previous involvement with the Muaūpoko Tribal Authority as a basis for applying to that involvement a different test or standard. The test is an objective one. Would an observer have a reasonable apprehension of the possibility of bias on the part of the Judge, knowing that:

(a) the Judge formerly acted for that organisation in litigation where Mr Rudd was the litigant;

(b) the Judge's instructing solicitor at that time is now the chair of the trust whose actions Mr Rudd challenges; and

(c) other persons then active within the Muaūpoko Tribal Authority are involved with the Lake Horowhenua Trust, and their view of things and Mr Rudd's are in opposition?

[20] It seems to us that although the standard for recusal is one of real and not remote possibility,[23] the facts as disclosed in this case give rise to a possibility that is more real than remote.

[21] There is also the matter of good process. In this case, it seems to us that proper disclosure before the hearing on 1 August 2016 might well have taken this case more into the remote rather than real zone of possible bias. That is because the Judge might in fact have had few meetings with his instructing solicitor Mr Sword, might have met few or none

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[22] Above n 17 at cl 4.1.
[23] Above n 15 at [4].

of those involved with the Muaūpoko Tribal Authority who are also involved in the enforcement of trust litigation that was the subject of this appeal, and might have had little opportunity in the time of his involvement to form much of a view of the subject matter or the parties. We simply do not know, and neither does Mr Rudd, because the Judge did not deal with the matter in a formal way before the hearing, but informally and rather summarily on the day of the hearing.

[22] It appears that Mr Rudd's allegations against the Judge's impartiality were contained in his further submissions filed on 12 July 2016. This meant that the Judge had notice of Mr Rudd's concerns, and had time before the hearing on 1 August 2016 to issue a minute outlining his former role (about which he would have had the opportunity to make inquiry), and to give Mr Rudd time to consider the matter and take instructions. If necessary, he could have directed an adjournment.

[23] Although the Judge admitted that he could not recapture all the facts, he did not take time to assemble the relevant information and put it before Mr Rudd. Instead, in the hearing, and before members of the Muaūpoko community involved in the long-running issues before the court, the Judge asked Mr Rudd to say then and there whether he wanted to the Judge to withdraw. For information about his previous involvement to supplement his own imperfect recollection, he turned to his former instructing solicitor Mr Sword, who was opposing Mr Rudd, and elicited his view on whether he should continue to sit on the matter.[24] This was not process that would reassure the objective observer.

[24] Mr Rudd, although experienced in Māori Land Court matters, is not a lawyer, and was not represented. He appears to be generally familiar with the ideas behind legal rules concerning conflicts of interest, but probably did not know about the particular requirements of judicial officers when they face an allegation of apparent bias. The law relating to apparent bias cannot be taken to be common knowledge, and indeed Mr Rudd's replies to the Judge's questioning on 1 August 2016 indicate that Mr Rudd put his allegation that the Judge had a conflict of interest into the same category as his concerns about conflicts of interest on the part of trustees. Furthermore, he revealed that he considered the issue to be about the Judge's own integrity, rather than one of whether there could be any reasonable apprehension on the

[24] Above n 9.

part of an objective observer of the Judge's being less than impartial. [25] It would be understandable if Mr Rudd did not want to proceed in public down a path of impugning the Judge's good character.

[25] Like the *Saxmere* case, this is not a situation where it is suggested that the Judge was actually motivated by any bias:[26]

> Instead, the allegation is that, because of his connection with counsel for the Wool Board, his judicial independence may have been affected by an unconscious bias in favour of Mr Galbraith and, through him, of counsel's client.

The present situation is analogous. The fair-minded lay observer test:[27]

> ...gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal...be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it.

Decision

[26] Reluctantly, because these matters have been before the Māori Land Court for a long time, and Judge Doogan has had carriage of them now for some years, we allow this appeal.

[27] We do so for the reasons of justice articulated above, and because on balance we consider that the hypothetical fair-minded lay observer test is satisfied in the present case – in part because that observer did not have a lot to go on. She would know only the outline of Judge Doogan's former involvement as counsel for the Muaūpoko Tribal Authority, and would have to infer from that apparently brief involvement (its length was not established) whether there was a real rather than remote possibility that the Judge might have formed a view of the parties, or the issues between them, that could have influenced his view of them or the matters before him in the enforcement of trust proceedings. Her assessment would not be amplified by helpful detail about what had passed between the Judge when he was a barrister and the persons who are involved in the enforcement of trust application that Mr Rudd was pursuing. She would have to infer from what she did know, and from her assessment of the context of relationships between clients, instructing solicitors and

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[25] Above n 2.
[26] Above n 15 at [2].
[27] Above n 15 at [3].

barristers,[28] whether she might reasonably apprehend the possibility that the Judge might not bring an impartial mind to the resolution of the questions before him, and should therefore disqualify himself.[29] We consider, erring on the side of caution as people tend to do when they have insufficient information, that the hypothetical objective lay person would admit of a real possibility that the Judge could have been unconsciously biased in addressing the questions before him. He should, therefore, have recused himself. We note, as did the Supreme Court in *Saxmere*:[30]

> The Court is not making a judgment on whether it is possible or likely that the particular judge was in fact affected by disqualifying bias and the judge is obviously not well placed to assess the influence of something which may have operated on the mind subconsciously.

[28] Because we find in favour of the appellant on this ground of appeal, we do not need to consider the others. The proceeding is remitted for hearing in the Māori Land Court by a new judge.

This judgment will be pronounced in open Court at the next sitting of the Māori Appellate Court.

S R Clark	**P J Savage**	**C M Wainwright**
JUDGE	**JUDGE**	**JUDGE**
(Presiding)		

[28] *Helow v Secretary of State for the Home Department* [2009] 2 All ER 1031 at [3].
[29] Above n 15 at [3].
[30] Above n 15 at [10].