IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20150001471
Appeal 2015/7

UNDER	Section 49, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Ngapiki Waaka Hakaraia
BETWEEN	JAMES TIORO, BAYETTE PRINCE AND SONIA TIORO Appellants
AND	CLARKE JAMES MCCALLUM First Respondent
AND	THE MĀORI TRUSTEE OF WHANGANUI Second Respondent

Hearing:	20 May 2015 (Heard at Whanganui)
Court:	Deputy Chief Judge C L Fox Judge D J Ambler Judge M J Doogan
Appearances:	S Burlace for the First Respondent
Judgment:	28 August 2015

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] This appeal involves a challenge to Chief Judge Isaac's decision of 2 December 2014 determining the persons entitled to one-half of the remainder interests in the estate of Ngapiki Waaka Hakaraia. In 1997 the Registrar of the Māori Land Court made orders determining the persons entitled on the basis of a partial intestacy. However, in 2014 Chief Judge Isaac cancelled those orders on the basis that a correct interpretation of Ngapiki's will meant that her granddaughter and her issue were entitled to the remainder interests, and that there was no partial intestacy. The estate includes general land and Māori land.

Background

The will

[2] Ngapiki died on 9 November 1969 leaving a will dated 4 July 1958. Probate was granted on 27 April 1970 in favour of the Māori Trustee and the deceased's Māori land interests were vested in him pursuant to s 81 of the Māori Affairs Amendment Act 1967 (the 1967 Act). The relevant parts of the will provided:

> 3. I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and wheresoever situate unto my Trustee upon trust to hold the same as to one half thereof for my adopted son JOHANNES HAKARAIA for his lifetime and as to the other half for my grand daughter TE AROHA WAIAUA HAKARAIA for her lifetime and from and after their respective deaths to hold the share of my estate bequeathed to each of them for life as aforesaid upon trust for his or her issue living at his or her death in the same shares as such issue would have taken in accordance with Māori custom had my said adopted son or my said grand daughter died intestate and been the absolute owner of the respective shares of my estate given to him or her for life and I DECLARE as well as Māori land any other assets belonging to my estate shall devolve in similar manner.
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> 4. If either my said adopted son or my said grand daughter shall die in my lifetime leaving issue living at my death the share of my estate bequeathed to such adopted son or grand daughter shall devolve in the same manner as it would have devolved had such adopted son or grand daughter survived me but died immediately afterwards.
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> 5. If either my adopted son or my grand daughter shall die in my lifetime without leaving issue who survive me I DIRECT that the whole of my estate shall go to the other of them upon the trusts hereinbefore set out but if both of them die in my lifetime without leaving issue living at my death then I DIRECT that the whole of my estate shall go to my adopted daughter ANIHAKA TE ORO but if she has predeceased me then to her issue living at my death per stirpes and not per capita.

[3] Johannes Hakaraia and Te Aroha Waiaua Hakaraia survived Ngapiki and therefore clause 3 of the will applied to Ngapiki's estate. They accordingly each received a one-half life interest in the estate with the remainder to their respective issue.

Johannes Hakaraia's life interest

[4] Johannes Hakaraia died in 1994. On 24 December 1996 the Māori Trustee filed an application as executor of the estate under s 81A of the 1967 Act for an order vesting the remainder of Johannes' one-half life interest in Pare Waaka Hakaraia and the issue of Tutira Waaka Hakaraia, Ngapiki's sisters (and their issue). The Māori Trustee took the view that Johannes died without issue, and that as a result there was a partial intestacy as clause 3 and the rest of the will did not stipulate what was to happen if either of the life tenants died after Ngapiki without issue.

[5] On 26 March 1997 the Registrar issued an order under s 81A of the 1967 Act in accordance with the Māori Trustee's application.[1] In total there were 83 successors including the appellants.

Section 45 application

[6] On 9 November 2006 Clarke James McCallum filed an application under s 45 of Te Ture Whenua Māori Act 1993 (the 1993 Act) challenging the 1997 s 81A order. Clarke is a son of Te Aroha Waiaua Hakaraia, the other life tenant under clause 3 of the will. He claimed that the remainder of Johannes' life interest should have gone to his mother for her lifetime and the remainder to her issue, including himself.

[7] After hearings in 2014 Chief Judge Isaac issued his decision on 2 December 2014.[2] He concluded that on a correct interpretation of the will the remainder interests should indeed have gone to Te Aroha for a life interest with the remainder to her issue. He reasoned that when read as a whole, the will intended that in the event of a life tenant dying without issue, the other life tenant and his or her issue would take those interests. There was therefore no partial intestacy. Chief Judge Isaac accordingly cancelled the 1997 s 81A order and made orders in substitution under s 81A of the 1967 Act:

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1 15 Whanganui Registrar's MB 139-141 (15 RGWG 139-141).

2 *McCallum v Māori Trustee of Whanganui – Estate of Ngapiki Waaka Hakaraia* [2014] Chief Judge's Minute Book 541 (2014 CJ 541).

(a) determining Aroha Waiaua Hakaraia as the person beneficially entitled to the life interest of Johannes Hakaraia identified in the will of Ngapiki Waaka Hakaraia; and

(b) vesting Johannes Hakaraia's life interest in Te Aroha Waiaua Hakaraia for a life interest with remainderman to be held by the Māori Trustee until her death whereupon her issue who survive her shall be determined.

[8] He also made an order pursuant to s 47(4) of the 1993 Act making all other consequential amendments where necessary.

The appeal

[9] The appellants are James Tioro, Bayette Prince and Sonia Tioro. They are children of the late Anihaka Te Oro, the adopted daughter (by custom, as we understand it) of Ngapiki, who is named as the substitute beneficiary identified in clause 5 of the will. Importantly, as a result of the 1997 s 81A order, the three appellants (with 80 others) succeeded to the one-half remainder interest by reason of being (in the appellants' case) descendants of Ngapiki's sister, Tutira.

[10] While the appeal was filed 7 days late, we granted leave to appeal out of time on the basis that the delay was limited and there was no prejudice to the respondents.[3]

[11] The appellants' grounds of appeal are:

(a) That as children of Anihaka Te Oro they were entitled to be heard in relation to Clarke McCallum's application pursuant to ss 44-45 to cancel or amend the succession order dated 26 March 1997;

(b) They were not notified of the application in accordance with the rules of the Court and accordingly were not afforded a right to be heard on the matter;

(c) The Court's orders of 2 December 2014 do not acknowledge or consider the claims of James Tioro, as a whāngai son of Johannes Hakaraia, to succeed to Johannes Hakaraia's half share of the estate of Ngapiki Waaka Hakaraia, as originally bequeathed to him in accordance with Māori custom;

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3 2015 Maori Appellate Court MB 14 (2015 APPEAL 14).

(d) Alternatively, the Chief Judge erred in finding the intention of Ngapiki Hakaraia, as indicated by her will, was that in the event of Johannes Hakaraia's death without issue subsequent to Ngapiki Hakaraia's death, Johannes Hakaraia's half share of Ngapiki Hakaraia's estate should devolve to Te Aroha Hakaraia.

[12] Although the appellants had the assistance of counsel in drafting their notice of appeal, they argued the appeal without that assistance. The first respondent was represented by counsel, Ms Burlace. The second respondent, the Māori Trustee, did not participate in the appeal and abides by this Court's ruling.

[13] The appeal hearing focussed on grounds (a) and (b), namely, the lack of notice of the s 45 application or hearings. We focus primarily on the issue of lack of notice and in doing so also touch on the other two grounds of appeal.

Lack of notice

What happened

[14] It is accepted by all parties that no notice of the s 45 application was sent to the appellants or to the majority of other affected owners, being Ngapiki's successors under the 1997 s 81A order. Nor did they receive notice of the hearings before Chief Judge Isaac held on 21 March and 11 July 2014. Consequently, they were not able to participate in the s 45 proceedings at all.

[15] The Registrar's preliminary report of 9 November 2009 in fact recommended that the report be sent to all parties. On 26 November 2009 Chief Judge Isaac directed that the Registrar's recommendations be followed. We would therefore have expected (as no doubt Chief Judge Isaac expected) that the report would have been sent to all affected parties, being those persons who succeeded under the 1997 s 81A order and any consequential orders.[4] However, there is nothing on the record on appeal to indicate that the appellants or the majority of affected owners ever received a copy of the s 45 report or notice of the s 45 application and hearings.

[4] While there were 83 owners per the 1997 order, some of those owners have since been succeeded to and so the total number of affected owners is now greater than 83.

What the law requires in terms of notice

[16] The Māori Land Court Rules 1994 (the 1994 Rules) applied to the s 45 application at the time it was filed and when Chief Judge Isaac issued his directions in 2009. The relevant rule was r 88, which provided:

> **88 Directions as to notice to be given**
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> In the case of an application under section 45 of the Act, the Chief Judge (where the application has, under section 46(1) of the Act, been referred to the Court for inquiry and report) may require the applicant to give such notice of the application as the Chief Judge or the Court thinks fit to the persons affected by the application, or may direct the Registrar to give such notice.

[17] By the time of the hearings in 2014, the Māori Land Court Rules 2011 (the 2011 Rules) and its transitional provisions applied. Rule 17.2(2) covers proceedings already commenced and provides:

> **17.2 Transitional provisions**
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> …
>
> (2) All proceedings in the Maori Land Court or the Maori Appellate Court commenced before and pending or in progress on the commencement of these rules may be continued, completed, and enforced under these rules, and accordingly these rules, so far as practicable, apply to those proceedings. In so far as it is not practicable for any provision of these rules to be applied to any of those proceedings, the 1994 Rules continue to apply to those proceedings to the extent necessary.

[18] As far as s 45 applications are concerned, the 2011 Rules are more comprehensive than the earlier Rules – see rr 8.2 to 8.7. Rule 8.2(2)(e) provides that the applicant is to include in the application "the names and, where obtainable, the addresses of those persons who might be affected if the application is granted." Rules 8.3 and 8.4 concern the Registrar's preliminary report. Of particular relevance, r 8.5 concerns notice to persons affected by the application and provides:

> **8.5 Notice to persons affected**
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> The Chief Judge or any Court to which an application has been referred under section 46 of the Act may—
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> (a) require the applicant to give notice of the application to the persons affected by it, or as many of them as can be located; or
>
> (b) direct the Registrar to give that notice.

[19] The 1994 and 2011 Rules contemplate that the Chief Judge *may* direct that affected parties be notified of a s 45 application. Although both Rules give the Chief Judge a discretion regarding notice to affected parties, the legal authorities on natural justice modify that discretion to such a degree that notice of some sort is expected, as we will now explain.

[20] It is a fundamental tenet of natural justice that an affected party should be given notice of proceedings that might affect his or her rights or interests. This stems from the maxim *audi alteram partem*, which simply means "hear the other side". As the leading text *Constitutional and Administrative Law in New Zealand* explains:[5]

> Where a hearing is proposed, it is elementary that persons who may be affected by the decision must be given notice of the date, time and place of the hearing. The range of interested parties must be determined according to common law requirements as to standing. The courts presume that Parliament does not intend its statutory procedures to prescribe exhaustively those who might have standing to be heard. Reasonable steps must be taken to serve all interested parties, unless the rights or interests affected are speculative or insignificant. An interested party includes those whose public responsibilities are implicated, such as a public official or body administering a statutory scheme. In *Waitemata Health v Attorney-General*, a review tribunal erred by failing to notify the Director of Mental Health of the right of appearance in a hearing to release a mental health patient. The law prescribes no particular procedure for the serving of notice, provided the notice is *reasonable*. Notice may be sent to a party's postal or business address, or it may be more widely disseminated through public notice in the local newspaper. The latter method may be necessary if the number of interested parties is indeterminate or large.

[21] Nevertheless, the requirements of natural justice depend on the circumstances of the case:[6]

> "Natural justice is but fairness writ large and juridically." The duty to act fairly (or simply "fairness") may substitute as a reference for natural justice. They are alternative descriptions for a single but flexible concept whose content may vary according to the nature of the public power in question and the circumstances of its use, including the effect of the decision on personal rights or interests. The requirements of natural justice are "flexible", "adaptable", and "context specific", and cannot be neatly tabulated: "This is an area of broad principle, not precise rules". Prescribing prescriptive rules of universal application would introduce "a new formalism" – a "recipe for judicialisation on an unprecedented scale". The courts will look at the matter "in the round" to determine whether the process was fair. Higher standards of fair treatment are required where a decision has profound or significant consequences, or bears the earmarks of adjudication affecting

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5 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 1046. (footnotes omitted)

6 Ibid at 1023. (footnotes omitted)

> "rights". Rigorous standards of procedural fairness are expected of courts but only rudimentary standards may apply to employers, trade unions or political parties: "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth." The courts are concerned with not only the "actuality" but also the "perception": decisions must be reached "justly and fairly", and be seen to be so.

[22] These principles of natural justice apply to the Māori Appellate Court, the Māori Land Court and applications to the Chief Judge.

[23] In *Ngati Apa ki Te Waipounamu Trust v Attorney-General* Keith J, delivering the decision of the Court of Appeal, observed in relation to the Māori Appellate Court:[7]

> We begin with the proposition the parties, those appearing before the [Māori Appellate Court], and those affected by the proceeding were entitled to a fair hearing. That entitlement includes the right to have adequate notice of the proceeding and a reasonable opportunity to present their own cases through evidence and submissions and to challenge the cases put up against them.

[24] Keith J noted, quoting a leading American judge, that "The history of liberty has largely been the history of procedural safeguards."[8]

[25] It has similarly been held that the Māori Land Court is obliged to give notice of an application to affected parties, and that an order made without proper notice is beyond the jurisdiction of the Court. In *Jennings v Scott* Savage J of the High Court ruled:[9]

> I am satisfied that the orders were made without jurisdiction and am prepared to found this conclusion on the one ground that the Māori Land Court was under a duty to give the owners of the lands involved a reasonable opportunity to be heard on whether or not the amalgamation order should be made and that in breach of that duty, and thus contrary to the rules of natural justice, it failed to provide the plaintiffs, or at least some of them, with that opportunity.

[26] In relation to applications to the Chief Judge under s 45, the High Court has held that natural justice requires parties be given the right to be heard. In *Bennett v Māori Land Court*,[10] Rodney Hansen J stated that the absence of a right to appeal a dismissal of such an application supports the implication of a right to be heard, and fairness required the applicant in that case be given the opportunity to be heard. The High Court held that the

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7 *Ngati Apa Ki Te Waipounamu v Attorney-General* [2004] 1 NZLR 462, at [18].
8 At [15], *McNabb v United States* 318 US 322 (1943) at 347, per Frankfurter J.
9 *Jennings v Scott* HC Rotorua A183/79, 13 November 1984, at 8-9.
10 *Bennett v Māori Land Court* (2000) 4 NZ ConvC 193, 255 (HC).

decision was made in breach of natural justice. It was quashed and remitted to the Chief Judge.

[27] Accordingly, the principles of natural justice apply to the Chief Judge as much as they do to the Courts of this jurisdiction. All affected parties before the Chief Judge are entitled to the right to be heard and procedural fairness, a touchstone of which is proper notice in accordance with the rules of Court. That has not happened in this case, the consequence of which is that there has been a breach of natural justice. Chief Judge Isaac was unaware that a breach of natural justice had occurred.

The impact of the lack of notice on Chief Judge Isaac's decision

[28] The failure to notify the appellants and other affected owners of the s 45 proceedings means that there was a fundamental flaw in the procedure before Chief Judge Isaac. In our assessment it would be unsafe to allow the decision of 2 December 2014 to stand in the circumstances. The appeal will be allowed and the s 45 application will need to proceed to a rehearing on proper notice.

[29] Given this finding, it is not necessary for us to reach a definitive view on whether the ultimate outcome of the s 45 application would have been different had the appellants and other affected owners been given proper notice and participated. But the appeal has identified three aspects of the outcome of the decision that are open to challenge.

[30] First, it is possible that if Chief Judge Isaac were to hear evidence and arguments from the appellants and other affected owners he might be persuaded to arrive at a different interpretation of Ngapiki's will from that which he arrived at in his decision.[11] We acknowledge that in addition to hearing from Ms Burlace for Clarke McCallum, Chief Judge Isaac also heard from Mr Shaw for the Māori Trustee. He argued that the 1997 s 81A order and the conclusion that there was a partial intestacy should be upheld. Nevertheless, it is conceivable that the appellants and affected owners (whether with the assistance of counsel or not) may offer a more compelling argument to support the 1997 orders. We simply do not know as that opportunity was not given.

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[11] We note that while this was effectively the fourth ground of appeal, it was not fully argued by the appellants who are lay litigants.

[31] Second, even if Chief Judge Isaac were to maintain his interpretation of the will and conclude that the 1997 order was in error, it is still open to the appellants or other affected owners to persuade him that the interests of justice do not favour correcting the order. Their positions were not considered by the Chief Judge in his decision, and if he does hear from them he may arrive at a different view on where the interests of justice lie.

[32] Under s 44(1) of the 1993 Act the Chief Judge not only has to be satisfied that there has been a mistake but also that it is in the interests of justice to remedy the mistake. The Chief Judge has previously discussed his approach to the interests of justice under s 44(1) in *Estate of George Amos*,[12] *Trustees of Tauwhao-Te Ngare Trust v Shaw – Tauwhao-Te Ngare Block*,[13] and *Mokena v Riwai Morgan Whānau Trust – Estate of Tamati Mokena*.[14]

[33] In the *Estate of George Amos* decision it was stated:[15]

> The interests of justice being a paramount consideration and whilst errors may exist in a Court order or in the facts presented, the Chief Judge must decide if the cancellation will bring justice to the situation or create an injustice.

[34] In the *Tauwhao-Te Ngare* case it was determined that:[16]

> Although these errors exist, the evidence and submissions presented to the Court demonstrate that both parties will suffer adverse affects if the order is cancelled or remains unchanged. I accept this position and the issue for me is, having regard to these factors, whether the interests of justice are best served by amending or cancelling the order or dismissing the application.

[35] In determining what is in the interests of justice, the Chief Judge must balance the rights of the parties and the adversity suffered by each. He must also consider policy issues and the intent and effect of the legislation on the parties, and on the general public.[17]

[36] Third, one of the appellants, James Tioro, also claims that he was a whāngai of Johannes Hakaraia and that he is therefore entitled to succeed to the one-half remainder interest in Ngapiki's estate. He seeks an opportunity to pursue that claim. This is effectively the third ground of appeal.

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12 *Estate of George Amos* [2002] Chief Judge's MB 54 (2002 CJ 54).
13 *Trustees of Tauwhao-Te Ngare Trust v Shaw – Tauwhao-Te Ngare Block* [2013] Chief Judge's MB 567 (2013 CJ 567).
14 *Mokena v Riwai Morgan Whānau Trust – Estate of Tamati Mokena* [2014] Chief Judge's MB 314 (2014 CJ 314).
15 At [4.14].
16 At [27].
17 *Mokena v Riwai Morgan Whānau Trust – Estate of Tamati Mokena*, at [46].

[37] Ms Burlace strongly opposed James having the opportunity to mount a whāngai claim. She argued that her client's s 45 application had not sought to challenge the underlying premise of the 1997 order that Johannes died without issue. Her client's position is that James was not a whāngai of Johannes and that Johannes had no issue. Ms Burlace also made much of the length of time it has taken James to formally pursue the whāngai claim; the issue was raised in correspondence from the Registrar of the lower Court on 22 May 1996 and at a hearing before Judge Marumaru on 1 July 1996.[18] Yet James never pursued an application to succeed as a whāngai. She also noted that there would be all manner of evidential problems in allowing such a claim to proceed at this late stage.

[38] However, Ms Burlace's points do not persuade us that James' whāngai claim is not relevant to the appeal and the s 45 application.

[39] While it is true that there was considerable delay between the 1996 order and James formally raising the issue with the Court, so too was it nine years before Clarke McCallum brought his s 45 application. Chief Judge Isaac's decision was issued 17 years after the s 81A order was made. There has been delay all round.

[40] Furthermore, the whāngai issue discussed in 1996 was in relation to Māori land interests that Johannes held in his own right. That advice did not apply to the remainder interests under Ngapiki's estate as they did not form part of Johannes' estate and the 1993 Act does not apply to Ngapiki's estate – see s 100(2) of the 1993 Act.

[41] Admittedly, James may face significant hurdles in arguing an entitlement as a whāngai. He would need to satisfy the Chief Judge that he was a whāngai of Johannes, that the 1997 finding that Johannes died without issue was therefore wrong, and that he was entitled as Johannes' issue under the terms of clause 3 of the will. There is longstanding authority that Māori customary adoptions did not have legal effect during the period with which the Chief Judge is here concerned.[19] But whether those authorities affect the interpretation of clause 3 of the will is a moot point. Importantly, we cannot conclude at an appellate level that James has no prospect of success with his whāngai claim. And we think

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18 60 Aotea Minute Book 70-78 at 72 (60 AOT 70-78).

19 See the discussion in *Whittaker v Maori Land Court of New Zealand* [1997] NZFLR 707 (CA); *Keelan v Peach* [2003] 1 NZLR 589; and *Sandys – Hinehou Te Reweti* (2004) 2004 Chief Judge's Minute Book 8 (2004 CJ 8).

that James is entitled to pursue that issue in the context of the s 45 application that challenges the overall interpretation of Ngapiki's will.

[42] The appellants have therefore satisfied us that there has been a miscarriage of justice and that the appeal should be allowed.

The Registrar's preliminary report under rr 8.3 and 8.4 of the 2011 Rules

[43] Finally, we consider it appropriate to offer a comment on the extent to which the Registrar's preliminary report on the s 45 application identified the affected parties.

[44] A preliminary report is now a requirement under rr 8.3 and 8.4 of the 2011 Rules. While r 8.4 sets out what the preliminary report must contain, it does not explicitly require the Registrar to set out the affected parties or their addresses. Yet this is important information, as the present case illustrates.

[45] Clearly Chief Judge Isaac assumed that, per his 2009 directions, the affected parties would receive notice of the s 45 application through receipt of the preliminary report. His directions were not followed, or at least not followed to the extent of notifying all affected parties.

[46] We see a flaw in the requirements of the preliminary report in that the report does not explicitly identify the affected parties or the information regarding their addresses to enable the Chief Judge to make an informed direction regarding notice under r 8.5 of the 2011 Rules.

[47] While r 8.2(2)(e) of the 2011 Rules now requires applicants to identify the affected parties and their addresses in the application, applicants will not always have access to all such information. It is always necessary for the Registrar to assess that issue. In this instance the preliminary report attached the relevant succession orders which would have contained the names of the successors, but did not separately list the affected parties and those for whom addresses were held.

[48] In our view, best practice dictates that the preliminary report should list the affected parties and those for whom addresses are known in a schedule. Further, we would expect

the Registrar to make recommendations to the Chief Judge as to the manner of notice to be given to those parties. As the Rules anticipate, notice via mail is not always possible and the Chief Judge may need to turn his mind to whether some form of public notice is also required. Each application must be addressed in its particular circumstances. The point of our comment is simply that the question of the identity and addresses of the affected parties needs to be answered clearly in the preliminary report.

Outcome

[49] Pursuant to s 56(1)(b) of the 1993 Act the appeal is allowed and the orders of the Chief Judge issued on 2 December 2014 are revoked. Pursuant to s 56(e) the 1993 Act we direct the Chief Judge to conduct a rehearing on notice to the affected parties, being those persons who succeeded to the remainder interests as a direct or indirect result of the 1997 s 81A order. The Chief Judge will need to determine what manner of notice is required in the circumstances.

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

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C L Fox **DEPUTY CHIEF JUDGE** (Presiding)	D J Ambler **JUDGE**	M J Doogan **JUDGE**