IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIĀRIKI DISTRICT

A20180008185
APPEAL 2018/18

UNDER	Section 49, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	an appeal against a decision of the Māori Land Court made on 3 September 2018 at 2018 Chief Judge's MB 493-510 in respect of the Māori land interests of Moehuarahi Inia
BETWEEN	WHAEARANGI INIA, LARAINE IRITANA and MARILYN WHARETOROA INIA-MCGARVEY, as trustees of the Inia Whānau Trust Appellants
AND	TUI KUIKAHA JULIAN Respondent

Hearing:	12 February 2019 (Heard at Rotorua)
Court:	Judge P J Savage (Presiding) Judge L R Harvey Judge S F Reeves
Appearances:	J Pou for Appellants J Kahukiwa for Respondent
Judgment:	12 July 2019

JUDGMENT OF THE COURT

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Introduction

[1] Moehuarahi Te Ruri or Inia died on 27 July 1994 at the age of 89 leaving seven surviving children.[1] As she left her Māori land by will to only two of her children, Te Pakiorangi Inia (Paki) and Oriwia Clarke, the other five were effectively disinherited. Mrs Clarke renounced her entitlement to succeed in 1994. By application dated 17 October 1994, Mr Inia sought succession orders in accordance with his mother's will.[2] On 2 February 1995, Judge Hingston vested the interests of the deceased in Mr Inia solely.[3] He also constituted the Inia Whānau Trust vesting the deceased's interests in Mr Inia and Audrey McCaull as trustees.

[2] When the whānau trust was created, no tipuna was named in the trust order. Mr Inia passed away in 2002 and was replaced as trustee by Marilyn Inia McGarvey on 7 June 2002.[4] Further land interests have since been added to the trust from sources other than the deceased, Moehuarahi Te Ruri.

[3] An application per s 45 of Te Ture Whenua Māori Act 1993 was filed by Tui Kuikaha Julian, a child of the deceased to, in effect, have the disinherited uri restored as owners of her lands. Mrs Julian argued that Judge Hingston failed to consider the rights of the disinherited children under family protection legislation and that, as the judge had acted for the estate of the deceased's husband, he should have recused himself because of a perception of bias. On 3 September 2018 Deputy Chief Judge Fox, while rejecting several of the arguments of the applicant, amended the trust order for the Inia Whānau Trust by naming the tipuna as Moehuarahi Te Ruri.[5] This had the effect of including Mrs Julian and her issue and her siblings and their uri as beneficiaries of the trust.

[4] The trustees of the Inia Whānau Trust now appeal that decision. They argued that the Court below erred in finding that apparent bias existed and failed to consider that, by expanding the class of beneficiaries of the trust, it was allowing the applicant and her uri interests in land in which they had no whakapapa connection, namely the lands of Hilda Inia, the wife of Paki Inia. It was also claimed that the siblings of Paki Inia had already succeeded to land interests of their father, Inia Te Ruri, although this was not pursued during the appeal.

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1 The deceased was also known as Mere Huarahi Rotohiko, Moe Huarahi Rotohiko, Merehuarahi Rotohiko, Merehuarahi Ruru, Arehuarahi Inia, Te Morehuarahi Te Mutu, Rotohiko and Moehuarahi Rotohiko. She had two children who died without issue, Te Hirata on 25 February 1941 and Percy on 25 June 1959.
2 The application was prepared by Le Pine & Co., solicitors of Taupo.
3 237 Rotorua MB 74-76 (237 ROT 74-76)
4 266 Rotorua MB 95 (266 ROT 95)
5 [2018] Chief Judge's MB 493-510 (2018 CJ 493-510)

Background

Section 45 applications

[5] On 23 April 2007, Mrs Julian applied to the Chief Judge have the 1995 succession order to her mother's estate cancelled. We understand that at the time of filing she was being assisted by a Matiu Payne, who might be described as a researcher or lay advocate. There were then a series of delays. These are considered in more detail later in this judgment.

[6] On 2 July 2014, a registrar's report was distributed to the parties. The applicant and other siblings objected to the report, so the case was set down for a preliminary hearing on 10 November 2014.[6] The application was then adjourned.

[7] By application filed per s 45 and received on 6 October 2017, Mrs Julian again sought cancellation of the 1995 succession order. A review of the record confirms that this was clearly an amendment to the original 2007 application. Mrs Julian wanted the deceased's Māori land interests vested equally in all her children, not just the two named in the will. The Chief Judge directed the parties to file submissions on the interpretation of the will and they were received on 25 September and 17 November 2017 respectively. Prior to that, on 16 October 2017, the Chief Judge recused himself and directed that the case be referred to Deputy Chief Judge Fox.[7]

[8] Then on 29 March 2018, a Court directed s 40 report was produced on the income received by the Inia Whānau Trust over a seven-year period. This recorded that there were 96 blocks of land where the trust held shares, 23 of which came from Moehuarahi Te Ruri, with the balance we understand coming from Paki and Hilda Inia. The total income was $51,340.84, with the portion relating to Moehuarahi Te Ruri's interests being $27,344.49.

[9] The case was heard on 25 May and the decision was issued on 3 September 2018.[8]

The case for Tui Julian on the s 45 application

[10] Mr Kahukiwa claimed that the 1995 orders were incorrect because:

(a) Full information regarding the deceased's children was never presented to the Court;

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6 [2014] Chief Judge's MB 520-529
7 For convenience now referred to in this judgment as Judge Fox.
8 [2018] Chief Judge's MB 125-163

(b) The will was never subject to a grant of probate and thus there was never any opportunity for her children to challenge its contents;

(c) The Court failed to consider the moral duty of the deceased to provide for all her children under the Family Protection Act 1955;

(d) The Court failed to adjourn consideration of the application to ensure it was not defeating the right of the applicant to have the deceased's moral duty to her properly assessed; and

(e) The Court failed to deal with any appearance of bias, as Judge Hingston was the solicitor for estate of the deceased's husband, Inia Te Ruri.

[11] Counsel submitted that his client had been adversely affected by the order because the Māori land interests of the deceased were incorrectly vested in Paki Inia solely and not all the children equally. Mr Kahukiwa argued that, in the terms of the overall justice of the case, the applicant sought to be included so that her uri are recognised in relation to their whenua, in accordance with the key principles of the Act.

The case for the Inia Whānau Trust

[12] The trustees of the Inia Whānau Trust opposed the application. Ms Wara (as she then was) submitted that there is no jurisdiction under s 44 as there was no error of law and that the Judge did not make any error or mistake of fact. She referred to the principle of finality and that thirteen years had passed without the applicant taking any action.

[13] Ms Wara contended that there was no case law to support the proposition that the Court must have regard to moral duties under the Family Protection Act 1955. The duty issue, she argued, cannot be a mandatory consideration as it is not provided for in the Act.

[14] Regarding the allegation of apparent bias, counsel submitted that Judge Hingston determined the application on merit. There was nothing to suggest that he was not impartial.

The decision on the s 45 application

[15] Judge Fox found that the possibility of a family protection claim was not a mandatory or highly relevant consideration when assessing succession applications under a will.[9] However, she

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9 [2018] Chief Judge's MB 506

concluded that whether there is a potential family protection claim is relevant when directing notice of an application or hearing. She also considered that Judge Hingston, once he became aware that all children were not included in the will, should have adopted a precautionary approach and required notice. Therefore, the making of the orders without notice constituted "an error of law as it was a breach of natural justice". However, Judge Fox concluded that despite the flaw in Judge Hingston's approach, the provision of notice would not have led to a different result, due to the clear terms of the will. She concluded that this is relevant in considering whether it is necessary in the interests of justice to remedy the mistake or omission.

[16] Judge Fox also considered that there had been a significant delay in the filing and prosecution of the application, that the applicant had rarely ventured to Rotorua following her mother's death in 1994 and that she had not had regular if any real contact with her brother Mr Paki before he died.[10] The judge noted that the applicant changed her attitude "only when her own son wanted to build on the land at Mourea". Prior to that, according to Judge Fox, the applicant was "comfortable with Paki Inia taking responsibility for the land." In short, Judge Fox found that Mrs Julian had effectively failed to prosecute her application to challenge the will per s 45 in a timely manner and compounded this by failing to maintain a relationship with both her mother and brother, which, we infer, might have facilitated a solution or at least could have lent more credibility to Mrs Julian's present claims.

[17] Regarding the allegation of apparent bias, it was determined that Judge Hingston ought to have disqualified himself as a fair-minded lay observer would have reasonably apprehended that he might not bring an impartial mind to the case.[11] However, instead of cancelling the order, Judge Fox amended the order constituting the Inia Whānau Trust by naming the tipuna as Moehuarahi Te Ruri thereby including the applicant and her issue as beneficiaries of the trust, alongside any other natural children and their issue.[12]

Issues

[18] We consider that the issues for determination are:

(a) Was there a reasonable apprehension of bias on the part of Judge Hingston?

(b) Was notice of the succession hearing given to the children of the deceased in 1995?

(c) Was there an obligation to adjourn the 1995 hearing if there was no notice?

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10 [2018] Chief Judge's MB 508
11 Ibid
12 Ibid, 509-510

(d) Has there been unreasonable delay in pursuing the application?

(e) Were the conclusions of the Māori Land Court based on the evidence?

(f) Should the decision to amend the trust order stand?

Appellants' submissions

[19] Mr Pou submitted that the trust order amendment was not one that could be made as there was no omission or mistake that required correction. He contended that it was irrational and created prejudice to the descendants of Paki and Hilda Inia by expanding the class of beneficiaries to confer interests to lands to those without a connection. In addition, counsel argued that the lack of notice and apparent bias findings were in error. Regarding notice, Mr Pou submitted that, as Judge Fox found that providing notice would have had no bearing on the result, there was no error for which the interests of justice would require a remedy.

[20] Mr Pou submitted that the judge appeared to confuse the wills of the deceased and her husband. Judge Hingston was the solicitor for Inia Te Ruri. Applying the *Saxmere* test, counsel argued that there was no logical connection between Judge Hingston having been the solicitor for Inia Te Ruri's estate which would suggest to a fair-minded lay observer that he would deviate from the course of deciding the case on anything other than its merits.[13] Therefore, it was submitted that there was no basis for a finding of apparent bias.

[21] Counsel also argued that even if apparent bias existed, it could not have had a material impact on the Court's finding. The powers pursuant to s 44 should be exercised sparingly to remedy genuine defects. It was not an opportunity for the Court to remake a decision to retrospectively re-enfranchise children who have been uninterested for over a decade.

[22] Mr Pou contended that even if there had been an error that required a remedy, the one that was ordered was inappropriate, as it effectively made the descendants of the deceased beneficiaries of all the property in the Inia Whānau Trust, which included interests from sources *other than* the deceased. The Court should never have amended the order in the way that it did, as it was an irrational exercise of jurisdiction and was not sought.

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13 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No2)* [2009] 1 NZLR 76 (SC)

Respondent's submissions

[23] Mr Kahukiwa submitted that the finding that there was no notice was within the Judge's powers under s 44, which the respondent does not contest. The respondent also supports the finding that the lack of notice was an error of law, as this meant that the procedure was defective and therefore contrary to the principles of natural justice. Counsel argued that the appellants' contention that this error cannot provide the basis for the exercise of the Judge's discretion as it would not have made a difference, misinterprets the Judge's meaning.

[24] Mr Kahukiwa contended that the appellants misconceived the finding by alleging that the apparent bias was found to exist based on an error. There was no error of fact as alleged, as Judge Hingston was solicitor for Inia Te Ruri's estate, not his wife Moehuarahi Te Ruri. The judgment shows a logical and consistent repetition that Judge Hingston was the solicitor for the husband's estate. Counsel contended that there would have been a solicitor client relationship between Paki Inia, as executor of his late father's estate, and Judge Hingston as the estate's solicitor.

[25] Mr Kahukiwa submitted that there was no legal basis for the appellants' contention that once Judge Fox was satisfied that the Court had committed an error, she was constrained to correct it. The judge determined that there were two errors, both of which are fundamental to natural justice, namely the lack of notice and the appearance of bias. The powers under s 44(1) of the Act, when triggered, are discretionary and wide-ranging. A finding of an error in law is a breach of natural justice, thus it is imperative that everything which that error touches must be corrected.

[26] Finally, counsel argued that the Judge's decision and consequential orders remedied the disconnect of the respondent, her siblings and their issue to their ancestral land interests, an outcome which furthers the principles set out in the preamble of the Act. It is also an outcome that is within the jurisdiction of s 106(2) of the Act, and a result provided for by s 113 of the Act to determine those persons legally entitled to succeed to Māori land interests.

The Law

[27] The powers of the Chief Judge are provided for in s 44 of the Act:

> **44 Chief Judge may correct mistakes and omissions**
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> (1) On any application made under section 45 of this Act, 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 of this Act, 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.

(2) Subject to section 48 but notwithstanding any other provision of this Act, any order under this section may be made to take effect retrospectively to such extent as the Chief Judge thinks necessary for the purpose of giving full effect to that order.

(3) Notwithstanding anything to the contrary in this Act, the powers conferred on the Chief Judge by this section may be exercised in respect of orders to which the provisions of section 77 would otherwise be applicable.

(4) The powers conferred on the Chief Judge by this section shall not apply with respect to any vesting order made under Part 6 in respect of Maori customary land.

(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.

[28] In *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)* the relevant principles were:[14]

As a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality of decisions. These principles are reflected in s 77 of the Act, which states that Court orders cannot be declared invalid, quashed or annulled more than 10 years after the date of the order. Parties affected by orders made under the Act must be able to rely on them. For this reason, the Chief Judge's special powers are used only in exceptional circumstances.

[29] Section 49 of the Act provides for appeals for the exercise of power under s 44-45:

49 Appeals
(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.

[30] Section 49 of the Act provides for appeals for the exercise of power under s 44-45:[15]

[36] Previous decisions of this Court demonstrate that an appeal against a decision of the Chief Judge is dealt with in the same manner as a standard appeal in terms of ss 54 – 58 of the Act.

[37] The jurisdiction afforded to the Chief Judge under s 44 of the Act is discretionary and used only in exceptional circumstances, given the need for certainty and finality of decisions. In *Kacem v Bashir* the Supreme Court noted the important distinction between a general appeal and an appeal in relation to the exercise of a discretion. Where the decision involves the exercise of a discretion, it can only be overturned on appeal where there is an error of law or principle, where the Court has taken into account irrelevant considerations or failed to take into account relevant considerations, or where the decision is plainly wrong.

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14 [2009] Chief Judge's MB 209 (2009 CJ 209)
15 [2016] Māori Appellate Court MB 343 (2016 APPEAL 343)

Discussion

Was there a reasonable apprehension of bias on the part of Judge Hingston?

[31] Judge Fox found that Judge Hingston had been the solicitor for Moehuarahi Te Ruri.[16] Because of that, she also determined that he should have recused himself from hearing the succession application. We do not agree with that conclusion. The evidence confirms that Judge Hingston was not the solicitor for the deceased's estate. He acted for the estate of her husband, Inia Te Ruri.

[32] Even so, we do not consider that, because Judge Hingston had been the solicitor to the estate of Inia Te Ruri, he was then disqualified from hearing the case. To the extent that we do have a concern, this was over Judge Hingston's reference to a discussion he said he had had with Mr Inia "He [Paki Inia] told me he has made application for a Whanau Trust, therefore there will be a Whanau Trust created." There is no other reference to any meeting or discussion Mr Inia had with Judge Hingston and we can only conclude that such a conversation occurred outside of a formal hearing where a record would have been kept. That he knew Mr Inia as solicitor to Mr Te Ruri's estate is not in doubt. It would, however, have been preferable for the judge to have stated when and where that conversation occurred and the circumstances.

[33] Apart from that reference, we can see nothing in the Record of Appeal that would excite any suspicion that a fair minded lay observer might apprehend a risk of a perception of bias. This is even more relevant when the proposition that the judge may have understood that the whānau trust he was creating would benefit all of the children of the deceased and not just Mr Paki and his sister Mrs Clarke is considered later in this judgment.

Was notice of the succession hearing given to the children of the deceased in 1995?

[34] It is trite law that Māori land owners possess testamentary freedom, like their general land counterparts, and are entitled to leave their lands by will according to their personal preferences. Their children, where excluded from any will, are equally entitled to challenge those decisions in courts of competent jurisdiction. Such claims are invariably required to be made within twelve months from a grant of administration.[17] But the excluded children can only consider the exercise of that right if they are aware of both the contents of the will and of any hearing held to consider its terms. In this case, the lack of notice of the succession hearing was compounded by the fact that a grant of probate was never sought. It is also well settled that an order issued without notice to an

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16 [2018] Chief Judge's MB 508

17 See s 9(2), Family Protection Act 1955 and s 6, Law Reform (Testamentary Promises) Act 1949

affected party will be an order made without jurisdiction.[18] In *Tioro* this Court 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.[19]

[35] Judge Fox considered the 1995 succession orders and the constituting of the Inia Whānau Trust without notice to all the children of Moehuarahi Te Ruri was a breach of the principles of natural justice and an error of law. Even so, she also concluded that the lack of notice would not have made a difference in this case, following her consideration of whether it was necessary in the interests of justice to remedy the mistake or omission. We disagree. Wills are altered all the time and in this case the Family Court or High Court may have found a breach of moral duty and varied the terms of the will to include the disinherited children. While this is speculation, the respondent at the very least had an argument that might have been made had she received proper notice of the hearing.

[36] Our conclusion is that, following a review of the court file, notice does not appear to have been given to the children of the deceased who were directly affected by the will. This does not appear to be a matter of dispute. Inexplicably, the succession application dated 17 October 1994 listed Mr Inia's siblings and included their addresses. The effect of the lack of notice is then the next relevant issue.

Was there an obligation to adjourn the 1995 hearing if there was no notice?

[37] In this context, the creation of the whānau trust has relevance. The application to create the trust made it plain that it was to benefit Mr Inia and his uri alone. That Mrs Inia would subsequently add her own land interests to the trust at least confirms the understanding of Mr Inia and his wife as to the purpose of the trust.

[38] During the hearing in 1995, Mr Harris Martin, an experienced officer of the Court,[20] confirmed before Judge Hingston that certain persons had not been consulted because a whānau trust was being established. He says, "That's the main reason why they [the trustees and executors] haven't consulted the others."[21] We consider that reference to "the others" could only have meant Mr Inia's siblings including Mrs Julian, which is the same conclusion Judge Fox reached. In any event, from the transcript it is evident that Judge Hingston was aware that only two of the deceased's

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18 Cameron – Part Maraetai 3B (1996) 19 Waikato Maniapoto Appellate MB 34 (19 APWM 34)

19 *Tioro v McCallum - Estate of Ngapiki Waaka Hakaraia* [2015] 2015 Māori Appellate Court MB 483 (2015 APPEAL 483) at [25]

20 Mr Martin was erroneously described as counsel in the judgment at para [38].

21 237 Rotorua MB 75 (237 ROT 75)

children were entitled under the will. He confirmed the succession according to the will and made the comment "He [Paki Inia] told me he has made application for a Whanau Trust, therefore there will be a Whanau Trust created …" Judge Hingston then comments further "It's a bit more involved, but it's alright."

[39] The evidence confirms that an argument could be made that Judge Hingston may have understood that the whānau trust he created was to benefit *all* the children of the deceased. Otherwise, there would be little point in discussing with Mr Martin whether there had been consultation with the children not included in the will. While we cannot express any final conclusions on what Judge Hingston understood, after reviewing the transcript and taking into account the circumstances, we consider that at the very least the respondent had an arguable case that when the trust was created, the judge understood that it would benefit all the deceased's children. This understanding was also confirmed in part by the respondent when she stated that Mr Inia had advised that "the estate was to be left to him to execute as the eldest son's duty".[22]

[40] When considering the preamble to the Act, s 2 and the principles of retention and development, while a land owner may exclude their uri from succession by will, or by an earlier gift of land, those affected by such conduct have a right to be heard. They can only consider taking up this right if they have been notified. As foreshadowed, both Judge Hingston and Mr Martin acknowledged that there had been no notice. In these circumstances, we consider that, on its face, the outcome was unjust because the five disinherited children were entitled to notice of the 1995 hearing and the opportunity to take advice and be heard.

[41] The exercise of the powers under ss 44 and 45 are a matter for the Chief or Deputy Chief Judge to consider if we allow the appeal and refer the case back for a further hearing. Whether that is appropriate will depend on the degree to which the respondent can be held sufficiently responsible for the delays in pursuing the s 45 application or whether factors beyond her control have contributed to the extent that it would be unjust to deny her a remedy.

Has there been unreasonable delay in pursuing the application?

[42] The record confirms that some of the delays were internal while others may be attributable to the applicant and her then adviser. As Judge Fox stated during the hearing:[23]

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22 [2018] Chief Judge's MB 508

23 [2018] Chief Judge's MB 127. Judge Fox was recognising here that some of the delay was as a result of what she referred to as the "internal staffing situation" while confirming that the delays were not the fault of the current case manager. To underscore her concerns over the internal delays of the registry, Judge Fox had the second paragraph cited above recorded in bold typeface, a practice usually reserved for orders or directions.

> We have had quite a long process involved in getting us to hearing today and even before I was involved, some 10 years before this matter was dealt with again. This is reflective of what is happening with s 45s generally in the Maori Land Court. It has much to do with the internal staffing situation of the special apps unit and I want to put on the record my concern about the continuing failure to provide the staff necessary in order to progress these applications in a timely manner
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> ….
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> **In my view, it is a breach of the right to access of justice and if the Ministry is not careful, applicants would have the full right to take those matters to the High Court, and I want a copy of today's minutes sent to the Chief Registrar and to her director. I expect the situation to improve with additional resourcing and staff, otherwise the Chief Judge and I cannot be expected to be able to keep processing matters in the way that is required under this Act"**
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> (Emphasis in original)

[43] Regarding the delays between 2014 and 2017, at [8] Judge Fox says the file was "deactivated" as there was a delay in counsel being instructed and internally there were two changes of case manager. In any event, a review of the record confirms that, following acknowledgment of the filing or the original application in 2007, the next correspondence was not until 2012. This correspondence suggests there had been an issue with Mrs Julian's then representation. Moreover, a document on the file records that the case became stalled at the preparation of the s 45 report stage and was not transferred to the Special Applications unit of the Court until 2012. Even at that time, the report and recommendation from the case manager had not been supplied.

[44] We are inevitably driven to the position that inactivity by Mrs Julian cannot be seen as the proximate cause of delay between 2007 and 2018, when the case was heard. It is evident that the majority of responsibility for the delays post filing lay with the registry. The delay between 1995 and 2007 is the next issue for consideration in the context of the conclusions reached by Judge Fox and the extent to which those determinations were based on the evidence.

Were the conclusions of the Māori Land Court based on the evidence?

[45] At paragraphs [39] to [42] of the decision under appeal Judge Fox concludes that the applicant took few, if any, steps for 14 years, until everyone who might have challenged her application had passed away. The judge commented further that the evidence suggests it was only when Mrs Julian's son sought a building site at Mourea that her attitude changed. Before then, according to the judgment, Mrs Julian appeared content with the status quo, with Mr Inia taking responsibility for the land, and rarely ventured to Rotorua following the death of her mother, Moehuarahi Te Ruri. Presumably these comments refer to the period between the decision of Judge Hingston in 1995 and the filing of the original s 45 application in 2007, a span of 12 years.

[46] Under cross examination, Mrs Julian confirmed that the first time she became aware of the will was in 2005, a decade after the succession orders were granted:[24]

> **Ms Wara:** When did you discover that she left a Will?
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> **T Julian:** When I came back to the tangi for my son. My son was a policeman and he died at the Rotorua Police Station, so we came back to Rotorua for his tangi and that was on the 5th of October 2005.
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> When we were there my nephew turned up, Joseph Inia, and he said, "Aunty, I've got to tell you Nan's house has been sold," and I said "Oh," I said, "None of us…" because my brother came up from Christchurch and the rest of my whānau was there and no one knew about it until that day.

[47] From the transcript, it is evident that this statement was not successfully impugned. It is significant because it appears to confirm that Mrs Julian had no knowledge of the will or its contents until ten years after the orders for succession were made.

[48] Mrs Julian went on to confirm that even her original application filed in 2007 had been largely the work of her then adviser, Matiu Payne, acknowledging that he wrote up most of the documents for her. Mrs Julian also explained that some of her siblings were equally in the dark about the will, as they were about their father's estate, where Mr Inia was also executor:[25]

> **Ms Wara:** But if you read the following passage for the Court – well, I will put it to you, now in your letter you say that, "At the time of probate, the beneficiaries relied on the conduct of Piki, that older sibling, who had advised them the estate to be left to him to execute as the eldest son's duty."
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> **T Julian:** Yes.
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> **Ms Wara:** So, this infers that you had a knowledge that there was a Will?
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> **T Julian:** No, I didn't. See, I thought that once you become an executor of the Will he's supposed to notify all of us, the beneficiaries. I thought we were beneficiaries but there was never one meeting called by him. We never, ever had a meeting with him and we didn't know anything. All the way through there was no meeting whatsoever, so we didn't know anything.
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> **Ms Wara:** So, in spite of your submission which says that you relied on the conduct of Paki as an executor –
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> **T Julian:** Well, I mean, he was the eldest brother, wasn't he supposed to tell us things?
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> **Ms Wara:** You understood that he was an executor?
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> **T Julian:** Hang on a minute. Well, I suppose he was also the trustee of the Inia Whānau Will.
>
> **Ms Wara:** I mean, this passage makes it quite clear that you understood that he was an executor and that you relied on him as an executor?
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> **T Julian:** I mean I'm not the only person that didn't know anything, you know. I'm not the only one in the whānau. Even my other brothers, they didn't know all this stuff, they don't know that because as I said he never called a meeting with us, not once. When the Inia Whānau Trust was set up, no.

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24 [2018] Chief Judge's MB 133
25 [2018] Chief Judge's MB 135

Ms Wara: But you say in this letter that you understood that he was the executor of the Will?

T Julian: Well, maybe Matiu Payne put that in because first time I've seen this but even, you know, written like this properly because I was just in and out, signed it and left. I mean, he wrote everything for me.

Ms Wara: So, you signed something that you did not understand the content of?

T Julian: Nah, I'm at a loss actually. I can't recall.

[49] Regarding the land interests of her father Mrs Julian also asserted that neither she nor her siblings had knowledge of the procedureand that they had not been included in any part of the process and had certainly not attended any hearings concerning that succession, which, it will be remembered provided for the inclusion of all the children of Inia Te Ruri:[26]

Ms Wara: Did you go through a Court process?

T Julian: I don't know. None of us knew anything about a Court process. I mean, we didn't know anything. We were sort of left out of it.

Ms Wara: Of your father's estate?

T Julian: Well, I only saw that Will after my Dad died, apart from that.

Ms Wara: So, after your father died, you inherited interests and those interests of your father got put into your name, is that correct?

T Julian: Yes.

Ms Wara: You must have gone through a process for those interests to go into your name?
T Julian: What do you mean I must have gone through a process? I don't understand.

Ms Wara: Did you go to Court?

T Julian: No, no. Definitely not. None of us went to Court.

Ms Wara: To inherit your father's shares?

T Julian: No.

Ms Wara: Did you sign some papers?

T Julian: No, 'cos we didn't even know about that Will till my Dad died and then we saw it. I mean, we were told nothing. We were never told anything.

Ms Wara: So, your father's interests were put into your name, you had no knowledge of it, and your understanding is you signed nothing?

T Julian: No.

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[26] [2018] Chief Judge's MB 136-137

[50] Judge Fox concluded that, not only had Mrs Julian been tardy in bringing proceedings to challenge the succession orders, but she also failed to maintain regular communication with her mother. On this point, the following relevant exchange is recorded in the transcript:[27]

> **Ms Wara:** When did you move to Auckland?
>
> **T Julian:** Oh gosh, probably 1970.
>
> **Ms Wara:** So, you've lived a significant portion of your life in Auckland?
>
> **T Julian:** Yes.
> **Ms Wara:** Now, before my friend was asking you about returning to Rotorua to visit your mother, how often were you returning to Rotorua to visit your mother?
>
> **T Julian:** No, my mother shifted to Hamilton. She was staying in Hamilton 'cos she had a state home there and that's where me and my two children moved to Hamilton and that's where I always used to visit my mother, in Hamilton.
>
> **Ms Wara:** So, you visited your mother in Hamilton, how frequently were you visiting your mother?
>
> **T Julian:** No, she ended up raising my two children and I went to South Island, through the Labour Department because we went there fruit picking.
>
> **Ms Wara:** Now eventually your mother returned to Rotorua, didn't she?
>
> **T Julian:** Returned to where?
>
> **Ms Wara:** Returned to Rotorua in her old age?
>
> **T Julian:** Yes, she went from Taumarunui and went there, and then I went and visited her once because as I said, my mother was always at Taumarunui and we spent most of our time travelling to Taumarunui to Mana Āriki.
>
> **Ms Wara:** So, with your mother being in Taumarunui, how often were seeing her in Taumarunui?
>
> **T Julian:** Oh, probably every month.

[51] On the relationship between Mr Julian and her brother, Judge Fox had determined that this was not close because, in part, Mrs Julian did not appear to take the time to visit Mr Inia or maintain close contact with him. The transcript records the following responses:[28]

> **Ms Wara:** How about Paki, how often did you see him?
>
> **T Julian:** I didn't because I always thought that me and my family were never welcome there. I mean, so why go there if you haven't been asked to go there. That's the way it is. You know, 'cos I used to hear remarks he used to say, "Oh, she's dumb," and run my children down and you know, we always used to feel so uncomfortable. Why bother? Why bother to go there?
>
> **Ms Wara:** Well, you have talked about the importance of the whenua in your brief of evidence, haven't you?
>
> **T Julian:** Yes, but I'm talking – when I was talking about that whenua, I was talking about my

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27 Ibid, at 137-138
28 [2018] Chief Judge's MB 138-139

mother's land at Mourea because we were brought up in that home. We're the ones that went to the State Mill when we were 15. We're the ones that worked in the State Mill, we get our wages, we had to take it home, and the wages wasn't big at that time, and then we give our wages to our parents to help pay for the house, food, whatever and we used to just have enough to pay for the bus ticket to go to work the following week. It was sort of like that. My parents weren't wealthy, they were quite pōhara.

Ms Wara: But they had a whare in Mourea?

T Julian: Yes, two-bedroom house and then they added later another bedroom in the garage.

Ms Wara: And even though this was an important place for you, you didn't return to Mourea?

T Julian: Well, I only went there because you know, the thing was my Mum, my Mum left Mourea. My Mum left Mourea and she had another partner and then she moved to Hamilton. She lived in Hamilton so if she wasn't there why bother to go home. I mean my Dad had met another woman and she was staying there with him. I heard that she had died in the room, in the house, so I wasn't going to go back because I didn't know her very well either. But it's just that, you know, as children we grew up at Mourea all our life till we left.

Ms Wara: Until you left?

T Julian: Yes, Mourea.

Ms Wara: And moved away from Rotorua?

T Julian: Yes.

[52] On the issue of the lands of Moehuarahi Te Ruri and their importance to Mrs Julian, once again during cross examination she provides a broader context for the extent of the relationships between herself and her siblings, especially Mr Inia:[29]

Ms Wara: So, the lands were important to you and the house was important to you?

T Julian: Yes.

Ms Wara: And there was seven years – well Paki passed away in 2001, didn't he? Or thereabouts?

T Julian: Yes.

Ms Wara: And so you had seven years to talk to your brother?

T Julian: Yes. I remember I was there. I went back one time there and I said to him, "Oh, can I have a bit of this land so my son can build a house on it," and he said, "no, no." Oh no, he didn't answer me, he didn't answer me, he walked away and it was his wife that answered me, she said to me, "Go and get your own land," and I go, "Gee."

Ms Wara: Well, this is interesting because all your evidence to date is that you haven't had any conversations with Paki?

T Julian: Yes, but that was – I didn't stay there. I was just passing through and every time we passed through anyway we'd drive the car up the road to have a look, you know, have a nohi and then drive back down the road and take off, you know.

Ms Wara: So, isn't it a bit convenient for you to suddenly recall this when you've never put it in

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29 [2018] Chief Judge's MB 139-140

your evidence?

T Julian: I can't think of everything eh, gosh.

Ms Wara: Now, you raised the issue with Paki while he was alive and you've just said that he refused to give you any land?

T Julian: Yes, well you know, you must remember Paki went away to the War and us kids, we stayed in the house and my parents used to have meetings with us and they used to say to us, "that land can never be sold because it's Māori land," and we grew up believing that you know. There's another brother of mine, he's not here. He asked for land to build him a house over there, he asked Paki, "No," they ended up having a big argument so I'm not going into that because it's up to him to talk about that not me, so I'm just giving you an example.

Ms Wara: So, the point is you asked him about the land, he said "No"?

The Court: No, his wife said no.

Ms Wara: His wife said, "No"?

T Julian: Yes, his wife said, "No"?

Ms Wara: His wife said, "No"?

T Julian: And he just walked away from me.

Ms Wara: Paki chose not to talk to you about it?

T Julian: Yes.

[53] Judge Fox heard the witnesses and had the opportunity to assess their demeanour at first instance. She concluded that for key parts of her testimony, Mrs Julian's evidence was, effectively, unreliable while also accepting that a remedy was nonetheless required.

[54] In summary, Mrs Julian's evidence, in part, was that:

(a) she and her siblings were brought up on the Mourea land until they moved away as adults. Even once they had entered the workforce they were expected to contribute to the maintenance of their household since their parents were not financially secure;

(b) her parents entered into new relationships with her mother moving to Hamilton for a period while her father's partner apparently died in their family home some years later. When she did travel to Rotorua, Mr Inia made her feel unwelcome and with her mother no longer in Rotorua until near the end of her life the desire to return there diminished. These events and circumstances meant that traveling to Rotorua regularly, once Mrs Julian had moved to Auckland, was not always practical or sensible;

(c) She would visit her mother every month for some years, they travelled to Taumarunui to visit Manu Ariki Marae from time to time and Mrs Julian also had two of her own children raised by their grandmother in Hamilton;

(d) the first she heard of her mother's will was in 2005. Neither she nor her siblings were involved then with the succession process for either parent since this duty was left to Mr Inia; and

(e) She and her siblings had been told that the Mourea land would never be sold but eventually it was. She and another brother had asked Mr Inia for land, but her evidence was that they were refused.

[55] We observe that several key aspects of the narrative as relayed by Mrs Julian were not successfully impugned on cross examination or called into real doubt by questions from the Bench. While Judge Fox was entitled to discount or not accept the evidence of any witness, including Mrs Julian, the reasons for doing so were required to be set out in detail in the judgment. It would not be unreasonable to expect to see in the decision the actual reasons for why Mrs Julian's evidence was so discounted or disregarded on critical issues.

[56] Then there are parts of the decision that do not appear to accord with the evidence or alternatively, it may be that insufficient weight was given to key aspects of the evidence. For example, Mrs Julian makes it clear that, contrary to the Judge's findings, she did in fact maintain a regular relationship with her mother – indeed she said two of her children were partly raised by Mrs Te Ruri. Mrs Julian also sets out the reasons why she did not keep a close connection with Mr Inia or his wife and the only real challenge to this was a question from counsel that Mrs Julian's recollection appeared "convenient" and that her timing was also questionable given that Mr and Mrs Inia were deceased.

[57] There was also the issue of whether Mrs Julian had discussed land issues with Mr Inia following the passing of their mother. Her responses confirmed that she and at least one other sibling had sought to do so but were unsuccessful due to what she claims was the negative attitude of her eldest brother Mr Inia. This too explained why she had not ventured to Rotorua on a regular basis. Again, the transcript discloses that this evidence was not challenged to such as extent as to render it completely unreliable.

[58] In this context, elements of tikanga also need to be considered. When Mr Inia filed the succession application in 1994 he was almost 70 years of age while his siblings were younger and,

in some cases, much younger than him. Mrs Julian also mentioned that Mr Inia had been a member of the armed services and had "went away to the War". Mr Inia had been executor and trustee for both his parents and as Mrs Julian confirmed, was looked to as the tuakana in the context of land dealings. This would not be unusual. The real point is that the role of the mataamua, the tuakana, should not be underestimated in the context of challenges to decisions that may have been taken by Mr Inia. Moreover, if our earlier observation is correct, that Judge Hingston might have proceeded on the basis that the whānau trust was to benefit all of the deceased's children – given the lack of notice to them – then this too adds weight to the proposition that it would have been potentially difficult for teina in these circumstances to immediately challenge the decisions taken by Mr Inia and his mother. That is not to say that such challenges are avoided, but simply to observe that it may not have been a simple task.

[59] In summary, we do not consider that all of the determinations made by Judge Fox accord with the evidence. Consequently, we do not agree with the conclusion that Mrs Julian effectively waived her right to pursue a s 45 claim because she had been tardy in the pursuit of that claim, she had failed to maintain a relationship with her mother Mrs Te Ruri and had failed to take any interests in land matters or communicate regularly with her brother Mr Inia.

[60] In arriving at this outcome, we also acknowledge the proposition that there should be finality in dealings over Māori land and that lengthy and protracted proceedings ought to be avoided where this is at all possible. This is even more pertinent where important witnesses have passed on and can no longer provide their version of the events in question. Inevitably, errors can and do occur over land transactions that may date back generations.[30] It is for this very reason that the Chief Judge's jurisdiction under ss 44 and 45 of the Act has been retained over many decades as a corrective power where errors have been detected that require a remedy.

[61] Therefore, we direct that the original s 45 application be referred back to the Deputy Chief Judge for a rehearing on four grounds. First, the issue of the lack of notice of the 1995 succession hearing before Judge Hingston. Second, on the basis that we disagree with Judge Fox's conclusion that, even if there had been notice, a claim under the Family Protection Act 1955 would have been unsuccessful. Third, that on the balance of probabilities, Mrs Julian's assertion that she first became aware of the will and its implications in 2005 was sustainable and explained the delay, in part, between 1995 and 2007. Fourth, that it is arguable that Judge Hingston may have been mistaken as

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30 For example, see *Tau v Nga Whanau o Morven and Glenavy - Waihao 903 Section IX Block* [2010] 2010 Māori Appellate Court MB 167 (2010 APPEAL 167) which involved succession to lands issued in 1887 and whether a grantee who died in 1927 held the land as a trustee or absolutely.

to what he understood was the basis for the creation of the whānau trust in 1995, given his exchange with Harris Martin at the hearing, which could also fall within the ambit of s 44 of the Act.

[62] In arriving at our decision, as foreshadowed, we have also paid close attention to the fundamental principles of retention and development in the hands of the owners, their whānau and hapū, as set out in the Preamble, ss2 and 17(1) of the Act. As we have foreshadowed, while owners of Māori land are free to leave their interests by will in accordance with their preferences, so too are the disinherited uri entitled to challenge those decisions in courts of competent jurisdiction which they can only do if they have notice. The current situation has meant that, due to the lack of notice, and the possibility of a mistake on the part of the Court in 1995, several generations of the descendants of Moehuarahi Te Ruri have been effectively disinherited from their tribal and hapū lands.

Should the decision to amend the trust order stand?

[63] While we can understand the Judge's intentions behind her decision to vary the trust order by adding Moehuarahi Te Ruri as the tipuna, this has resulted in the siblings of Mr Inia and their uri becoming beneficiaries to the lands of his wife Hilda Inia. There can be no basis for the in-laws of Mrs Inia to share in her lands without her consent. Therefore, the order varying the terms of trust by naming the tipuna as Moehuarahi Te Ruri is accordingly annulled.

[64] One final point. Earlier this week a memorandum was received from Mr Pou who set out concerns as to the way that communications from him to the staff of Māori Land Court, Wellington subsequent to the hearing has been disclosed to this coram. The communication concerned the timing of this decision. It is our view that it is a purely administrative matter and has no bearing on our functions and is not relevant to this judgment.

Decision

[65] The order varying the terms of trust for the Inia Whānau Trust by adding the trust tipuna as Moehuarahi Te Ruri is annulled.

[66] The original application per s 45 of Te Ture Whenua Māori Act 1993 is referred back to Deputy Chief Judge Fox for a rehearing.

[67] There will be no order as to costs.

Pronounced in open Court at 2.15pm in Wellington on Friday this 12th day of July 2019.

P J Savage	L R Harvey	S F Reeves
JUDGE	**JUDGE**	**JUDGE**