IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20180007223
APPEAL 2018/17

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An appeal against an order of the Māori Land Court made on 12 July 2018 at 175 Taitokerau MB 257-326 in respect of Nuki o Te Hapū Tahawai ki Rataroa Whānau Trust and Ngā Uri o Ngāti Pakahi Trust
BETWEEN	BRYCE PEDA SMITH Applicant
AND	TERRENCE TWIGG SMITH, RICKARDO SMITH, LAUNA-ANNE OUIDA SMITH, PETER-BARRY SMITH, NGARONOA TONI IDA RENATA AND KAREN MOANA TANGIHAERE-SMITH AS TRUSTEES OF THE NUKI TE HAPŪ TAHAWAI KI RATAROA WHĀNAU TRUST AND NGĀ URI O NGĀTI PAKAHI TRUST Respondents

Hearing:	13 February 2019, 2019 Māori Appellate Court MB 90-104 (Heard at Whangarei)
Court:	Judge L R Harvey (Presiding) Chief Judge W W Isaac Judge P J Savage
Appearances:	B P Smith, in person M Tuwhare, for Respondents
Judgment:	26 March 2019

JUDGMENT OF THE COURT

Copy to:

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Introduction

[1] On 18 July 2018, Judge Wainwright issued orders replacing Bryce Smith, Doreen Smith-Renata, Nicholas Smith (deceased) and Te Wairama Renata with Terrence Smith, Launa-Anne Smith, Rickardo Smith, Karen Tangihaere-Smith and Ngaronoa Renata as trustees of Nuki o Te Hapū Tahawai ki Rataroa Whānau Trust. The learned Judge also made orders replacing the appellant and Nuki Aldridge-Smith (deceased) as trustees of the Ngā Uri o Ngāti Pakahi Trust with Terrence Smith, Launa-Anne Smith, Ngaronoa Renata, Rickardo Smith and Peter-Barry Smith. This was on the basis that meetings convened by the beneficiaries on 24 March 2018 had effectively voted the current trustees out of office and elected replacements.

[2] By notice dated 11 September 2018, Bryce Smith now appeals those orders on four principal grounds. First, he says that the eligible beneficiaries of the trust were prevented from participating in the hui and the election because the respondents, directly or indirectly, impeded the mokopuna of Nuki and Doreen Aldridge-Smith from voting. Second, Mr Smith claims that as a result, the Māori Land Court did not properly consider the extent to which the nominees were broadly acceptable to the beneficiaries. By excluding the mokopuna, he contends, the Court could not be satisfied as to the test of broad acceptability. Third, he says that the notice for the meeting was inadequate. Fourth, Mr Smith argues that proxy voting, permitted under at least one of the trust orders, was applied inconsistently, thereby tainting the election outcomes.

[3] The respondents deny these claims. They say that there was no exclusion of beneficiaries, and that some of the mokopuna declined to participate until their parents had resolved the disputes between themselves. The respondents also deny that the notice was deficient, since it made it clear that there would be an election of replacement trustees, and that proxy voting was applied inconsistently. In response they argue that the former trustees have failed to fulfil their duties by refusing to hold general meetings as required on a regular basis. Overall, the respondents contend that, given the lack of accountability to the beneficiaries, the election and replacement of the former trustees was the only sensible outcome in the circumstances.

[4] After hearing from the appellant and counsel, we confirmed at the hearing that the appeal would be allowed with reasons in writing to follow.[1]

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[1] 2019 Māori Appellate Court MB 90-104 (2019 APPEAL 90-104) at 104

Issues

[5] The issues for determination are:

(a) Were the meetings convened in accordance with the trust order?

(b) Were all the trust beneficiaries given the opportunity to participate in the election?

(c) Can a meeting of beneficiaries 'remove' a trustee?

(d) Did the appellant receive notice of the risk of removal by the Court?

(e) Should the order appointing replacement trustees stand?

[6] Prior to the hearing, the appellant sought to adduce further evidence. We declined that application on the basis that the material filed was available at the time of the original hearing and should have been presented then.[2]

Background

[7] Ngā Uri o Ngāti Pakahi Trust was created over Mangaiti 1A1 on 12 December 1991 per s 438 of the Māori Affairs Act 1953.[3] Curiously, according to the website maorilandoneline.govt.nz there are no beneficial owners listed for this land and the trust order does not name the beneficial owners. After reviewing the Court file back to when the trust was constituted, it appears that the land was held solely by Doreen Smith-Renata. The subsequent orders created the trust and vested the land in five trustees as joint tenants.[4] Therefore, even though her name no longer appears on the website, Doreen Smith-Renata is likely to have been the only beneficial owner. It is unclear as to whether succession orders have been made in respect of these interests. At the time of hearing in the Court below, the trustees were Nicholas Smith, Doreen Smith-Renata, Bryce Smith, Te Wairama Renata and Launa Ann Smith.

[8] Nuki o Te Hapū Tahawai ki Rataroa Whānau Trust was established over interests in Pupuke M Lot 1 DP 81424 on 7 March 2003.[5] The original trustees were Nuki Aldridge-Smith and Bryce Smith. It appears that the land was vested in a s 438 trust at the same time

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2 2019 Māori Appellate Court MB 90-104 (2019 APPEAL 90-104) at 91
3 17 Kaitaia MB 195 (17 KT 195)
4 17 Kaitaia MB 255-256 (17 KT 255-256)
5 33 Kaikohe MB 87-88 (33 KH 87-88)

as the Mangaiti 1A1 block with the same trustees, given the legislation in force at the time.[6] However, the minute book at this reference is missing. Even so, the order shows Nuki Smith was the applicant. Subsequently, the trust was cancelled, and the land re-vested in Nicholas Smith also known as Nuki Aldridge.[7] The minute records Mr Aldridge-Smith acknowledging he was the original owner. At the same time as re-vesting, Mr Aldridge-Smith gifted some shares to his sister Dahlia McGeachie. Currently the Court's title record, Māori Land Information System, or MLIS, confirms that the ownership is shown as two whānau trusts, Nuki o Te Hapū Tahawai ki Rataroa Whānau Trust holding 0.9942 out of 1 share and the Dahlia Waitai Whānau Trust holding 0.0058.[8] The beneficial owners of this block are therefore these two whānau trusts.

[9] To avoid doubt, from the outset we consider it important to underscore the reality that these proceedings concern two separate but related entities – an ahu whenua trust and a whānau trust. The ahu whenua trust has an orthodox trust order, whereas the whānau trust is quite different for two reasons. First, it has its own specific trust order almost entirely in te reo Māori. It does not therefore contain many of the standard clauses that would be expected in a conventional whānau trust order. Second, the beneficiaries of the trust are the uri of the tīpuna, Nuki and Doreen Aldridge-Smith, not a list of beneficial owners defined by Court order and set out in an ownership schedule.

The Law

[10] Section 240 of Te Ture Whenua Māori Act 1993 provides:

> **240 Removal of trustee**
> The court may at any time, in respect of any trustee of a trust to which this Part applies, make an order for the removal of the trustee, if it is satisfied—
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> (a) that the trustee has failed to carry out the duties of a trustee satisfactorily; or
> (b) because of lack of competence or prolonged absence, the trustee is or will be incapable of carrying out those duties satisfactorily.

[11] Where a trustee's conduct is so unacceptable and in breach of trust duties, then in the absence of any tenable defence, one of the few sanctions available under the Act is the removal of that individual from office. *Ellis v Faulkner – Poripori Farm A Block* underscores the requirement to assess whether the trustees' overall conduct in the

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6 17 Kaitaia MB 194 (17 KT 194)
7 30 Kaikohe MB 106-107 (30 KH 106-107)
8 See 3 Kaikohe Succession MB 234 (3 KH(S) 234)

performance of their duties was 'satisfactory' in the context of s 240 of the Act. Judge Carter also provides a useful discussion on the powers of the Court in relation to trustees, underscoring the view that removal is almost invariably a last resort.[9] It was also necessary that the trustees at risk of removal are properly notified by the Court of that possibility.[10]

[12] Then in *Perenara v Pryor – Matatā 930,* this Court confirmed:[11]

> As a general approach the Court should proceed with caution when asked to consider removal. Conversely, we also endorse the notion that immediate removal should follow obvious abuse, failure or malfeasance. However, as pointed out by Mr Kahukiwa, the test to apply is not one confined to obvious abuse, failure or malfeasance. Rather the legislation may, depending on the circumstances of each case, also require consideration of trustees' performance to assess whether they have carried out their duties satisfactorily. In considering performance, the rules of natural justice must be observed, the appropriate legal thresholds as provided for in the Act, the Trustee Act 1956 and the Reservation Regulations have to be reached and the Court must consider whether there is any positive defence or reasonable excuse for unsatisfactory performance.

[13] The Court of Appeal in *Rameka v Hall* agreed that the prerequisite for removal was not a simple failure or neglect of duties, but a failure to perform them satisfactorily.[12] Therefore, an assessment of the trustee's performance was essential when applying s 240.

[14] Regarding the broad acceptability of a trustee in the context of appointment, the Court of Appeal in *Clarke v Karaitiana* confirmed that it is the Court that must make the final decision, after considering several critical factors that include the views of the beneficiaries. Those views, while being very important, are not necessarily determinative:[13]

> [51] The touchstone is s 222(2) itself. In appointing a trustee, the Court is obliged to have regard to the ability, experience and knowledge of the individual concerned. In considering those issues, the Court will no doubt have regard to such matters as the nature and scale of the assets of the trust concerned and the issues the trust is facing. The importance of the views of the beneficial owners of the trust is underlined by s 222(2)(b) which forbids the Court from appointing a trustee unless the Court is satisfied that the appointment of that person will be broadly acceptable to the beneficiaries.
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> [52] It may be putting the matter too highly to say that the Court should only depart from the views of the owners in rare circumstances. The Court is not bound to appoint the leading candidates resulting from an election by the beneficial owners. A candidate who has strong support from the owners might be regarded by the Court as unsuitable through lack of ability, experience and knowledge or for other reasons. For example, the existence of conflicts of interest might be relevant or the need to obtain a suitable spread of skills amongst the trustees. Nevertheless, the Court would ordinarily give substantial weight to the views of the owners as demonstrated by the outcome of the election. If the Court is minded not to appoint

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9 (1996) 57 Tauranga MB 7 (57 T 7)
10 *Perenara v Pryor – Matatā 930* (2004) 10 Waiāriki Appellate MB 233 (10 AP 233) at 244
11 Ibid, at 241
12 [2013] NZCA 203 at [30]
13 [2011] NZCA 154, [2011] NZAR 370

> the leading candidates as elected by the owners, it must still be satisfied the requirements of s 222(b) are met. For that purpose, the Court would need to have appropriate evidence before it. The outcome of an election at a meeting of owners is a useful means of obtaining such evidence.

[15] In summary, the authorities confirm that removing a trustee requires a careful approach that must include proper notice of the risk of removal, an assessment of the trustee's performance and consideration of any possible defences and relief. They also confirm the legal orthodoxy that decisions by beneficiaries, while often highly persuasive, are not binding on the Court or the trustees unless there is express provision in the trust order. The only further exception is where a trust order provides for triennial or periodic elections and the election process has been followed correctly.[14]

Discussion

Were the meetings convened in accordance with the trust order?

[16] We refer to "meetings" because strictly speaking, there are two separate but related trusts the subject of this appeal and in the proceedings in the Court below. Therefore, there had to be two separate meetings for these trusts – more so since they are governed by two separate and very different trust orders. The notice for the 24 March 2018 meeting stated that the sole agenda item was "to make application to the Māori Land Court to remove, replace and appoint trustees". It also specified that the hui was being called on behalf of "Nga Tamariki a Nuki Aldridge-Smith and Doreen May Renata". Any queries were to be dealt with by Terry Smith, according to the notice. Counsel argued that the intent of the hui was therefore obvious to the trusts' beneficiaries and that the appellant ought to have known that the purpose of the meeting was to hold an election to replace both himself and his late father as trustees.

[17] While that may have been the intent, the beneficiaries were not empowered under the trust order for the ahu whenua trust or trust law principles generally to convene any formal meeting of beneficiaries. Clause 16(a) of the trust order for the Ngā Uri o Ngāti Pakahi Trust dated 13 May 1992, provides that it is for the trustees to convene annual

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[14] See for example, Pukeroa Oruawhata Trust, Palmerston North Reserves Trust and Rotoiti 15 Trust where regular elections are held. Invariably, following due process, and in the absence of disqualifying conduct, nominees are appointed by the Court in accordance with the election outcomes. Even then, however, as *Clarke v Karaitiana* confirms, the Court is not irrevocably bound by the election results

general meetings of beneficiaries.[15] The trust order for the Nuki o Te Hapū Tahawai ki Rataroa Whānau Trust is silent on the process for convening general meetings. We see no reason why the process should not be the same, in the absence of express provisions in the trust order. In other words, it is for the trustees to convene general meetings and where they fail to do so, only then can the beneficiaries of a whānau trust seek relief from the Court. In any event, cl 16(a) is a standard provision contained in many ahu whenua and whānau trust orders. Chaos would ensue if groups of opposing beneficiaries or beneficial owners kept calling their own meetings with no recourse to the trustees, the legal owners of the land.

[18] The correct procedure for the beneficial owners to have followed, if they had concerns, as set out in the trust order, was to requisition a meeting of owners, under cl 16. This requires six beneficial owners to sign a requisition. If the trustees failed or refused to do so, then procedurally, the next step would have been for an owner to either apply for directions, per s 67 of the Act, or to seek the enforcement of obligations of trust under s 238. In this case neither path was followed.

[19] A further complication is the fact that the trust order provides that the quorum for a general meeting is a majority of the beneficial owners, which even counsel referred to as "onerous". We agree. However, until the trust order is varied per s 244 of the Act, then that is the quorum for the ahu whenua trust. Counsel accepted that a quorum was not present, further adding to the invalidity of the meeting.[16] For completeness, we note that, in any event, it does not appear that succession has been completed and so, as foreshadowed, there are, strictly speaking, no beneficial owners unless or until succession has been or will be completed. This adds yet another layer of complexity to the ownership and management of the trust.

[20] The evidence confirms that the meeting was called by the beneficial owners and not the trust, even though the Judge opined that the former were entitled to do so.[17] Their counsel acknowledged this fact in response to questions. That concession, properly made, can only result in a finding that the meeting was invalid since it was not convened in accordance with the trust order. While the beneficial owners may have legitimate grievances against the trust, they are still required to seek those remedies as set out in the trust order and the legislation. Added to the problem of the convening of the meeting was the lack of a quorum. Given that the meeting was invalid, then its outcomes are not conclusive. At best,

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15 17 Kaitaia MB 255-256 (17 KT 255-256)

16 2019 Māori Appellate Court MB 90-104 (2019 APPEAL 90-104) at 96

17 175 Taitokerau MB 257-326 (175 TTK 257-326) at 312

in accordance with the decision of this Court in *Walker - Section 1A Parish of Katikati* the minutes are simply a record of what evidence to place before the Court.[18]

[21] Having made the finding of invalidity, with the result that the order of removal must be quashed, we also consider the remaining questions posed at the beginning of this judgment, both for completeness and to provide further grounds for annulling the orders of the Court below.

Were all the trust beneficiaries given the opportunity to participate in the election?

[22] The appellant claims that the respondents limited, directly or indirectly, the ability of all trust beneficiaries to participate in the hui and the election process. He says that the beneficiaries are the uri of Nuki and Doreen Aldridge-Smith aged 18 years and above. Mr Smith argues that the respondents acted in such a manner as to actively discourage all but their generation from participating. Shannon Walker, one of the mokopuna, gave evidence supporting Mr Smith's claims, although her evidence appeared, at one point at least, to refer to a different whānau hui.[19] Put another way, the appellant says that the voting and participation was limited to the children of Nuki and Doreen Aldridge-Smith only. As foreshadowed, Mr Smith's notice of appeal dated 11 September 2018, also asserted that "proxy voting was applied inconsistently".

[23] The respondents denied these claims. Ms Tuwhare submitted that none of the mokopuna were told that they could not participate. Instead, some had simply decided that they did not wish to become involved until the disputes between their parents, the children of Nuki and Doreen Aldridge-Smith, had been resolved. According to her clients, at no time did anyone state from within the whānau that mokopuna were not able to be involved.

[24] To avoid doubt, and we distinguish between the whānau and ahu whenua trusts, as we read the trust order, we can find no exclusion of the mokopuna from participating in the business of the trust as beneficiaries. Indeed, the wording of the trust order appears to encourage a recourse to tikanga and inclusiveness. While there may have been some confusion surrounding the ability of the mokopuna to be involved in the hui and the election, the short point is that they were entitled to participate. If they did not, due to a misunderstanding or any other form of impediment, then the election of replacement trustees for the whānau cannot be considered safe.

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18 (1995) 18 Waikato Maniapoto Appellate MB 260 (18 APWM 260)

19 Affidavit of Shannon May Walker dated 14 November 2018

[25] The ahu whenua trust is a different matter. The trust order is clear that those persons entitled to participate in general meetings and the trust activities generally are the beneficial owners. This means only those persons listed on the schedule of ownership are entitled to vote and participate formally in any general meetings of the trust. As we have noted, unless succession has been completed, for present purposes, there are no beneficial owners set out on the title or memorial schedule. Regardless of that deficiency, as we have set out above, they can only be general meetings convened by the trustees or at the direction of the Court.

Can a meeting of beneficiaries 'remove' a trustee?

[26] The transcript confirms that the Judge presided over highly contested proceedings involving two trusts, each holding one land block but separate shares of Māori freehold land. It was claimed by the respondents that the appellant had failed to get re-elected which was why the appeal had been filed. Even so, it is evident that Mr Smith had not resigned and therefore could only be removed pursuant to s 240 of the Act. In the application, the ground for removal was, in each case, related to elections by beneficiaries of replacement trustees.

[27] The transcript runs to 69 pages and it records that parties simply talked with each other and, for most of the time, at each other and this was only lightly moderated by the Judge.[20] It appears no witnesses were called or sworn. There was no evidence in chief, cross-examination or re-examination. The issues were not defined, and no consideration was given to the onus of proof or the standard of proof. The transcript makes it plain that the parties did not know who had to prove what and to what standard.

[28] In addition, Mr Smith raised his objections with the Judge over the process when the case was first called.[21] He also sought an adjournment to secure a review of the current trust order. Mr Smith raised concerns over the meeting voting procedure as another reason for seeking an adjournment. He also said that some of the participants had been abusive and that an earlier meeting had descended into conflict.[22] The Judge declined his request.

[29] At one point, there was a suggestion that mediation might have been a more suitable pathway for the parties to pursue to resolve what are clearly serious issues of conflict

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20 175 Taitokerau MB 257-326 (175 TTK 257-326)
21 Ibid, at 260-261
22 Ibid, at 268-270

between these siblings. However, this option did not find favour with the majority of the parties present.

[30] There were a multitude of factual issues before the Court. Some relevant and some not relevant, but there are no findings of fact made by the Judge, apart from the comments that it was the meeting that had "removed" Mr Smith, not the Court. There is an added complication in that the relevant provisions of the Act do not appear to have been discussed. No findings were made as would be required in accordance with the principles set out in the case law cited above. There is no apparent exercise of the discretion that must be carried out if the precursors in s 240 (a) or (b) are found to be present.

[31] The Court seems to have proceeded on the basis that if a meeting of beneficiaries had decided to "remove" this appellant then that was determinative. We accept that that is relevant to an application under s 240. We do not accept that it is determinative. That the Judge took this course is well demonstrated by the passage "Well, it's not me taking them off. I am not taking them off."[23] The short point is, that unless the trust order contains provisions for the regular election of trustees, and in the absence of a formal determination per s 240 of the Act preceded by proper processes, and the absence of any tenable defence, then a vote by beneficiaries – to the extent that all beneficiaries were able to participate – cannot act to "remove" a trustee. That is the role of the Court.

[32] In response to Mr Smith's complaint that no reason had been given for his "removal" by the meeting, the result of all this was that orders were made appointing trustees and removing the appellant. As foreshadowed, the order removing the appellant was made without reference to s 240 of the Act or the tests set out in the decisions of this and other Courts cited above. Consequently, it must be annulled.

Did the appellant receive notice of the risk of removal by the Court?

[33] It is well settled that the Māori Land Court cannot make orders without proper notice to the parties directly affected by those orders, because of the fundamental principle of natural justice that any such party has a right to be heard.[24] On reviewing the record on appeal, we note that the correspondence sent to the appellant referred to a hearing to

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23 175 Taitokerau MB 257-326 (175 TTK 257-326) at 287.

24 For examples, see *Cameron – Part Maretai 3B* (1996) 19 Waikato Maniapoto Appellate MB 34 (19 APWM 34); *Karena v George – Karaka Huarua A and B* (2002) 6 Taitokerau Appellate MB 32 (6 APWH 32)

consider the replacement of trustees. We therefore accept that the appellant should have been aware that the case before the Court below would have discussed the appointment of replacement trustees.

[34] That said, it would have been preferable that the notice issued by the Registrar made it explicit that the appellant faced removal and that he should take legal advice given that risk of removal. In future, we consider it appropriate that any Registrar, when dealing with an application that could result in the removal of trustees contrary to their wishes, should ensure that the notice of the hearing must contain reference to the risk of removal, the consequences of removal – especially if the trust is over a Māori reservation - for example, a marae, urupā, wāhi tapu – and that any trustee in such circumstances is cautioned to seek legal advice.[25]

Should the order appointing replacement trustees stand?

[35] We accept the argument that some of the whānau trust beneficiaries, inadvertently or otherwise, may have been led to believe that they were not able to participate in the meeting or in the election. Therefore, there is a risk that the tests in s 222 of the Act may not have been adequately satisfied. Counsel also accepted that the ahu whenua trust hui was inquorate. While there was a reasonable participation level of the children of Nuki and Doreen Aldridge-Smith, we are concerned that the mokopuna may not have had a proper opportunity to have been involved in the election. Added to that was the apparent confusion over the method of voting by proxy and the claims that the process was applied inconsistently. For these reasons, our conclusion is that the order appointing replacement trustees cannot stand.

[36] Despite this, we also consider the status quo is untenable. A sizeable section of the beneficiary community for these trusts appear to have legitimate concerns over their administration and management. Those concerns remain extant and so it is important that the processes set out in the trust order and under the Act are followed correctly. However, rather than putting the beneficiaries to the task of requisitioning a meeting, we consider that it will be more efficient in the present circumstances if the Registrar convenes a meeting of the two trusts within three months. The agenda for that meeting should include a report from the trustees as to their administration of the trust property and consideration of the

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[25] Due to what has been considered to be a drafting error in reg 3(h) of the Māori Reservations Regulations 1994, any trustee removed by the Court from such a trust will be ineligible for reappointment.

election of additional responsible trustees. A report and the draft minutes of that meeting should then be referred to the Court below for further directions in due course. The Registrar may contract in an independent facilitator for the meeting if that is appropriate.

[37] Finally, if the respondents continue to seek the removal of the appellant, then they need to follow the correct process and file an application for removal supported by appropriate evidence and submissions.

Decision

[38] The orders appointing replacement trustees and removing the appellant are annulled.

[39] The Registrar is directed to convene a meeting of beneficiaries to consider the election of additional trustees within three months from the date of this judgment.

[40] There is no order as to costs.

Pronounced at 4.15pm on Tuesday this 26th day of March 2019.

L R Harvey (Presiding)	W W Isaac	P J Savage
JUDGE	**CHIEF JUDGE**	**JUDGE**