

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

CIV-2017-485-000218

UNDER

the Marine and Coastal Area
(Takutai Moana) Act 2011

IN THE MATTER OF

an application by HORI TURI
ELKINGTON, of Wellington, trustee of the
Ngāti Koata Trusts, for recognition orders
under the Marine and Coastal Area
(Takutai Moana) Act 2011

Minute: 2 May 2019

MINUTE (NO 2) OF CHURCHMAN J

Conflict of interest

[1] In a minute in this matter dated 11 April 2019, I drew to the parties' attention some potential conflict of interest. I expressed the view that none of these matters were such as would impact upon me managing the proceedings but invited any party with a contrary view to notify the Registry.

[2] Subsequently memoranda have been received from Hobson Pledge Trustee Limited, Rex Andrew Beer and Warren J Tuohey, all suggesting that a conflict of interest existed. The Attorney-General filed a memorandum indicating that he did not accept that any basis for recusal existed.

[3] No party has suggested that I have a conflict of interest in relation to any particular case but have suggested that the conflict relates to my management of the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) list itself.

[4] The management of the list is an administrative function. The parties who have filed memoranda in this matter have not distinguished between such an administrative function and the judicial function of adjudicating on individual cases in the list.

[5] There are presently over 200 cases in the MACA list and it is not intended (nor would it be physically possible) for the Judge in charge of the list to hear all of the cases. It is likely that the Judge in charge of the list will preside over a number of the early cases and any cases of particular legal significance but that the bulk of the cases will be heard by Judges domiciled in the registries that are most conveniently located to the subject matter of the claims.

Principles of recusal

[6] Although three memoranda requesting recusal relate to the function of managing the list, I will treat the applications as if they were governed by the more stringent legal principles applying to recusal relevant when a Judge is assigned to sit on a particular case.

[7] These principles have been developed in caselaw and are also set out in the Ministry of Justice *Guidelines for Judicial Conduct*.¹

[8] Judges have a duty to sit on cases allocated to them and the Courts have emphasised that Judges should not automatically disqualify themselves in response to a litigant's suggestion that there is an apparent lack of impartiality or whenever an objection to their sitting arises.²

[9] The three memoranda in support of recusal make it clear that they do not allege actual bias but rely on what is commonly referred to as apparent bias. The test for apparent bias is whether a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question the Judge is required to decide.³

¹ Ministry of Justice *Guidelines for Judicial Conduct* (March 2013) at [29].

² *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35 at [88]; *Deliu v The National Standards Committee* [2015] NZHC 67 at [10].

³ *Saxmere Co Ltd v Wool Board Disestablishment (No 2)* [2009] NZSC 72; [2010] 1 NZLR 35 at [3], [80], [89] and [127].

[10] In terms of apparent bias arising as a result of a Judge having previously acted for a particular client, it is generally only when the advice given by the Judge in his or her former capacity as a legal advisor is in issue in the proceedings that a reasonable apprehension of bias might arise.⁴

[11] As I made clear in my minute of 11 April 2019, I have not advised any party in relation to issues arising under the Act.

[12] In terms of the Ministry of Justice *Guidelines for Judicial Conduct*, there is no logical connection between my prior relationship with some applicants in the sense of there being a capacity to influence the Court to deviate from a course of deciding a case on its merits alone.

[13] Accordingly, there is no basis for me to resile from my duty to sit on the cases that will be allocated to me in this matter including the administration of the list.

Case management conferences

[14] A series of case management conferences will begin on 10 June 2019.

Status of interested parties

[15] The case management conferences held in 2018 involved only the applicants and the Attorney-General. Interested parties did not appear. This was primarily because of the physical constraints around some of the venues and uncertainty as to the numbers of applicants who would take the opportunity to attend the case management conferences. We now have more clarity around these issues.

[16] Should any interested parties wish to appear at any of the forthcoming case management conferences, they should promptly file memoranda applying to the Court to do so.

⁴ *Re Polites; ex parte Hoytes Corporation Pty Ltd* (1991) 100 ALR 634, High Court of Australia (joint judgment of Brennan Gaudron and McHugh JJ) at 641.

[17] Those interested parties who have no interest in attending the case management conferences are not required to do anything and do not need the leave of the Court not to appear.

Maps

[18] All documents relating to originating applications under MACA are made available to the public on the courtsfnz.govt.nz website. It was the intention of the Court that originating applications should be accompanied by a map or maps which clearly delineated the area subject to the claim.

[19] In accordance with a minute of Collins J of 21 March 2018, applicants were required to file maps by 13 April 2018.

[20] The purpose of the Court's direction in relation to the filing of maps was not that they be made available on the courtsfnz.govt.nz website, but for the purposes of the Attorney-General.

[21] There is no reason why these maps should not be included along with the other material available on the courtsfnz.govt.nz website. It may be that the maps originally filed for the purposes of the Attorney-General now in a number of cases need to be refined to reflect changes in the claims.

[22] In order to ensure that the Court is accurately informed as to the geographic areas covered by the claims and that this information be made publicly available on the courtsfnz.govt.nz website, the applicants involved in the forthcoming case management conferences are directed to file up-to-date maps by 16 May 2019. These maps will then be made available on the courtsfnz.govt.nz website. If there have been no changes to the claim, applicants can simply file a copy of their original map.

Memoranda of counsel

[23] Any applicants (and such interested parties that wish to apply to appear at the case management conferences) shall file memoranda for those conferences by 16 May 2019 with the respondents' memoranda to be filed by 23 May 2019. This will assist

the Court to identify the issues that will require attention in the June case management conferences.

Churchman J