IN THE COURT OF APPEAL OF NEW ZEALAND

CA163/03

	BETWEEN	NGATI TAHINGA & NGATI KAREWA TRUST & CLARK & OTHERS AS TRUSTEES Appellant
	AND	THE ATTORNEY-GENERAL OF NEW ZEALAND First Respondent
	AND	I H MCKINNON Second Respondent

Hearing: 15 September 2003

Coram: Tipping J
Anderson J
Glazebrook J

Appearances: J E Dorbu for Appellants
A R Burns for Respondents

Judgment: 24 September 2003

JUDGMENT OF THE COURT DELIVERED BY ANDERSON J

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[1] This is an application for special leave to appeal out of time against a judgment of the High Court at Auckland, delivered by Randerson J on 5 November 2001. In the alternative, the application seeks the recall of the judgment of this Court delivered on 27 June 2002 under CA73/02.

[2] The High Court decision declared invalid and of no effect the purported appointment as trustees of the Ngati Karewa and Ngati Tahinga Trust (the Trust) of Mr Francis Clark, Ms Nicolette Hoete, Mrs Bella Wati, Miss Karen Cooper and Mr Kingi Brown. Further, the High Court removed the validly appointed trustees

Ngaire Nicola Clark, Graham Uerata Clark and Te Warena Taua as trustees of the trust pursuant to s51 of the Trustee Act 1956 with immediate effect. The Public Trustee at Auckland was appointed by the Court as the interim trustee of the trust until further order.

[3] The historical background to the establishment of the trust and the nature of disputes in respect of its administration need not be set out extensively in this judgment. They are examined in a judgment of the High Court at Auckland, delivered by Anderson J on 4 March 1992 in the proceedings CP821/91 and M892/91; they are extensively set out in the judgment of Randerson J in respect of which special leave to appeal is now sought; and they are summarised in the judgment of this Court delivered on 27 June 2002 under CA73/02. It is sufficient to note that the administration of the trust by those who have been removed as trustees and whose appointments have been declared invalid caused sufficient concern for the Attorney-General to commence proceedings. In addition, Mr I H McKinnon, a beneficiary under the trust, has been involved in litigation now for some 12 years in order to bring the operation of the trust under the supervision of this Court and for the administration of it to be entrusted to persons other than those who support the present application.

[4] The previous application for special leave to appeal out of time was dismissed by this Court for reasons which it summarised in these terms:

> …we consider that this appeal would be hopeless and against the interests of justice.

[5] The present application is advanced, not on a basis that an appeal is other than hopeless on its merits but on the grounds of apparent bias on the part of Randerson J.

[6] An allegation of apparent bias was first raised by the appellants in the course of further proceedings before Randerson J on 14 July 2003. Since this Court dismissed the prior application for special leave Mr and Mrs Clark had sought, unsuccessfully, an application for stay of the High Court judgment and a further application for its recall under r540(6) of the High Court Rules. In the face of an

application by the Public Trustee for summary judgment against Mr and Mrs Clark for recovery of an advance to them by the trust, of $150,000, those former trustees again applied to the High Court for a stay of the judgment. It was on the hearing of that application on 14 July 2003 that Mr and Mrs Clark submitted, by counsel, that Randerson J should disqualify himself from further involvement in the proceedings by reason of a connection between himself and the Anglican Church. On 20 August 2003 Randerson J delivered a reserved decision in response to Mr and Mrs Clark's request that he disqualify himself.

[7] Randerson J notes that:

> I was surprised by Mr Dorbu's submission because I was not aware that the Anglican Church had any material involvement in the proceedings, except as a matter of historical record. The involvement of the Anglican Church had never been a matter of submission or evidence, except as part of the general background.

[8] The factual basis upon which the claim of apparent bias rests is as follows:

(1) The property of the trust, which had its genesis in a grant by chiefs of Ngati Kawea and Ngati Tahinga to the Committee of Missionaries of the Church of England in 1839, was retransferred by the New Zealand Mission Trust Board to the two subtribes as a matter of justice and honour.

(2) The New Zealand Mission Trust Board, a body associated with but separate from the Anglican Church, provided funds of up to $12,000 to the Ngä Uri O Tahinga Trust Board in April 1999 and those funds were used to advance Mr McKinnon's interests in his concerns over the administration of the trust. Those funds were exhausted at the latest by mid September 2001 and thereafter Mr McKinnon's interests were funded by legal aid.

(3) The provision of the $12,000 was facilitated by Archdeacon A I Clarke, a trustee of the New Zealand Mission Trust Board but no instructions were given by Archdeacon Clarke or any other member

of the Anglican Church hierarchy to Mr McKinnon's solicitors in connection with the proceedings.

(4) At the beginning of the substantive hearing before Randerson J Archdeacon Clarke had led the karakia. (According to an affidavit of Mr G U Clark, the Archdeacon had introduced himself to the Court and made it clear he represented the interests of the church, but this alleged fact is neither established nor likely.)

(5) Randerson J is the brother of the Rt Rev Richard Randerson, the Dean of the Auckland Cathedral and Assistant Bishop of the Anglican Diocese of Auckland.

(6) Randerson J also has connections with the Church of England in the respects set out in paras [27] and [28] of his judgment reproduced below.

[9] In his judgment of 20 August 2003, Randerson J held there was no evidence that the Rt Rev Richard Randerson had any knowledge of or involvement in the trust or of the provisions of monetary assistance in 1999 and the Judge declared that he was certainly not aware of any involvement by the Rt Rev Richard Randerson in any of the matters at issue. In connection with Archdeacon Clarke leading the karakia Randerson J stated that he had no recollection of the identity of the person who delivered the karakia or of being advised that such person was an Archdeacon or a Minister of the Anglican Church. He stated further that he had no recollection of any advice that the person leading the karakia represented the Anglican Church and said that he was sure he would have recalled the latter statement if it was made because he was absolutely clear that he was not informed at any time that the Anglican Church had any interest in the matter except historically.

[10] We think it appropriate to set out in full the following paragraphs from Randerson J's judgment:

> Now that the issue of the possible involvement of the Anglican Church in the proceedings has been raised, it is proper that I should disclose my own

> connection with the Church. I am a member of the Anglican Church and have held positions of responsibility in two local parishes of the Anglican Church in the city of Auckland. I relinquished those roles in early 2002. Since 1999, I have held positions of responsibility in the Anglican Province of Melanesia and a related body known as the New Zealand Advisory Council. The Province of Melanesia is outside New Zealand and includes the Solomon Islands and Vanuatu. The New Zealand Advisory Council acts as an intermediary between the Melanesian Church and the Melanesian Mission Trust Board which holds land in the Auckland area and other assets in trust for the Church of Melanesia. Neither the Province of Melanesia nor the New Zealand Advisory Council has any control of or influence over the Anglican Church in New Zealand.
>
> None of the roles I have had or currently have in the Anglican Church (either in New Zealand or in Melanesia) have any connection of any kind with the subject land or Trust. I was not aware of the existence of the Trust or the subject land until shortly before the hearing in October 2001. At no time have I had any role in the Diocesan hierarchy in either the Auckland Diocese or the Waikato Diocese. It is the latter Diocese in which I understand the subject lands are to be found.

[11] We think it appropriate also to set out the Judge's conclusions on the submission made to him of apparent bias.

> I have concluded, having ascertained the relevant circumstances, that at least until the issue was raised for the first time on 14 July 2003, there was no real danger of bias or real possibility of bias in the sense that the court might have unfairly regarded with favour or disfavour, the case of a party on the issues under consideration. I reach that conclusion for these principal reasons:
>
> a) Neither the Anglican Church nor any of its related institutions are parties to these proceedings. The involvement of the Church or any of its associated Boards or institutions was and is entirely peripheral to the issues before the court.
>
> b) Apart from the historical involvement of the New Zealand Mission Trust Board in 1985/1986 when the subject lands were returned to the newly established Trust, the only evidence of any other involvement of the Anglican Church or any of its associated bodies was in the provision of legal costs in 1999, some lobbying of a politician by Archdeacon Clarke, and some assistance by him in preparation for Mr McKinnon's meetings with his solicitors.
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> c) By the time I became aware of these proceedings shortly before the hearing in October 2001, the funds provided in the way described were exhausted and the McKinnon interests were funded by legal aid.
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> d) Neither Mr nor Mrs Clark considered at the time of Mr McKinnon's affidavit of April 2000 that the involvement of the Anglican Church in providing funds to the McKinnon interests was a material issue.

e) There has never been any prospect that the Anglican Church or any of its institutions would or could gain anything from the proceedings other than seeing that the Trust was duly administered. That was the concern of the Attorney-General who had the principal carriage of the proceedings in the execution of her statutory duties to supervise such trusts. The proceedings later issued by Mr McKinnon did not seek any relief additional to that sought in the proceedings already issued by the Attorney-General other than in respect of the loans made to Mr and Mrs Clark.

f) I had no prior knowledge of the subject lands or Trust. I did not at the time of the substantive hearing and still do not have any control or influence over the Anglican Church in New Zealand, its associate bodies, or anyone involved in its organisation, other than as a member of it in common with thousands of others and in my local Parish in Auckland which has no connection with the issues in these proceedings. Nor am I influenced by the Church or any member of it in relation to this or any other proceeding.

g) There is no evidence that the Rt Rev. Richard Randerson has had any part in the Church's dealings with the Trust. The issue of my family relationship with him was not raised before me at any time before 14 July 2003. Nor was any prior reference made to the Anglican Church in the course of the many hearings before me, except as part of the historic background.

h) While it is just possible that I may have read the reference to funding in the prior interlocutory affidavit at the time of the substantive hearing, I have no recollection of having done so and I would undoubtedly have pursued the issue if I had considered it to be material. I certainly had no knowledge of the matters deposed to by Archdeacon Clarke in his recent affidavit until it was received.

I conclude that there was nothing at the time of the hearing in October 2001 or at any time up to the issue being raised on 14 July 2003 which, considered objectively with knowledge of all the material facts, would give rise to a real danger of bias or a real possibility of bias in the sense described in the cases. As I was ignorant of the possibility of any disqualifying interest, no-one could reasonably suggest that the court could be affected, consciously or otherwise, by something of which it was not aware. There was nothing raised by counsel or the parties or by the facts known to me up to 14 July this year which raised any question in my mind about the propriety of my determining the case.

However, now that the issue has been raised and the facts not previously known to me have come to light, I have given anxious consideration to whether I should continue to determine the outstanding issues in this matter. I am conscious that disqualifying myself will inevitably pass the burden of this case to one of my colleagues. I also accept that it is not the view of the parties to the case which is determinative but the view of the court which is significant, considered on an objective and fair-minded basis. While I do not entertain any doubt about my ability to continue to determine the issues on an objective basis without fear or favour, I have concluded that I should disqualify myself from further involvement. I do so not out of any conviction that there is or could be any appreciable perception of bias, but

> out of an abundance of caution and to eliminate any possibility of or potential for a perception that justice may not be seen to be done in relation to the issues yet to be determined, however remote that possibility may be.

Applicants' arguments

[12] Leaving aside for the time being counsel's examination of the legal principles, we summarise his argument as follows:

(1) Randerson J's links with the Anglican Church automatically disqualify him from sitting on the case; but having sat on it his judgment ought be set aside because he was effectively a Judge in his own cause, contrary to the ancient principle expressed in the maxim *nemo iudex in causa sua*.

(2) That principle operates to invalidate the decision notwithstanding that the appellants make no suggestion that Randerson J was actually biased.

(3) An assertion of impartiality in fact cannot, for reasons concerned with the appearance and integrity of justice, displace an appearance of bias.

(4) The Judge's own links with the Anglican Church disclosed by him in his judgment of 20 August 2003, were not known to the appellants at the time of their previous application for special leave to appeal.

(5) Such links exemplify a sufficient personal association with the interests whose cause he was adjudicating upon as to render him a Judge in his own cause.

(6) The Judge's failure to disclose his personal associations with the church was itself a procedural impropriety warranting the setting aside of his judgment.

Submissions in opposition to application

[13] Mr Burns emphasised that Randerson J has now disqualified himself only out of an abundance of caution. Further, the Anglican Church was not a party to the proceedings either in the technical sense of a person being served with proceedings (Judicature Act 1908 s2) or any wider sense of having any financial or proprietorial interest in any particular outcome of the litigation. It was submitted that assertions by Mrs Clark of a wider interest were without evidential basis. All that occurred was that a trust board associated with the Anglican Church provided some financial assistance to Mr McKinnon in connection with the proceedings more than two years before the substantive hearing.

[14] Justice Randerson had no recollection at the time of the hearing of the church having provided funding, as he states in his judgment at para [14], and the involvement of the church and related entities was entirely peripheral. In counsel's submission there was never any prospect that the church or its institutions would or could gain anything other than the trust being properly administered.

Discussion

[15] In *Erris Promotions Ltd & Ors v Commissioner of Inland Revenue* CA68/03 24 July 2003, this Court suggested, in relation to apparent bias, a revised test which gives full weight to the requirements of public perception and objectivity, as well as being capable of straight-forward application. The suggested test was:

> Would the reasonable, informed observer think that the impartiality of the adjudicator might be/might have been affected?

[16] In raising that test for discussion this Court had regard to the shift that has occurred in English jurisprudence to a specifically objective approach, more consonant with the jurisprudence of Australia and other Commonwealth countries and of Europe.

[17] We think it expedient to evaluate the applicants' case in terms of the suggested test which has a lower threshold than a test posited in terms of "real

danger" or "real risk". We do so because even by the lesser test leave to appeal is not justified and we should not want the unsuccessful applicants in this persistent and acrimonious dispute to think, at some later time, that their application failed by reference to a criterion which may subsequently have changed.

[18] The reasonable informed observer would know that the subject matter of the proceedings was a dispute about the due administration of a charitable trust established substantially for the benefit of those who whakapapa to Ngati Tahinga and Ngati Karewa; that on one side of the dispute was the Attorney-General whose constitutional responsibilities include oversight of charitable trusts, and also beneficiaries represented by Mr McKinnon, while on the other side were trustees or purported trustees whose proper interests could only be the due administration of the trust for the benefit of beneficiaries. The reasonable informed observer would also know that a trust board associated with the Church of England had provided some limited financial assistance to Mr McKinnon but this had been exhausted two years or more before the hearing. Archdeacon Clarke appeared to be taking some interest in the proceedings but in a personal rather than an ecclesiastical capacity. That observer would also know that the trial Judge had those family and church connections which have been indicated earlier in this judgment.

[19] The reasonable informed observer would also know that the interests of the Anglican Church could not be affected in the least by the outcome of the litigation nor in the event was.

[20] Since the test we are applying is retrospective to the trial, the question is whether the reasonable informed observer would think that the impartiality of Randerson J might have been affected. We think it perfectly plain that the reasonable informed observer would not think so.

[21] At the very least the relevant question is not sufficiently arguable to justify the grant of leave in a case which is still manifestly hopeless on its merits. The application for special leave and for recall of our earlier judgment are each accordingly dismissed, with costs to the Attorney-General against the applicants in their personal capacity in the sum of $3,000 together with the reasonable

disbursements as fixed by the Registrar, including travelling expenses of counsel for the Attorney-General.

Solicitors:
Crown Solicitors, Auckland