

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

**CIV-2010-404-005092**

**UNDER** the Judicature Amendment Act  
1972 and Part 30 of the High Court Rules

BETWEEN:

**NEW ZEALAND CLIMATE SCIENCE  
EDUCATION TRUST**

Applicant

A N D:

**NATIONAL INSTITUTE OF WATER AND  
ATMOSPHERIC RESEARCH LIMITED**

Respondent

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**SECOND MEMORANDUM OF SOLICITOR FOR PLAINTIFF IN  
RELATION TO COSTS**

**Dated**

**2012**

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**B E Brill**  
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## May it please the Court

1. The defendant has filed a memorandum concerning costs in which it argues (inter alia) for a substantial uplift above normal scale and seeks non-party costs against two individuals associated with the plaintiff. In response, the plaintiff has filed a memorandum opposing the defendant's requests and submitting (inter alia) that costs ought to be waived or reduced in recognition of 'the watchdog principle' applicable to public interest litigation.
2. It has recently come to the attention of the plaintiff that Your Honour was described in *Muir v Commissioner of Inland Revenue* [2007] NZCA 334 at [26] as " a shareholder and director of Tahakopa Forest Trust Ltd " which is described at [29][5] as a "non-trading entity which holds the land on which the forest is planted on behalf of all investors".
3. The plaintiff understands (in consequence of searches of public records) that: (a) Tahakopa Forest Trust Limited ("TFTL") is registered to receive New Zealand Units ("NZUs") under the Emissions Trading Scheme established by the Climate Change Response Act 2002; and (b) Your Honour is no longer a shareholder or director of TFTL. However, the plaintiff is unable to ascertain from public records whether Your Honour currently retains a beneficial interest in TFTL and/or its entitlements to NZUs.
4. The plaintiff has argued that government policies in relation to climate change are predicated upon NIWA's projections of future New Zealand warming which are in turn reliant upon the Seven-station Series ("7SS"). This reasoning is at the basis of the plaintiff's case that the 7SS "has major public consequences" (see Chapter 9 of Exhibit A68 and Section G of the Synopsis of Submissions of the Plaintiff ).

5. The Court of Appeal in *Muir* said at [62]

“In our view, the correct enquiry is a two stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair- minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case.”

6. The plaintiff believes a fair-minded lay observer could well apprehend that a judge with a material pecuniary interest in the future of climate change policy might not bring an impartial mind to the resolution of the instant case.

7. Before addressing that question, however, the plaintiff needs to ascertain the factual detail of Your Honour’s direct and indirect pecuniary interests (if any) under the Emissions Trading Scheme. These are matters within the peculiar knowledge of Your Honour. It appears from the judgments in *Saxmere Company Limited v Wool Board* [2009] NZSC 72 that the appropriate procedure is to invite your Honour to disclose the relevant information by way of a minute (see, in particular, the comments of Blanchard J at [33] and Tipping J at [48]).

8. Your Honour is requested to respond to the following questions:

(a) Does Your Honour (or any member of Your Honour’s immediate family) currently retain any beneficial interest, or the right to acquire an interest, in:

(i) TFTL or any future profits derived by TFTL; or

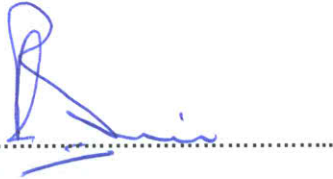
(ii) any asset owned (whether in whole or part) by TFTL or any future profits derived from such an asset? and

(iii) if so, what is the nature and quantum of such interest?

(b) Is Your Honour aware of any other facts related to forestry interests which might give rise to an inference of bias under the test described in the *Saxmere* case?

9. Upon receipt of the requested information, it will be incumbent upon the plaintiff and its advisers to carefully consider the appropriateness of an application for Your Honour to recuse himself from further consideration of the outstanding costs issues.

DATED                      2012



Barry Brill

Solicitor for the plaintiff