

**IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT**

A20120013588

UNDER Sections 17, 18, 19(1)(a) and 20 of Te Ture
Whenua Māori Act 1993

IN THE MATTER OF The W T Nicholls Trust

BETWEEN MARK STEVE NICHOLLS, AIRINI
PIRIHIRA TUKERANGI, DELACE WILLIAM
JAMES, KAHUTOROA MATAIA
TUKERANGI, VIV TAMA NICHOLLS,
ANITA MARI NORMAN and SARACH JANE
NICHOLLS as trustees of the W T NICHOLLS
TRUST
Applicants

AND GEORGE TAMA NICHOLLS, WILLIAM
OHOMAURI DANIEL (TANIORA) POMANA
NICHOLLS, ZENA LYNDA NICHOLLS,
CHERIE POVEY, AROHAINA POVEY
Respondents

Judgment: 9 June 2014

DECISION OF JUDGE C T COXHEAD

Introduction

[1] On 24 October 2012 the applicants filed an application seeking the following orders:

- (a) An order pursuant to s 18(1)(a) and 20(d) granting recovery of the Oamaru Bay land by way of the return of control and possession of the Oamaru Bay land to the Trustees of the Trust;
- (b) An order pursuant to s19(1)(a) that the Respondent and their invitees are trespassing and are not to occupy the Oamaru Bay land;
- (c) An order pursuant to s 19(1)(b) permanently restraining the Respondents and their invitees from entering using or dealing with the Oamaru Bay land without the consent of the Trustees; and
- (d) An order pursuant to s 19(1)(d) for the recovery of rental received by the Respondents for the caravan sites, income from the camping ground and dwelling sites.

[2] On 21 December 2012 in an oral judgment I made orders per s 19(1)(a) granting the injunction against all the respondents preventing them from entering or occupying the Oamarau Bay lands including the camping ground. I also made an order per s 20(d) for recovery to the trustee of the Oamaru lands occupied by the respondents.

[3] In that judgment I also made the following directions to all respondents involved in this matter:¹

54. With regard to the orders sought for recovery of rental income that the respondents have received and mesne profits, the Court is hindered in coming to a view due to the lack of information that it currently has. I therefore direct that the respondents are to provide documentation so that the Court can ascertain what rental has in fact been received by the respondents from the caravan owners; what number of sites have in fact been occupied; what income has been received for the

¹ 50 Waikato-Maniapoto MB 10 (50 WMN 10).

flats, cabins and tent sites; and what arrangements the respondents have made for the payment of tax obligations i[f] any. This is to be provided within 30 days.

55. Once this information is received I will inform the parties as to the next step.

[4] Compliance with these directions was delayed as the substantive matter was subsequently appealed. The Māori Appellate Court has now dismissed that appeal.²

[5] On 1 November 2013 I held a teleconference with the parties concerning the progress of compliance with my earlier directions. Mr Kahukiwa raised jurisdictional issues in relation to the ability of the Court to make orders sought in terms of the recovery of rental and mesne profits. Mr Williams stated that all the documentation requested in the direction was readily available from Hauraki Taxation Services. I granted the respondents 30 days from 1 November 2013 to provide the documentation requested.³ I indicated that the issue of jurisdiction would be considered further once the requested documentation had been provided to the Court.

[6] On 3 December 2013 counsel for Mr George Nicholls, filed a memorandum and affidavit with an annexure. The information provided to the Court consisted of a one page spreadsheet with handwritten figures beside each category of expenditure. Unsubstantiated figures were provided for total income received from caravans, cabins and the campground and expenditure for the 2010 - 2011, 2011 – 2012 and 2012 – 2013 years.

[7] The applicants filed a memorandum dated 5 December 2013 requesting that the Court of its own initiative make an order pursuant to r 6.18(1)(b) and (c) of the Māori Land Court Rules 2011 requiring:

- (a) The production by the Bank of New Zealand Limited, of all bank statements for the accounts in the name of the Oamaru Bay Holiday Park and the Oamaru Bay Family Holiday Park, listed in “A” and “B” and relating to Eftpos income at “E”; and

² The appeal was dismissed at [2013] Māori Appellate Court MB 515 (2013 APPEAL 515) written reasons for dismissal were issued on 3 October 2013 at [2013] Māori Appellate Court MB 598 (2013 APPEAL 598).

³ 67 Waikato Maniapoto MB 170 (67 WMN 170).

- (b) The production by the Hauraki Taxation Service Limited of any documents which Mr George Nicholls has provided to them for the preparation of accounts for the Oamaru Bay Holiday Park, and the Oamaru Bay Family Holiday Park business and Mr George Nicholls personally.

[8] “A” is a memorandum by Tewi Nicholls and William Nicholls dated 10 March 2008 to caravan owners. “B” is a memorandum in the name of “your host George Nicholls” dated 12 March 2011 to caravan owners outlining the 2011-2012 Annual Caravan Fee Structure and payment options. Annexure “E” is an extract from the affidavit of Mr George Nicholls dated 6 March 2013 relating to his application for stay orders.

The issue for determination

[9] The issue is whether the Court can require the Bank of New Zealand Limited, and the Hauraki Taxation Services Limited to provide the information requested by the applicant.

Applicants’ submissions

[10] The applicants submit that, in summary:

- (a) The documentation submitted by Mr George Nicholls in his affidavit of 2 December 2013 is entirely unsatisfactory and contradicts earlier evidence he has presented to the Māori Land Court and Māori Appellate Court;
- (b) Further, none of the other respondents in this matter and in particular William Nicholls has provided any information to the Court either within the 30 days from the original direction of 21 December 2012 or by 2 December 2013;
- (c) The Court needs the information requested in order to assess whether or not it has jurisdiction to make orders and give directions regarding the recovery of rental and mesne profits. Rule 6.18 provides the Court with clear jurisdiction;

- (d) The memorandum signed by Mr Tewi Nicholls and William Nicholls dated 10 March 2008, to caravan owners, along with the memorandum in the name of “Your Host, George Nicholls” dated 12 March 2011 to caravan owners establish that the bank statements of the Oamaru Bay Holiday Park and the Oamaru Bay Family Holiday Park are in the possession of the Bank of New Zealand Limited;
- (e) It is clear from Māori Land Court transcription of 17 October 2012, the Māori Appellate Court hearing transcript of 10 September 2013 and relevant pages from the affidavit of George Nicholls dated 6 March 2013 that George Nicholls’s financial statements which include information pertaining to rental income and accounts for the Oamaru Bay Family Holiday Park are in the possession of the Hauraki Taxation Service Limited;
- (f) While Oamaru Holiday Park and Oamaru Bay Family Holiday Park are not separate legal entities in themselves and are not named as respondents in these proceedings, it is clear that these accounts are run and operated by the respondents and in particular George and William Nicholls.

Respondent’s submissions

[11] The only respondent to reply is Mr George Tama Nicholls. He opposes the applicants’ request for further information on the basis that:

- (a) the Court lacks jurisdiction to compel the respondent to deliver up the documents; and
- (b) the receipt of rental information already provided to the Court is satisfactory in meeting the Court’s request, in that it is, consistent with the quality and standard of evidence given in relation to financial information by the applicants and it is attested to by this respondent.

[12] In terms of jurisdiction the respondent submits that the Court has no jurisdiction in these circumstances to compel the respondents to provide the additional information upon the grounds that:

- (a) The Court does not have an inherent jurisdiction to call upon the respondents to comply with the Court's request in this case, as the respondent is not an appointed trustee for the purposes of Part 12 of Te Ture Whenua Māori Act 1993;
- (b) The substantive orders were made per ss 19 and 20 of the Act. Those sections do not consequentially empower the Court to pursue rental monies or any accounting for them, or again to meet the Court's request in this case;
- (c) In relation to the substantive orders, the Court is now functus officio and in any event lacks any necessary enforcement powers; and
- (d) There is no "actual" provision in the Act or the Māori Land Court Rules 2011, to assist the Court to make the requested orders.

Discussion

[13] This Court has a broad discretion as to how it conducts its hearings. Pursuant to s 69(2) of Te Ture Whenua Māori Act 1993 the Court may:

(2) ... itself cause such inquiries to be made, call such witnesses (including expert witnesses), **and seek and receive such evidence**, as it considers may assist it to deal effectively with the matters before it, but shall ensure that the parties are kept fully informed of all such matters and, where appropriate, given an opportunity to reply. (emphasis added)

[14] Rule 6.18 of the Māori Land Court Rules 2011 further provides that:

- (1) The Court may, on the application of any party to an application or on its own initiative, if it considers that further evidence is reasonably necessary for the proper exercise of its jurisdiction, make orders or give directions requiring—
 - (a) the giving of additional evidence:
 - (b) the production of any document for inspection:
 - (c) the production of copies of entries in any ledgers or books of account.

[15] In *Hammond v Whangawehi* the Māori Appellate Court examined the role of the Court and its jurisdiction and stated:⁴

[32] ... The Act contemplates that the Court is to have an active role in hearings before it. Section 66 of the Act makes it clear that the Court has a broad discretion as to how it conducts its hearings, provided that they are “conducted in a proper manner.” Section 69(2) of the Act gives the Court special powers to “... cause such inquiries to be made, call such witnesses (including expert witnesses), and seek and receive such evidence...” as may assist the Court. That is, it has an inquisitorial role. In our view the Court is entitled to ask relevant questions of those who come before it. The nature of the Court’s jurisdiction and the parties that come before it are such that the presiding Judge is often required to question witnesses where parties are not represented, or where there is no other party or where the issues before the Court simply require it. It must be remembered that, while the Court has one eye on the parties before it (who may often be in agreement), it will always have its other eye on its statutory jurisdiction (in particular the principles, intentions and objects of the Act as contained in the preamble to the Act and sections 2 and 17) and the interests of those with contingent interests who, in accordance with the preamble and section 2, include the whānau, hapū and descendants of the owners.

[16] It is apparent that the Māori Land Court has the broad jurisdiction to seek and receive such evidence as will assist the Court in its proceedings.

[17] Neither s 69 of the Act or r 6.18 expressly restricts the type of information that can be sought nor do those provisions restrict the persons or parties from whom that information can be sought.

[18] The Court also has the ability to issue a witness summons requiring the person named in the summons to attend the hearing of the application to give oral evidence or to produce any document in that person's possession or control per r 6.22 of the Māori Land Court Rules 2011.

[19] I therefore find that the Court has a broad jurisdiction per s 69 of the Act to request the information sought. Alternatively the Court is also able to issue a witness summons in line with r 6.22 requiring the Bank of New Zealand Limited and Hauraki Taxation Services Limited to file evidence by way of affidavit.

⁴ (2007) 34 Gisborne Appellate MB 185 (34 APGS 185).

Issue of jurisdiction to award rental recovery or mesne profit

[20] With regards to the jurisdictional issues raised by Mr Kahukiwa in his submissions, I consider that the matter of the Court's jurisdiction to award rental recovery or mesne profit is still yet to be determined.

[21] The Court is not functus officio in relation to those parts of the application which are still live.

[22] In *R v Nakhla (No 2)* [1974] 1 NZLR 453 it was held that:

Once a judgment of the Court (which is not a nullity) has been finally recorded the Court is functus officio and its inherent power to vary its judgment is lost.

[23] I do not consider that the judgment delivered on 21 December 2012 had the effect of fully determining the application.⁵ In that judgment I clearly indicated that I would give an oral decision with regards to some of the orders being sought and I would reserve and seek further information with regards to others parts of the application.

[24] To date, no orders have been made with regards to the application for recover of rental and mesne profits have been made. As I have previously indicated:⁶

With regards to the orders sought for recovery of rental income that the respondents have received and mesne profits the Court is hindered in coming to a view due to the lack of information that it currently has.

[25] As has been noted above, the Court has a broad jurisdiction to request information. In my view that is not dependant on whether or not the Court has, or does not have, jurisdiction to provide a remedy with regards to that cause of action.

[26] In other words, the Court has the jurisdiction and power to request the information being sought, whether that be as in this case, from third parties and/or from the respondents directly.

⁵ 50 Waikato Maniapoto MB 10 (50 WMN 10).

⁶ 50 Waikato Maniapoto MB 15 (50 WMN 15).

[27] Given Mr George Nicholls evidence before the Māori Land Court on 17 October 2012, the Māori Appellate Court on 10 September 2013 and relevant pages from the affidavit of George Nicholls dated 6 March 2013 that George Nicholls's financial statements which include information pertaining to rental income and accounts for the Oamaru Bay Family Holiday Park are in the possession of the Hauraki Taxation Service Limited the information should be readily available.

Orders

[28] For the reasons above the Court will exercise its jurisdiction pursuant to s 69(2) of Te Ture Whenua Māori Act 1993 and orders as follows:

- (a) The production by the Bank of New Zealand Limited, of all bank statements for the accounts in the name of the Oamaru Bay Holiday Park and the Oamaru Bay Family Holiday Park, from 1 January 2008 (being the approximate date that the one or other of Respondents took occupancy of the Camping ground) to present; and
- (b) The production by the Hauraki Taxation Service Limited of any documents which Mr George Nicholls has provided to them for the preparation of accounts for the Oamaru Bay Holiday Park, and the Oamaru Bay Family Holiday Park business.

[29] The documentation requested is to be filed with the Māori Land Court at Hamilton by 5.00pm 9 July 2014.

[30] The Māori Land Court is to serve a copy of this decision along with orders on the Bank of New Zealand Limited and Hauraki Taxation Service Limited.

Pronounced in open Court at 10.10 am in Rotorua on the 9th day of June 2014

C T Coxhead

JUDGE