**I TE KOOTI PĪRA MĀORI O AOTEAROA**
**I TE ROHE O TE WAIARIKI**
*In the Māori Appellate Court of New Zealand*
*Waiariki District*

**A20200008432**

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| WĀHANGA<br>*Under* | Section 58, Te Ture Whenua Māori Act 1993 |
| MŌ TE TAKE<br>*In the matter of* | Lot 6 DP 34349 |
| I WAENGA I A<br>*Between* | VALENTINE NICHOLAS, NGĀTI TAI HAPŪ INCORPORATION and WHAKAUE KI MAKETU MĀORI INCORPORATION<br>Ngā kaitono pīra<br>*Appellants* |
| ME<br>*And* | THE OFFICIAL ASSIGNEE<br>Kaiurupare pīra<br>*Respondent* |

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| Nohoanga:<br>*Hearing* | 12 February 2021, 2021 Māori Appellate Court MB 127-148<br>(Heard at Rotorua) |
| Kooti:<br>*Court* | Judge M P Armstrong (Presiding)<br>Judge T M Wara<br>Judge D H Stone |
| Kanohi kitea:<br>*Appearances* | K Te Heuheu for the appellants<br>K Eastwood and S Cann for the respondent |
| Whakataunga:<br>*Judgment date* | 17 June 2021 |

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**TE WHAKATAUNGA Ā TE KOOTI PĪRA MĀORI**
*Judgment of the Māori Appellate Court*

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Copies to:
K Eastwood and S Cann, Meredith Connell, PO Box 90750, Victoria Street West, Auckland, kate.eastwood@mc.co.nz and stephanie.cann@mc.co.nz
K Te Heuheu, kellyteheuheu1@gmail.com

**He kōrero tīmatanga**
*Introduction*

[1] Maketū is an idyllic coastal settlement in the Bay of Plenty. Valentine Nicholas owned land there. Some of that land, as well as a forestry block in Ōpōtiki, was taken from him through forfeiture orders under the Criminal Proceeds (Recovery) Act 2009 (CPRA). The forestry block has since been sold by the Official Assignee to third parties. The Official Assignee still holds the Maketū land and is in the process of selling it.[1]

[2] On 18 June 2020, the Official Assignee served Valentine Nicholas with an eviction notice to move off the Maketū land so that it could be prepared for sale. On 29 July 2020, an entity called the Ngāti Tai Hapū Incorporation filed an application in the Māori Land Court for an urgent injunction to determine whether the Maketū land is General land owned by Māori. The application was heard on 13 August 2020. The Māori Land Court dismissed the application on two grounds: first, the Ngāti Tai Hapū Incorporation did not have standing to bring the application to Court and, second, the Court lacked jurisdiction to grant the injunction because the Maketū land is General land. That is the decision under appeal.

**Ngā kupu o te ture**
*Legal jargon*

[3] This case involves a number of technical legal concepts that are not often used in day to day language. Some of the concepts are not usually discussed in the Māori Land Court or this Court. Being familiar with these concepts helps to understand what has happened in the past and how we deal with this appeal. Those legal concepts, and our brief explanation of them, follow:

(a) *Standing:* In some instances, only certain people can bring applications to court. Usually, only people who have an interest in a matter can bring an application. Otherwise any person could go to court about anything. A person who can bring an application to court has *standing*, meaning they can literally stand in court. There are rules determining who has standing.

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[1] The Maketū land comprises 631, 633 and 634 Maketū Road. The initial injunction application filed in the Māori Land Court sought an injunction over 631 Maketū Road and the forestry block in Ōpōtiki. At the hearing of the injunction application in the Māori Land Court, Mr Nicholas also referred to 633 and 634 Maketū Road as being the subject of the application.

(b) *Jurisdiction:* This Court and the Māori Land Court exist through an Act of Parliament, Te Ture Whenua Māori Act 1993. That Act sets out what these courts can do. This is called *jurisdiction*. If the Act does not allow these courts to do something, it is said that the courts "lack" jurisdiction. That means the court cannot do what it is being asked to do.

(c) *Injunction:* This is an order of the Court that prevents something from happening or requires something to be done. Sometimes an injunction can be temporary, in which case it only lasts for a limited time. This is called an interim or interlocutory injunction. Sometimes an injunction can be permanent. This is called a permanent injunction.

(d) *Forfeiture:* Under the CPRA, assets can be taken by the Crown if they were obtained through criminal activity. When an asset is taken, it becomes *forfeit.* This means it has been taken by the Crown. Forfeiture is used to describe that process.

(e) *Land status:* All land in Aotearoa has a status for the purpose of the Act. There are six (6) statuses. For our purposes, the most relevant are Māori freehold land, General land owned by Māori and General land.

(f) *Discretion:* Sometimes, but not always, judges have a number of options when making their decisions. In these instances, judges can choose which option to take, or in other words, they have *discretion*. This is relevant because, on appeal, we cannot simply arrive at our own decision as to how we would have used that discretion. Instead, our role is more limited.

**Kōrero whānui**
*Background*

[4] The background to this appeal is extensive. A restraining order under the Proceeds of Crime Act 1991 was first recorded against the legal title to the Maketū land on 6 May

2010, over 11 years ago. In that time, matters concerning the forfeiture of certain sections of Valentine Nicholas' property have traversed the court system. In summary:

(a) Assets and profit forfeiture orders were first issued under the CPRA by the High Court on 17 August 2016. The Maketū land was ordered to be sold to satisfy the profit forfeiture order to meet Valentine Nicholas' debts to the Crown. The forestry block was taken under the assets forfeiture order.

(b) The High Court orders were appealed to the Court of Appeal. On 19 October 2017, the Court of Appeal dismissed the appeal over 631 and 634 Maketū Road, but allowed the appeal over 633 Maketū Road, as there was a possibility that "undue hardship" would result if it was forfeited. The matter was sent back to the High Court to consider whether the loss of 633 Maketū Road would cause undue hardship to Mr Nicholas.

(c) Between 2 November 2017 and 5 July 2018, Mr Nicholas was provided with various opportunities to set out his case for undue hardship. For whatever reason, Mr Nicholas did not do so. Accordingly, the High Court determined there was no evidence that Mr Nicholas would suffer undue hardship if the properties were forfeited.

(d) Mr Nicholas appealed this second decision of the High Court to the Court of Appeal. He sought to recall the Court of Appeal's earlier decision from 2017. On 11 March 2019, the Court of Appeal dismissed this application.

[5] During this period, various applications were heard and dismissed in the Māori Land Court.[2] As noted, the injunction application was heard and dismissed in the Māori Land Court on 13 August 2020. A Notice to Appeal that decision was filed on 8 September 2020 by Valentine Nicholas, Whakaue ki Maketū Māori Inc. and Ngāti Tai Hapū Inc. The grounds

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2 In 2017, Mr Nicholas applied to change the status of the Maketū land from general land to Māori freehold land. This application was dismissed (*Nicholas – Lot 5 DP 34349* (2017) 176 Waiariki MB 273 (176 WAR 273)). In 2020, Stewart Reuben applied to have the Chief Judge amend or cancel the High Court forfeiture orders and also appealed the earlier 2017 Māori Land Court decision to dismiss the change of status application. This application was also dismissed (*Reuben – Allotments 170-176 Parish of Manurewa* (2020) Chief Judge's MB 5 (2020 CJ 5).

for appeal were in relation to standing. On 17 November 2020, Ngāti Tai Hapū Incorporated withdrew from the appeal.

[6] Finally, in relation to this appeal, on 22 September 2020 the Official Assignee sought its dismissal without hearing pursuant to r 8.19 of the Māori Land Court Rules 2011 (the Rules), or alternatively struck out as an abuse of process. On 14 December 2020, we issued a minute declining that request with reasons to follow.

[7] Rule 8.19 allows the Māori Appellate Court to dismiss an appeal without hearing where it is clear on the face of the appeal that the Māori Appellate Court does not have jurisdiction to hear the appeal.[3] The Official Assignee sought to invoke this Rule on the basis that the Court lacks jurisdiction to grant the relief sought by the appellants in the Māori Land Court. Rule 8.19 does not refer to jurisdiction to grant the relief sought in the lower Court, rather the focus is on whether we can hear the appeal. These are two distinct matters. The Appellants satisfy the requirements of s 58 of the Act, which states that the Appellate Court has jurisdiction to hear and determine any appeal provided that the appeal is an order of the Māori Land Court, made under the Act and brought by a party to the original proceedings. We therefore determined that we have jurisdiction to hear the appeal and declined to dismiss the appeal without hearing.

[8] Nor did we strike out the appeal as an abuse of process. The starting point is that there is a right of first appeal in our jurisdiction.[4] Following the case of *Ngāti Apa v Attorney-General* as it was applied by Judge Ambler in *The Proprietors of Maraeroa C v NZ Forest Products Ltd,* we consider that a claim must continue unless it can be established that the applicants cannot succeed.[5] It was not clear on the face of the appeal that all the Appellants' argument would definitively fail. Accordingly, we declined to strike out the proceeding.

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3 Māori Land Court Rules 2011.
4 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.
5 *Ngati Apa v Attorney General* [2003] 3 NZLR 643 at [108], applied in *The Proprietors of Maraeroa C v NZ Forest Products Ltd* (2007) 121 Waikato-Maniapoto MB 258 (121 WKM 258).

**Te Ture**
*The law*

[9] We start with the law, because it frames the issues we must consider. As with most court applications, an applicant must first show that they have standing. They must also convince the court that it has jurisdiction to hear the case.

[10] Once those threshold requirements are met, an applicant who has come to the court for an injunction must convince the court that it is required. The law relating to interim injunctions is settled. To obtain such an injunction, an applicant must show that:[6]

(a) There is a serious question to be tried.

(b) The balance of convenience is in the applicant's favour.

(c) The overall justice of the case supports an injunction being granted.

[11] Whether to grant an injunction involves the exercise of a discretion. On appeal, we are not required to consider the case afresh and arrive at our own decision about how we would have exercised the discretion. We have a more limited role. We can only intervene if we are satisfied that the Māori Land Court acted on an error of law or a wrong principle, failed to take into account a relevant consideration, took into account an irrelevant consideration or was plainly wrong.[7]

**Te take**
*The issue*

[12] The question is whether the Māori Land Court made a mistake in declining to grant an injunction to stop the Official Assignee from selling the Maketū land. In answering this question, we must consider:

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6 *Hettig v ANZ Bank of New Zealand Ltd – Lot 1 Deposited Plan 158328* (2014) 93 Taitokerau MB 238 (93 TTK 238). See also *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129.

7 *Nikora v Te Uru Taumata Trust* [2020] Māori Appellate Court MB 248 (2020 APPEAL 248); *Hohepa v Banks – Waima C30A* [2019] Māori Appellate Court MB 629 (2019 APPEAL 629) and *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

(a) whether Ngāti Tai Hapū Incorporated had standing to bring the injunction application; and

(b) whether the Māori Land Court had jurisdiction to issue the injunction.

**Ngā kōrero a ngā kaipīra**
*Submissions for the appellants*

[13] The appellants make the following arguments:

(a) The Maketū land was previously Māori freehold land. However, through the operation of the Māori Affairs Act 1953 and its various amendments, the Maketū land was converted to General land without the consent of its owners. This has resulted in serious harm and grief. The Maketū land should in fact be Māori freehold land.

(b) It is unlawful and a breach of human rights and the Bill of Rights Act 1990 that the Criminal Proceeds (Recovery) Act 2009 permits the forfeiture of land when no criminal conviction is entered. Mr Nicholas has not been convicted of the charges on which the forfeiture orders are based.

(c) The Maketū land is culturally significant to the whānau who reside there. Losing this whenua will create trauma, grief and harm to the whānau. Land owned by Māori should not be liable to forfeiture.

(d) Ngāti Tai is the hapū with mana whenua in the area. The hapū has historical and cultural associations with the area. The Ngāti Tai Hapū Incorporation represents the hapū and is therefore a "person interested" for the purposes of s 19 of the Act.

(e) The injunction was sought under ss 19(1)(a), (b) and (d) of the Act.

**Ngā kōrero a te kaiurupare**
*Submissions for the respondent*

[14] The Official Assignee makes the following submissions:

(a) The Māori Land Court was correct to dismiss the injunction application because the applicant, Ngāti Tai Hapū Incorporated, did not have standing.

(b) On appeal, additional parties are named as appellants (Mr Nicholas himself and Whakaue ki Maketū Māori Incorporation) and Ngāti Tai Hapū Incorporated has withdrawn from the appeal. Whakaue ki Maketū Māori Incorporation does not have standing to apply for an injunction or bring the appeal.

(c) The Māori Land Court does not have jurisdiction to grant the injunction. The Maketū land is General land and the Court cannot issue injunctions over General land that is now owned by the Official Assignee. Nor is there a substantive proceeding before the Māori Land Court to support an interim injunction.

[15] The Official Assignee further submits that, even if the threshold issues of standing and jurisdiction are satisfied, the injunction should not be granted because:

(a) There is no serious question to be tried. Mr Nicholas' remedies, if he has any, lie with the civil courts, not the Māori Land Court.

(b) The balance of convenience favours the injunction being declined. The Maketū land is now General land. Although it was General land owned by Māori prior to the forfeiture orders being made, the Court's powers over General land owned by Māori do not apply in this case. Further, the alternative remedies available to Mr Nicholas (if any remain) further tip the balance of convenience in favour of declining the injunction.

(c) The overall justice of the case does not support the grant of an injunction. The proceedings are an abuse of process because they represent a collateral attack on the High Court forfeiture orders. Mr Nicholas' own conduct, particularly in failing to submit evidence to the High Court on whether forfeiture of 633 Maketū Road would cause him undue hardship, counts against the injunction being granted. The grant of an injunction would also

be prejudicial to the Official Assignee and, in relation to the forestry block, third parties.

**Kōrerorero**
*Discussion*

*Did Ngāti Tai Hapū Incorporated have standing to seek the injunction?*

[16] The injunction application was filed by Ngāti Tai Hapū Incorporated on behalf of others. An injunction may be sought by any person interested. Ngāti Tai Hapū Incorporated is neither an owner nor a former owner of the Maketū lands. Its legal status is unclear, although it certainly is not an entity constituted under the Act. The application did not set out Ngāti Tai Hapū Incorporated's interest in the Maketū lands. In this context, the Māori Land Court said this entity did not have standing to bring the application. We see no error in this aspect of the decision.

[17] It is not clear on whose behalf Ngāti Tai Hapū Incorporated was acting. It is also not clear why the injunction application was not filed by Mr Nicholas himself. At the hearing, he confirmed that the application was for himself.[8] Mr Nicholas clearly is a person interested. He is the former owner of the Maketū lands and has lost them through forfeiture to the Crown. In principle, Mr Nicholas had standing to bring the injunction application.

[18] The problem for Mr Nicholas is that the application was not filed in his name. Although at the hearing he said that he sought the injunction himself, he also confirmed that he was speaking for Ngāti Tai Hapū Incorporated. In this context, it was understandable that the Māori Land Court proceeded on the basis that Ngāti Tai Hapū Incorporated was the applicant. We find no reviewable error in this approach.

*Did the Māori Land Court have jurisdiction to grant the injunction?*

[19] Even if Mr Nicholas had followed the proper procedure to apply for an injunction himself, the Court did not have jurisdiction to grant it. That is because the land in question is General land. An injunction may be granted over General land in certain circumstances.[9]

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8 238 Waiariki MB 188-195 (238 WAR 195).
9 *Hettig v ANZ Bank of New Zealand Ltd – Lot 1 Deposited Plan 158328*, above n 4 at [43] – [46].

For reasons outlined below, we do not think this is one of them. No substantive proceeding was pending before the court or the Chief Judge.[10] Nor did the application clearly articulate why an injunction over General land could be maintained in this instance. Mr Nicholas did not provide this explanation at the hearing, other than to argue that the status of the land needed to be established first. The Judge in the Māori Land Court was not convinced of the response. His Honour did not make a reviewable mistake here either.

[20] At the hearing of this appeal, the appellants made heartfelt submissions about the fairness of the Maketū lands being forfeited to the Crown, particularly when no criminal conviction has been entered against Mr Nicholas. It is evident from the number of people who attended the hearing in support of the appeal that a significant section of the Maketū community shares these concerns. We acknowledge these submissions. However, those are matters that neither this Court nor the Māori Land Court can resolve. They are not within our jurisdiction.

**Whakataunga**
*Decision*

[21] The appeal is dismissed.

[22] The Māori Land Court reserved the question of costs and sought submissions from the parties. The case on appeal indicates that on 25 August 2020 the Official Assignee sought costs of $16,000, being 80% of his actual costs. It does not appear that the applicants in the injunction application provided a response. The applicant before the Māori Land Court is not a party to this appeal, so we cannot determine the issue of costs before the Māori Land Court. That matter is referred back to the Māori Land Court for determination.

[23] Costs would ordinarily be awarded in favour of the successful party on appeal. The Official Assignee has sought an award of costs for the appeal, again of 80% of his actual costs. We do not know the Official Assignee's actual appeal costs. We therefore make the following directions:

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[10] The injunction application referred to proceedings pending before Criminal Cases Review Commission. However, s 19(1)(b) requires proceedings to be pending before the court (in this context meaning both the Māori Land Court and the Māori Appellate Court) or the Chief Judge.

(a) The Official Assignee is to file a memorandum on costs for the appeal within 7 days of the date of this judgment.

(b) The appellants are to provide a response within 14 days of receipt of the costs memorandum to be filed by the Official Assignee.

I whakapuaki i te 4.00 pm i Te Whānganui a Tara, tekau mā whitu o ngā rā o Pipiri i te tau 2021.

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| M P Armstrong | T M Wara | D H Stone |
| **JUDGE** | **JUDGE** | **JUDGE** |