IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20130001428
A20130005882

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	an appeal against orders of the Māori Land Court made on 21 December 2012 at 50 Waikato Maniapoto MB 10-16 and on 30 April 2013 at 55 Waikato Maniapoto MB 288-306 in respect of Part Papaaroha 6B Block
BETWEEN	GEORGE TAMA NICHOLLS Appellant
AND	MARK STEVENS, AIRINI PIRIHIRIA TUKERANGI, DELACE WILLIAM JAMES, KAHUTOROA MATAIA TUKERANGI, VIV TAMA NICHOLLS, ANITA MARI NORMAN and SARAH JANE NICHOLLS as Trustees of the W T Nicholls Trust Respondent

Hearing:	29 - 30 July 2013, 2013 Māori Appellate Court MB 289-429 10 September 2013, 2013 Māori Appellate Court MB 435-513 (Heard at Hamilton)
Court:	Deputy Chief Judge C L Fox (presiding) Judge S F Reeves Judge M J Doogan
Appearances:	Mr Kahukiwa and Ms Takitimu for the appellant Mr Wackrow and Ms Gray for the respondent
Judgment:	22 November 2013

REASONS FOR JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] On 21 December 2012 Judge Coxhead issued an injunction against Mr George Tama Nicholls.[1] The injunction restrained Mr Nicholls (and others) from entering or occupying certain lands at Oamaru Bay without the consent of the Trustees. Judge Coxhead also issued an order in favour of the Trustees for recovery of the lands and the commercial campground that had been occupied by Mr Nicholls, members of his family and associates. Mr Nicholls appeals those orders and additional orders made by Judge Coxhead during the hearing of the matter on 19 and 20 December 2012,[2] the effect of which was to deny Mr Nicholls the opportunity to present evidence in person.

[2] Judge Coxhead subsequently declined an application by Mr Nicholls for a stay in respect of the injunction. Mr Nicholls appeals that decision also.

[3] In response to an application by the trustees for recovery of rental income and mesne profits received by Mr Nicholls (and others) Judge Coxhead directed Mr Nicholls to provide documentation so that the Court could ascertain what rental had in fact been received from the caravan owners, what number of sites were occupied, and what income had been received from the flats, cabins, and tent sites, and what arrangements the respondents had made for tax obligations. That information was to be provided within 30 days of 21 December 2012. Mr Nicholls (and the other respondents) have not complied with that direction.

[4] We part heard the appeals on 29 and 30 July and resumed the hearing on 10 September 2013 having granted Mr Nicholls leave to adduce additional evidence.

[5] We delivered a reserved judgment on 3 October 2013 dismissing the substantive appeal (with reasons to follow) and dismissing the appeal against the stay of proceedings decision.[3] Mr Nicholls and most of the other named respondents to Judge Coxhead's original orders have remained in occupation and the trustees are now proceeding to enforce the injunction in the High Court.

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1 50 Waikato Maniapoto MB 10-16 (50 WMN 10).
2 49 Waikato Maniapoto MB 270-281 (49 WMN 270).
3 2013 Māori Appellate Court MB 515 (2013 APPEAL 515).

[6] We now deliver our reasons for dismissal of the substantive appeal. Given the circumstance we have endeavoured to do so as quickly as possible. We mean no disrespect to the industry of counsel by not canvassing all arguments raised. However, we find that the appeal can be disposed of within the confines of several key issues.

Background

[7] This unfortunate case arises from longstanding division within an extended whānau fortunate enough to receive a substantial land inheritance from their grandparents generation. That inheritance included land and dwellings, a farm at Paeroa, a farm at Coromandel, land at Koputuaki Bay, Pohukua Island and other Māori freehold land. The lands that are the subject of these proceedings are beachfront and hilltop land at Oamaru Bay and an adjacent commercial caravan park and holiday flats.[4]

[8] In 1979 the grandfather (Wiremu Tawhia Nicholls) and great uncle (Vivian Tamatehura Nicholls) of the appellant established a trust over these lands. Sometime later that trust was dissolved and the lands were distributed in equal shares among the ten children of Wiremu Tawhia Nicholls (Vivian Nicholls left no issue). The appellant is the son of one of those ten children (now deceased). The trustees who obtained injunctive relief against him are also grandchildren of Wiremu Tawhia Nicholls (from different parents).

[9] By the year 2000 significant debt had accrued against the lands due to some poor investment decisions.

[10] The following summary of events leading up to the proceedings that are the subject of this appeal is drawn from the chronology prepared by solicitors for the respondent.[5] We set out this context at some length as it is relevant to issues arising in the appeal about the nature and extent of the appellant's right to occupy once the lands were vested in trustees in 2011.

- October 2000: Owners meet and discuss an action plan to sell three estate properties in order to reduce debt. The appellant opposes

[4] Affidavit of Mark Stephen Nicholls dated 2 November 2012, Record of Appeal at page 1563, at [2].
[5] Record of Appeal at pages 55-67.

- 6 November 2000: The appellant and siblings obtained an injunction against dealings involving the lands except for the three properties.

- 19 November 2000: Majority of owners agreed to a property management agreement and appointment of an executive committee. From that time up until approximately 2008 the management committee paid rates arrears, put a manager in to run the camping ground and from that income and the lease on the Paeroa farm made some dividend payments.

- 2001-2002: Three beach front properties at Oamaru Bay have status changed from Māori freehold land to general land and are sold with settlement proceeds used to repay debt.

- August 2003: Viv Nicholls on behalf of the estate purchases "Mitchell dwelling" a property privately owned by non-whānau members on whānau land.

- December 2003: New tenants from the Mitchell dwelling were allegedly intimidated by appellant and his partner and leave. Appellant and his partner then move into Mitchell dwelling. No consent sought from management committee or other owners.

- 2004: The appellant's brother, William (Taniora) and family move into another Oamaru Bay property. No consent sought from management committee or other owners.

- 2004-2005: The appellant and others take possession of Lot 16 Oamaru Bay. Appellant's partner's daughter moves into property. No consent sought from management committee or other owners.

- Early 2008: The tenant of Lot 17 allegedly prevented from entering by appellant and others. Associates of the appellant then moved in. No consent sought from management committee or other owners.

- 28 January 2008: Lot 2 occupied by appellant and associates after allegedly preventing existing tenant entry. No consent sought from management committee or other owners.

- On or about 9 March 2008: The appellant and William Nicholls gained entry to administration block and premises of the caravan park and holiday flats. Existing operations manager evicted. Claim of assault against the appellant by that manager.

- 10 March 2008: The appellant and others send letter to caravan owners signed by Tiwi and Oho Nicholls advising caravan owners to change bank account details for payment of annual rentals.

- 10 March 2008: William Nicholls writes to tourist flats and caravan park users advising of change of management and change of account.

- 20 March 2008: Viv Nicholls and others seek injunction for trespass against appellant and others. In early April 2008 parties reached agreements and gave undertakings as to which accounts the income from the campground would be paid. The appellant (and others) have not complied with those undertakings.

- 5 October 2009: Judge Coxhead declined to grant the injunction because owners in common cannot sue in trespass. Judge Coxhead observed that the respondents had used intimidating actions to get onto the land, potentially at the expense of the WT Nicholls estate and lands. Judge Coxhead recommended that owners agree to a new administrative structure and propose that the Court facilitate a meeting of owners for that purpose. Judge Coxhead requires the undertakings of 3 April 2008 to remain in place until a new management structure is in place.

- November 2010: William Nicholls leaves the campground and George Nicholls (appellant) takes over.

- November-December 2010: The management committee give notice to caravan owners advising of correct account for payment of rentals. The appellant responds advising caravan owners that he was closing the campground and withdrawing services if caravan owners did not pay the account he nominated. Owners and members of Management Committee attend at Oamaru Bay to try and assist caravan owners who had been prevented entry. They were blocked by the appellant's partner. Police are called to assist.

- April and June 2011: Court facilitated owners meetings to discuss formation of an ahu whenua trust.

- 15 August 2011: Court establishes an ahu whenua trust on an interim basis and vests the estate lands including the Oamaru Bay lands in the respondent trustees. Trustees required to report over the following year.

- December 2011-February 2012: Correspondence from trustees to appellant (and others) requiring appellant to leave the caravan park and account for money.

- 14 March 2012: Beneficial owners meet and resolve to authorize trustees to remove appellant and others from the land.

- 30 September 2012: Rates arrears by this time $114,639. There are also difficulties servicing the Westpac debt.

- 3 October 2012: Trustees send further notice to appellant and others demanding they leave the Oamaru Bay lands.

- 17 October 2012: Review of Trust and confirmation of the Trust by the Court. Application for injunction and recovery of land filed.

[11] The subsequent procedural history is summarised in our reserved judgment of 3 October 2013 and where relevant, in more detail below.

[12] Mr Nicholls characterises his occupation of these lands as kaitiakitanga of ancestral lands that had been poorly managed and were put at risk. The trustees say that Mr Nicholls and his associates have selfishly assumed control in a hostile manner ultimately resulting in a substantial diversion of income from the estate and the trust for the sole benefit of Mr Nicholls and his immediate whānau and associates.

The Orders on Appeal

[13] The amended notice of appeal dated 15 July 2013 challenges three different orders or sets of orders made in the Court below. The first and second orders appealed are described as oral orders made respectively on 19 and 20 December 2012. They were orders of a procedural nature declining to adjourn and declining leave for Mr Nicholls to present evidence. These orders are challenged on the basis that they are said to breach the appellant's rights to natural justice and they were flawed by reason of bias and pre-determination. Whether or not these are in fact orders from which a right of appeal lies is an issue we address at Part 2 of this judgment below.

[14] The third set of orders under appeal are the orders made on 21 December 2012 by way of injunction and recovery of land. While there is some overlap with the natural justice grounds, the primary complaint in respect of these orders is error of law. A right of appeal clearly arises with respect to these orders.

[15] We turn first to the appeal against the final orders granting the injunction and the order for recovery of lands. We then turn to the natural justice and bias grounds.

Part 1: The Trespass and Possession Issue

[16] This ground of appeal challenges the substantive orders of the Court below. These were by way of injunction under s 19(1)(a) and an order for recovery of land under s 20(d) of Te Ture Whenua Māori Act 1993 ("the Act").

[17] The original notice of appeal is dated 25 January 2013. An amended notice of appeal dated 15 July 2013 was later filed. Mr Kahukiwa sought to file a further amended

notice of appeal by way of memorandum dated 3 September 2013. By then the appeal had already been part-heard and due to the proximity of the application to the final day of hearing (10 September 2013) and consequent prejudice to the respondent, leave was declined.

The Appellant's Case

[18] From counsel's submissions and the amended notice of appeal dated 15 July 2013, the key arguments for the appellant can be summarised as follows.[6]

[19] It is alleged that the Court was wrong to find that Mr Nicholls was an unlawful occupier and/or trespasser. The Court failed to have proper regard to the fact that he was a beneficial owner who had commenced residing on the land before the Trust was established;

[20] It is said that his continued occupation is consistent with the purposes of the Trust. In the absence of any order of the Court extinguishing his equity on the vesting of the lands in the trustees, the trustees' right to possession remains subject to his pre-existing rights of occupation. This is said to be a result of the true effect of s 220(2) of the Act together with related common law principles such as equitable tenancy in common;

[21] On the basis of these principles it is argued that the trustees did not have the right to eject the appellant (as the holder of an equitable interest). The trustees did not have a better right to possession than the appellant, nor did they have the right to destroy his right to possession.

[22] It is argued that the lower Court invalidly exercised jurisdiction to grant the equitable remedy of injunction without knowing whether the applicants had clean hands.

[23] Mr Kahukiwa says that the lower Court invalidly exercised jurisdiction to grant an order for recovery of land (s 20(d)) based on an erroneous finding that Mr Nicholls was a person who held no right or title. It is also alleged that the lower Court failed to apply the

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6 Amended Notice of Appeal dated 15 July 2013; Record of Appeal pages 82-90; Submissions of Counsel for the Appellant dated 30 July 2013; Submissions in Reply dated 3 September 2013.

provisions of s 17(2)(c) of the Act in that it did not consider alternative forms of resolution including segregation or partition of Mr Nicholls' equitable interests.[7]

[24] Mr Kahukiwa sees trespass as a component of both orders. He cites *Law of Torts in New Zealand* where trespass to land is defined as:[8]

> The action for trespass to land is primarily intended to protect possessory rights rather than rights of ownership. Accordingly, the person prima facie entitled to sue is the person who had possession of the land at the time of the trespass. Actual possession consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other persons. Either element alone is not sufficient; although intention to possess will usually be inferred from the physical acts that evidence control over the land.

[25] Mr Kahukiwa submits, relying on *Waugh v Sheehy*[9] and *Rangatira Forests Limited v Transit New Zealand,*[10] that a suit in trespass can only be brought by someone who has exclusive possession of the land. What is factually sufficient to constitute 'possession' as a matter of law, is dependent on the nature of the land in question.

[26] The nub of Mr Kahukiwa's argument on this issue can be found in his submission in response to Mr Wackrow's reliance on the doctrine "trespass by relation". In his reply submissions, Mr Kahukiwa says that reliance on this doctrine is misconceived. He goes on to say: [11]

> ... merely making an application to a Court for possession, in these circumstances, does not conspire to liberate his clients [the Trustees] from meeting the elementary pre-requisite of maintaining an action in trespass, which is actual possession. While this doctrine might be relevant to his clients application to recover mesne profits, that application, and indeed the entirety of his clients case can only proceed if the appellant's possession is a trespass, both in fact and in law, but both of which we say on this appeal were not proved, and were unable to be established by the lower Court at law acting correctly.

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7 Amended Notice of Appeal dated 15 July 2013, Record of Appeal pages 87-90, at [5.3].
8 S Todd (ed) *Law of Torts in New Zealand* (6th ed, Brookers Ltd Wellington, 2013) at 9.2.04.
9 *Waugh v Sheehy* [1889] VII NZLR 81 at [83].
10 *Rangatira Forests Limited v Transit New Zealand* HC Wellington CIV-2006-483-199, 22 November 2007.
11 Submissions of Counsel for the Appellant dated 3 September 2013 at [12].

[27] Mr Kahukiwa points to s 220(2) of the Act. He submits that on a vesting of land in trustees there is no extinguishment of prior equities such as those held by his client in connection with his rights as a beneficial owner already in possession of the lands.[12]

[28] Mr Kahukiwa also says that the vesting of legal title in trustees by order under s 220(2) does not confer possession on the registered proprietor in the same way as occurs in the case of a bonafide purchaser for value by virtue of ss 62, 63 and 64 of the Land Transfer Act 1962 ("the LTA"): [13]

> This is because section 220(2) of the Act expresses that the effect of a vesting order is not a conveyance for transfer of title, but a vesting of the rights held by the owners. No clearing of the title by registration, of say unregistered interests unknown to the transferee is affected.

[29] The result according to Mr Kahukiwa is that where a beneficiary of a trust is in possession of land, and exercising his equitable interest, and that land later becomes impressed with a trust, then:

(a) Provided that the possession exercised is consistent with the purpose of the trust (meaning there is no ouster), the trustee has no right to turn the beneficiary out; and

(b) Correspondingly, the mere receipt of rents by the beneficiary is no evidence of ouster and the beneficiary is the agent of the trustee for that purpose.

[30] Mr Kahukiwa distinguishes the *Eriwata v Trustees of Waitara SD s 6 and 91 Land Trust — Waitara SD s 6 and 91 Land Trust*[14] line of decisions on the basis that the beneficial owner in each of those cases had sought to enter the land to exert a right to possession when the trustees were already exercising their right of possession and had been doing so for some time.

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12 Submissions of Counsel for the Appellant dated 30 July 2013 at [51].
13 Ibid at [53.2].
14 *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust - Waitara SD s6 and 91 Land Trust* (2005) 15 Aotea Appellate MB 192 (15 WGAP 192).

The Respondent's Case

[31] Mr Wackrow for the respondents argued that when the trustees became the registered proprietors they obtained better title than that of the beneficial owners. Once the vesting order was made all of their interests were transferred to the trustees and the owners became beneficial owners under the Trust. They were no longer legal co-owners.

[32] Mr Wackrow relies on the principles set out by the Māori Appellate Court in the judgment of *Eriwata.*

[33] Mr Wackrow also relies on a number of High Court authorities in support of the proposition that it is the registered proprietors who have the right to possession. If Mr Nicholls cannot prove a lawful right to possession, then the trustees are entitled to orders for the recovery of the land.[15]

[34] He contends that the trustees were entitled to an injunction founded on actual and threatened trespass.[16] Following the vesting of the lands in the Trust Mr Nicholls and his associates have remained in unlawful occupation. This constitutes an unjustified interference of the land which is rightfully in the possession of the trustees.

[35] With regard to the entitlement to sue in terms of trespass, Mr Wackrow submits that both the elements of actual possession of the land and the exercise of control over the land to the exclusion of others are established in favour of the Trust.

[36] The trustees applied to the Court seeking the creation of the ahu whenua trust and on the creation of the Trust and the vesting of the lands the trustees became the legal owners. The application itself demonstrates an intention to possess the land. The trust deed and empowering legislation provide the trustees with the ability to exercise control of the land to the exclusion of others, including Mr Nicholls.[17]

[37] Mr Wackrow rejects Mr Kahukiwa's interpretation of s 220(2) of the Act. That section provided that a vesting order made by the Court shall take affect according to its

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15 Submissions of Counsel for the Respondents dated 29 July 2013 at [90]-[94].
16 Te Ture Whenua Māori Act 1993, s 19(1)(a).
17 Above n 15 at [96]-[106].

terms to vest land (or other assets) but subject to any lease, licence mortgage, charge or any other encumbrance to which the land may be subject at the date of the order.

[38] There being no lease, licence, mortgage or charge pertaining to Mr Nicholls occupation, Mr Wackrow focused on the definition of "encumbrance" and cited the text *Land Law in New Zealand* and cases referred to therein which define an encumbrance as: [18]

> ... any memorial on the title which interferes with any otherwise lawful use of the land by the registered proprietor, by creating a charge or interest over the land of the benefit of another.

[39] Mr Wackrow referred to the actual encumbrances which are recorded on the title and notes that the only lease or licence arrangements in relation to the Oamaru Bay land are those in favour of the caravan owners.

[40] Mr Nicholls (and others) have lodged caveats restraining the registration of dealings in respect of the lands that will need to be addressed in order for the trustees to refinance the debt to Westpac Bank. In Mr Wackrow's submission, the caveats themselves should not prevent the trustees making necessary applications to the Court in relation to the refinancing and nor should they prevent the trustees seeking orders by way of injunction and recovery of lands against Mr Nicholls.

[41] Mr Wackrow accepts that the land is vested in the trustees subject to the beneficial interests that Mr Nicholls and other owners share in the Trust. However, those equitable interests in the Trust do not amount to an equitable right to occupy the land over and above any other beneficiary of the Trust and certainly not without the consent of the trustees. Mr Wackrow submits the position is the same as in the *Eriwata* case where the Māori Appellate Court found that as a beneficial owner Ms Eriwata had no "greater or lesser right then the other beneficial owners".[19]

[42] Mr Wackrow also takes issue with the appellant's resorting to equitable principles on the basis that "he who seeks equity must do equity." Mr Wackrow points to the

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18 Ibid at [116].
19 Ibid at [118]-[124].

background to this case and submits that Mr Nicholls does not bring clean hands to the matter.[20]

[43] Mr Wackrow pointed to the indefeasibility provisions in the LTA and the principles of the Torrens system by which the registered proprietor's estate or title is paramount against interests that are not notified on the register.[21]

[44] Upon the vesting of the lands in the trustees they take fee simple title and hold the lands subject to the terms of the Trust and prior registered interests. As against the trustees, Mr Nicholls has no countervailing or superior legal entitlement that would enable him to remain in occupation without the consent of the trustees.

Discussion and Reasons for Decision

[45] Mr Kahukiwa's arguments centre upon two propositions. The first is that the indefeasibility provisions of the LTA do not defeat his client's possessory rights. This is because the trustees received title pursuant to a statutory vesting under s 220(2) of the Act. That section provides that on the constitution of a trust, the vesting order in favour of the trustees shall take effect subject to any "lease, license, mortgage, charge or other encumbrances" to which the land or assets may be subject as at the date of the vesting order.

[46] Mr Kahukiwa contended that a statutory vesting such as this was not a bona fide conveyance for value to which the indefeasibility provisions ordinarily apply.

[47] The second and related proposition is that the trustees' right to possession remains subject to his client's pre-existing right of possession.

[48] We reject both propositions. Mr Kahukiwa submits that a vesting pursuant to s 220 is not a conveyance for transfer of title but a vesting of the rights held by the owners and therefore there is no clearing of the title by registration of an unregistered interest unknown

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20 Ibid at [125]-[132].
21 Land Transfer Act 1952, ss 62-64.

to the transferee. That argument was rejected by the Supreme Court in the *Regal Castings* case:[22]

> In terms of s 62 [the fundamental purpose of the Torrens system] is to make the registered proprietor's estate (or title, as it is usually put) paramount against interests which are not notified on the register. It is, in my view, immaterial whether such an interest could have been registered...
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> [Section 62] is simply expressed and deliberately so. Except in the case of fraud, the registered proprietor takes free of all interests that are not notified. The certainty and simplicity of that proposition should not be watered down by reference to whether that interest qualifies for registration. It is the fact of non-notification which is crucial.

[49] Pursuant to s 220(2) the Māori Land Court has power to vest land and other assets in responsible trustees. The order takes effect according to its terms. In this case the order was to vest the fee simple estate in the trustees and the relevant titles reflect that. Upon registration they are subject to the indefeasibility provisions of the LTA.

[50] Section 220(5) requires the District Land Registrar to make such adjustments to the register or the provisional register as are necessary to give effect to any vesting order. That order is what occurred following the vesting order.

[51] Nothing turns upon the fact that the relevant lands in this case were vested in the trustees pursuant to s 220(2). The legal effect once the trustees become the registered proprietor is the same whether or not the lands in question might otherwise have been conveyed by way of purchase.

[52] Mr Kahukiwa relies upon the fact that his client's occupation predates the formation of the Trust. According to Mr Kahukiwa a beneficiary in such a situation, who is exercising his equitable interest in occupying the land for purposes consistent with the Trust, cannot be turned out by the trustees except in very limited circumstances. We disagree. To the extent that Mr Nicholls has an equitable interest it is no greater or lesser than that of all the other beneficial owners. The underlying principle remains that equitable interests are not carved out of a legal estate but impressed upon it.[23]

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22 *Regal Castings Ltd v Lightbody* [2008] NZSC 87, 2 NZLR 433 at [149].
23 *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 at [311].

> An absolute owner holds only the legal estate, with all the rights and incidents that attach to that estate. Where a legal owner holds property on trust for another, he has at law all the rights of an absolute owner but the beneficiary has the right to compel him to hold and use those rights which the law gives him in accordance with the obligations which equity has imposed on him by virtue of the existence of the trust. Although this right of the beneficiary constitutes an equitable estate in the property, it is engrafted on to, not carved out of, the legal estate.

[53] We find ourselves in broad agreement with Mr Wackrow that the issues in this case can largely be determined by the straightforward application of the principles set out by this Court in the *Eriwata* decision. In that case the Court found:[24]

> When trustees are appointed to an ahu whenua trust, they take legal ownership. The owners in their shares, in the schedule of owners, have beneficial or equitable ownership but do not have legal ownership, and do not have the right to manage the land or to occupy the land. Trustees are empowered and indeed required to make decisions in relation to the land and they are often hard decisions. Their power and obligation to manage the land cannot be overridden by any owner or group of owners or even the Māori Land Court, so long as the trustees are acting within their terms of trust and the general law, and it reasonably appears that they are acting for the benefit of the beneficial owners as a whole. A meeting of owners cannot override the trustees. Decisions to be taken for the land are to be the decision of the trustees. They decide who can enter and who can reside there and how the land is managed.

[54] We do not agree with Mr Kahukiwa's submission that the *Eriwata* case can be distinguished on the basis that it addressed circumstances where a dispute over a trustee's right to control occupation arose after establishment of the Trust. We referred Mr Kahukiwa to the case of *Pouto Topu A Trust* as an example where the Māori Land Court had exercised its powers to issue an injunction and order for possession in respect to occupation by owners (and others), that pre-dated the formation of the Trust itself.[25] Mr Kahukiwa did not distinguish that case or persuade us that there was a relevant error in the reasoning applied.

[55] We do not accept that Mr Nicholls has a legal or equitable interest by reason of his prior occupation which is sufficient to override or defeat the trustees' right to manage the land and control who occupies the land.

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[24] Above n 14, at [5].
[25] *Kemp - Pouto Topu A Trust* (2012) 51 Taitokerau MB 277 (51 TTK 277).

[56] Mr Wackrow argued (correctly in our view) that the circumstances of this case come within the established exception to the general principle that only a person who had possession of the land at the time of the trespass could sue.

[57] The exception known as "Trespass by Relation" provides that a person who at the time of the trespass has a right to immediate possession of the land may sue in respect of that trespass provided that before so suing the plaintiff had acquired actual possession by entry upon the land. To establish entitlement to sue under this exception a plaintiff must establish first that they were entitled to immediate possession and secondly prove entry upon the land prior to the commencement of the proceedings. The least act of entry or attempted entry is sufficient.[26]

[58] The trustees were entitled to possession from 15 August 2011. The trustees made numerous attempts to regain possession and control. They did so by telephone, by correspondence and then by entry upon the land itself to try and persuade Mr Nicholls to surrender possession of the campground and other lands that he and his associates were occupying. These matters are traversed in the affidavits that were before Judge Coxhead. The affidavit of Mark Nicholls for example refers to entry to the caravan park and flats on 7 April 2012 by trustees in an attempt to deliver a new memorandum of understanding to the caravan owners.[27]

[59] Mr Nicholls (and associates) have never occupied the camp ground or other properties pursuant to a lease or licence. Mr Nicholls (and associates) have never paid rent or rates with respect to their occupation. Mr Nicholls relies on the fact that he is a beneficial owner in the land but so are the other owners. We see nothing in the evidence concerning the nature of Mr Nicholls' prior occupation which would lead us to conclude that he retained some legal or equitable interest that would defeat or qualify the right of the trustees to decide that he (and his associates) should be required to leave the lands and account for income received from them.

[60] Upon the creation of the ahu whenua trust in August 2011 and the vesting of the property in the trustees, Mr Nicholls interests at law and equity are the same as his fellow

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[26] *Law of Torts in New Zealand* above n 8, at 9.2.04(4).

[27] Affidavit of Mark Stephen Nicholls dated 2 November 2012, Record of Appeal at page 1583, at [60]-[61].

beneficial owners. Subject to compliance with the terms of the Trust Order, the trustees have every right to control who occupies the land

[61] We conclude that the nature of Mr Nicholls' interests prior to the formation of the Trust in 2011 are not interests of the kind expressly preserved by s 220(2) which provides that the trustees receive the lands subject to any "lease, licence, mortgage, charge or other encumbrance".

[62] We also think there is force in Mr Wackrow's submission that he who seeks equity must do equity and that Mr Nicholls lacks the necessary "clean hands". We note Judge Coxhead's findings concerning the behaviour of the appellant and his associates discussed below.

[63] We conclude the lower Court exercised its jurisdiction appropriately in making the orders complained of and this aspect of the appeal must fail.

Part 2: The Natural Justice Issue

[64] Mr Nicholls complains that he was denied a fair hearing in the lower Court. The complaint is one of breach of the principles of natural justice arising from Judge Coxhead's refusal to allow Mr Nicholls to give evidence.

[65] Judge Coxhead made that decision at a teleconference with counsel the day before the hearing was due to commence and again during the hearing itself. This was against a background of non-compliance by Mr Nicholls with earlier timetabling orders. Judge Coxhead also took the view that the issues raised in Mr Nicholls' notice of intention to appear were matters for legal argument rather than evidence. The late filing of a notice of intention to appear was excused and leave was granted to Mr Nicholls' counsel to appear, cross examine witnesses and make submissions.

[66] Relevant procedural history is set out at pages 46 – 52 of the Record of Appeal.[28] By way of summary:

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[28] 52 Waikato Maniapoto MB 146-152 (52 WMN 146-152).

(a) On 17 October 2012 Her Honour Judge Milroy was hearing an application for the review of the WT Nicholls Trust. Upon the satisfactory conclusion of the review the Trustees filed the application for injunction and recovery of land. The appellant (George Tama Nicholls) was in attendance at that hearing as was Cherie Povey (another respondent and Mr Nicholls' partner). They were both given a copy of the application and supporting memorandum at that time. The application also named Arohaina Povey, Zena Nicholls and William Nicholls as respondents;

(b) Judge Milroy made the following directions in relation to the injunction application;

(i) The trustees were to file evidence with the Court by 2 November 2012;

(ii) The respondents were to file their response by 30 November 2012;

(iii) The trustees are to reply by 14 December 2013.

(c) Judge Milroy indicated a hearing in January subject to the availability of judges.

(d) The trustees filed affidavits on 2 November 2012 and service was affected upon Mr Nicholls (and others), on 6 and 7 November 2012.

(e) Mr Nicholls (and the other respondents), took no steps to comply with the timetable set by Judge Milroy (despite notices from the Court).

(f) On 4 December 2012 counsel for the trustees sought advice from the Court as to whether the matter could be brought forward for hearing given that no opposition to the application had been filed.

(g) On 5 December 2012 Judge Coxhead issued directions noting that the trustees had complied with the timetabling directions and that none of the respondents had filed notices of opposition to the application or evidence in

opposition. Judge Coxhead directed that the matter be set down for hearing in Hamilton on 20 December 2012.

(h) On 14 December 2012 counsel for Mr Nicholls filed a notice of intention to appear in opposition to the application. The other respondents took no steps in relation to that appeal nor have theytaken any steps in relation to this appeal.

(i) Counsel for the trustees filed a memorandum in response on 17 December 2012.

(j) His Honour Judge Coxhead convened a teleconference with counsel on 19 December 2012 (case on appeal pages 143-154 (49 Waikato-Maniapoto MB 270-112)).

(k) After hearing counsel, Judge Coxhead granted Mr Nicholls leave to appear and for his counsel, Mr Kahukiwa, to argue the grounds set out in the notice of intention to appear and cross examine the witnesses for the trustees. Judge Coxhead did not accept that there was any basis on which the hearing set down for the next day should be adjourned (as argued by Mr Kahukiwa).

(l) When Mr Kahukiwa opened his case for the appellant the following day, he again sought leave to call Mr Nicholls to give evidence. Counsel for the trustees objected and after hearing counsel Judge Coxhead adjourned for a short period to consider the issue before confirming that the leave granted to the appellant to appear would be restricted to counsel.[29]

The Issues

[67] The first issue we consider is whether the decision made by Judge Coxhead to limit Mr Nicholls' entitlement to be heard to that of counsel is a decision from which the right of appeal lies.

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[29] Record of Appeal at pages 122-127; 52 Waikato Maniapoto MB 223-228 (52 WMN 223).

[68] The second issue for our consideration is whether or not the substantive orders made against Mr Nicholls' were in some way defective by a reason of breach of the principles of natural justice.

The Nature of the Decision Made

[69] In the original notice of appeal dated 25 January 2013 the appellant appeals against oral orders made on 19 and 20 December 2012 and in the alternative against the injunction and recovery orders made on 21 December 2012 when Judge Coxhead delivered his oral decision.[30]

[70] Judge Coxhead's decisions on 19 and 20 December 2012 were rulings of an interlocutory nature which would not ordinarily fall within the Court's appellate jurisdiction which consists of appeals from "final orders".[31]

[71] The grounds of the appeal in respect of the first and second orders complain that the Court wrongly assumed a Form 16 notice had been served upon the appellant, failed to apply the rules of natural justice thereby "preventing him from the greatest opportunity available at law to the appellant to prepare and provide his case in relation to potentially very adverse orders having an effect on where he lives".

[72] On 25 February 2013 the Chief Judge directed that counsel for the appellant clarify the exact nature of the final orders of the Court which were the subject of the substantive appeal.[32]

[73] Counsel for the appellant filed an amended notice of appeal on 15 July 2013. On 16 July 2013 we issued a direction noting that the "orders" complained of in paragraphs [1.1], [1.2], [2] and [3] of the amended notice of appeal would normally constitute directions issued by the lower Court judge, and would not normally constitute final orders from which a right of appeal lies. Counsel for the appellant was required to file confirmation that

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30 Notice of Appeal, Record of Appeal at pages 6-13.
31 Te Ture Whenua Māori Act 1993, s 58(1).
32 2013 Chief Judge's MB 118 (2013 CJ 118).

the orders complained of were final orders by the close of business Monday 22 July 2013.[33]

[74] On 22 July 2013 Mr Kahukiwa filed submissions on this issue and on the breach of natural justice allegations.[34] He elaborated on these matters in his written submissions dated 30 July 2013.

[75] The key points emerging from Mr Kahukiwa's argument can be summarised as follows:

(a) Judge Coxhead's decisions on 19 and 20 December 2013 to refuse to hear from Mr Nicholls directly are not directions but by their nature are properly characterised as decisions or determinations and therefore "orders" for the purposes of ss 4 and 58 of the Act.[35]

(b) Directions that would not come within the definition of "order" are those rulings of a procedural nature necessary for the Court to conduct the case in a fair and efficient way. In contrast anything that affects the substantive rights of the parties is properly characterised as an "order".[36]

(c) The orders complained of are "final" in character because they finally disposed of the rights of the parties. The result was that the appellant would not and was not fairly and fully heard by the lower Court.[37]

(d) The rules of natural justice are applicable to proceedings before the Māori Land Court.[38]

(e) The appellant asserts that he is not a trespasser. This requires an assessment of fact.[39]

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33 2013 Māori Appellate Court MB 278.
34 Record of Appeal at pages 68-74.
35 Memorandum of Counsel for the Appellant dated 22 July 2013 at [3].
36 Ibid at [8.3] - [8.5] and [12].
37 Ibid at [13] - [14].
38 Submissions of Counsel for the Appellant dated 30 July 2013 at [22] - [24].
39 Ibid at [28.1].

(f) The potential consequences for the appellant were so serious (removal from his ancestral lands) that this also points towards his right to be heard before orders of such magnitude are contemplated or made.[40]

(g) Judge Coxhead was wrong to conclude that the appellant had failed to meet relevant filing deadlines, there being no evidence that the appellant had been served with a notice in Form 16 advising him of the consequences of non compliance.[41]

[76] In response Mr Wackrow for the respondents argued:

(a) Only a final order of the Māori Land Court may be appealed. Therefore a right of appeal only lies from the decision of the Court dated 21 December 2012.[42]

(b) While the distinction between final orders/interlocutory orders is no longer of importance in current civil procedure there is a long line of authority from the civil jurisdiction of the High and District Courts. Relevant cases are cited which characterise a final order as one which is addressed principally to the result of the application or one which finally determines the proceeding.

(c) The failure to issue a Form 16 notice was not material because the need for it was over taken by directions issued by Judge Milroy. In the alternative it is open to the Court to excuse compliance. The absence of a Form 16 notice was not due to failure on the part of the respondent and no prejudice arose as the appellant did file a notice to appear (albeit late).

(d) As to the substance of the complaints concerning the right to be heard and the refusal of the adjournment the respondents refer to Court of Appeal authority to support the proposition that the appellant must bear the

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40 Ibid at [28.3] and [28.4].
41 Ibid at [26.1] and [26.2].
42 Submissions of Counsel for the Respondents dated 29 July 2013.

consequences of his own actions.[43] It was the appellant's failure to comply with the Court's directions which lead to the situation he now complains of.

(e) There are earlier findings of fact from court proceedings in 2009 which include findings that the appellant had used intimidation tactics to get onto the land at the expense of the estate. These are findings that give rise to estoppel or res judicata and are binding on the appellant.[44]

(f) In terms of balancing prejudicial effect the respondents were not in control or possession of land vested in them by the Court and were not receiving income from the tourist park or the dwellings on the land which were needed to service debt and rates.[45]

(g) The appellant on the other hand had a minority interest in the land, was in occupation by virtue of intimidation and was receiving income from the business at the expense of the estate and the estate beneficiaries. The appellant's connection to the land as a beneficial owner is very much a minority interest, no greater than the other beneficial owners and proportionally much less when set against the interests of those owners who voted for the establishment of the Trust.[46]

(h) Rules of natural justice apply to both parties and the respondents are entitled to have their applications progressed.[47]

(i) Determinative facts in this type of case fall within a very narrow compass. The application for injunction and recovery of lands requires the straight forward application of a clear line of authority including the *Eriwata* case.[48]

(j) The grounds set out on the notice of intention to appear did not require the appellant to give evidence but were rather confined to matters of law.

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43 *Ngati Apa ki Te Waipounamu v Attonery-General* [2004] NZLR 462, as cited in submissions of Counsel for Respondents dated 29 July 2013 at [27]-[30].
44 Submissions of Counsel for Respondents dated 29 July 2013 at [43].
45 Ibid.
46 Ibid.
47 Ibid.
48 Ibid at [45].

> Relevant background facts were either uncontested, were part of the evidence filed by the respondents, or were res judicata.[49]

Discussion and Reasons for Decision

[77] We accept without hesitation Mr Kahukiwa's submission that the rules of natural justice apply to proceedings before the Māori Land Court. We also agree that rulings of a procedural nature necessary for the Court to conduct a case in a fair and efficient way would not be "orders" from which a right of appeal would lie.

[78] We have more difficulty however accepting the breadth of Mr Kahukiwa's proposition that anything that affects the substantive rights of the parties could properly be characterised as an "order". The rights in issue in this instance being the right to observance of the principles of natural justice.

[79] Mr Kahukiwa says that orders made by Judge Coxhead declining Mr Nicholls the right to present evidence are final in character because they finally disposed of the "rights of the parties" and the result was that his client would not and was not fairly and fully heard in the lower Court.

[80] Even if Mr Kahukiwa is right in that there had been some relevant breach of the principles of natural justice, it does not follow that the procedural rulings which are said to cause the breach thereby become appealable orders.

[81] We note that while the Court's primary appellate jurisdiction is to hear appeals from final orders we do have jurisdiction to hear appeals from a provisional or preliminary determination.[50] Just what constitutes a "provisional or preliminary determination" is not defined in the Act. In the *Davis* case this Court concluded:[51]

> [23] Having regard to the statutory wording and context summarised above, we conclude that a provisional or preliminary determination is a determination of fact or law for the purpose of making orders to dispose of the substantive proceeding but which is provisional or

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49 Submissions of Counsel for the Respondent dated 29 July 2013 at [49].

50 Te Ture Whenua Māori Act 1993, s 59.

51 *Davis v Mihaere – Torere Reserves Trust* (2012) 2012 Māori Appellate Court MB 641 (2012 APPEAL 641) at [23] – [24].

> preliminary to any such final orders being issued. The nexus apparent from s 59(2), (5) and (6) in particular. It also follows that the Court must make an explicit determination of fact or law otherwise a prospective appellant would not know whether the election under s 59(6) has arisen.
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> [24] Such a determination of fact or law will be appropriate where the lower Court considers that it will assist the final disposition of the proceeding. In the context of partitions, for example, a preliminary determination may be appropriate to address the statutory criteria which are prerequisites to an order, before a final hearing addresses the ownership and configuration of any new title orders. Importantly, as we point out below, an interlocutory order or direction in the course of proceedings is not a provisional or preliminary determination.

[82] However, the procedure for hearing appeals against provisional or preliminary determinations under s 59 of the Act was not in any event used in this case and therefore does not arise as an issue for determination. If it had, we are of the view that the orders or directions declining to allow Mr Nicholls to give evidence were in the nature of interlocutory orders or directions. As such they cannot properly be characterised as either final orders or a preliminary determination.

[83] As the decisions made by Judge Coxhead on 19 and 20 December 2012 to decline to allow the appellant to give evidence are procedural decisions of an interlocutory nature no appeal right exists, although judicial review may have been available.

[84] We conclude this aspect of the appeal must fail.

Natural Justice and the Substantive Orders

[85] We now turn to consider the natural justice issues as they relate to the substantive orders. Are the substantive orders defective because they were reached in a manner inconsistent with natural justice requirements?

[86] While it can be accepted that the principles of natural justice apply to proceedings in the Māori Land Court, what constitutes compliance with those principles is very much a case-specific inquiry: [52]

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52 *Russell v Duke of Norfolk* [1949] 1 ALLER 109 at 118 (Tucker LJ).

> The requirements of natural justice, must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject matter to be dealt with...

[87] The application of the principles of natural justice to the proceedings of this Court on a case stated from the Waitangi Tribunal was considered by the Court of Appeal in *Ngati Apa ki Te Waipounamu Trust v Attorney-General.*[53]

[88] In that case Justice Keith said:[54]

> We begin with the proposition the parties, those appearing before the MAC, and those affected by the proceeding were entitled to a fair hearing. That entitlement includes the right to have adequate notice of the proceeding and a reasonable opportunity to present their own cases through evidence and submissions and to challenge the cases put up against them.

[89] The Court of Appeal was clear that its assessment must turn on the facts. At issue was a narrow set of questions concerning alleged disparity of funding, lack of representation and inadequacy of notice. Justice Keith noted that although the issues were narrow they were still important:[55]

> The history of liberty has largely been the history of procedural safeguards.

[90] What constitutes a fair hearing in the present case also turns very much on the facts. It is clear that Mr Nicholls did have adequate notice of the proceeding. He received the proceedings the day the trustees filed and raised the matter at the conclusion of the Trust review application then being heard by Judge Milroy. Subsequent directions issued by Judge Milroy also gave Mr Nicholls a reasonable opportunity to present his case including by way of evidence in reply to the evidence of the trustees. He did not take up that opportunity. When he did finally take steps, Mr Nicholls' counsel was given the opportunity to present submissions and to challenge the case put up against him. The late filing of a notice of intention to appear was excused. We do not consider that the absence of a Form 16 notice is a material issue in the context of this case.

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53 *Ngati Apa Ki Te Waipounamu v Attorney-General* [2004] 1 NZLR 462.
54 Ibid at [18].
55 Ibid at [15]. Justice Keith citing Justice Frankfurter in *McNabb v United States* (1943) 318 US 322 at [347].

[91] The issue is whether the denial of the right to present evidence compromised Mr Nicholls' right to a fair hearing.

[92] The case for the appellant in the lower Court was that he was not a trespasser. The issue was whether on the vesting of the lands in the trustees their right to possession would automatically prevail over his existing possession.

[93] As we have found, the trustees' right to possession accrued upon the creation of the Trust and the vesting of the lands in the trustees by order of the Māori Land Court on 15 August 2011. In light of the fact that Mr Nicholls (and others) were in possession of the lands at that time but without a lease or licence or interest impinging upon the trustees title, the only material fact that needed to be established in the lower Court in order to ground the trustees application for an injunction based on trespass, was whether or not prior to bringing the action the trustees had acquired or attempted to acquire actual possession by entry upon the land. There was evidence before Judge Coxhead to that effect as we noted at paragraph [58] above.[56]

[94] It was common ground that Mr Nicholls, his brother and the other individuals who were the subject of the original application were not in occupation pursuant to a lease or license to occupy. They had simply taken up occupation by physical possession and assertion of an ownership interest. It could not be said that there was a breach of natural justice principles by Judge Coxhead's failure to hear further evidence around this central issue. The key facts were established and the core issues for Judge Coxhead were legal issues.

[95] However, we came to the view that we should grant Mr Nicholls leave to adduce further evidence to assist us in assessing whether the Court below had in fact deprived itself of important and relevant evidence of probative value. This was also important to ensure that this Court reached a just decision.

[96] We invited counsel to take instructions. On the second day of the hearing Mr Kahukiwa made application pursuant to s 55(2) to adduce further evidence.

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[56] Affidavit of Mark Stephen Nicholls dated 2 November 2012, Record of Appeal at pages 1582 – 1583, at [59]-[61].

[97] We issued a direction dated 1 August 2013 granting Mr Kahukiwa's application. In paragraph 9 of those directions we said:

> On balance we have decided that Mr Kahukiwa's application to adduce evidence should be granted. We consider that the appellant ought to be given the opportunity to put forward the evidence he wished to present by way of response to the application in the Court below. We are of the view that this is necessary in order to enable us to reach a just decision on the appeal, in which denial of natural justice is a central issue. We also consider it would assist the Court to reach an understanding of the context in which Judge Coxhead heard the matter with a degree of urgency in December 2012 if the appellant is given an opportunity to provide evidence that addresses what he has done in response to the undertakings given before Judge Clark in 2009 and what has happened with the income that he and his brother and extended whānau have received from the campground operation since they assumed effective control several years ago.[57] It would also assist if the appellant can provide evidence clarifying the properties that he and his co-respondents to the injunction application were occupying or in control of when the matter came before Judge Coxhead in December 2012. Clarification is sought by reference to the list of properties set out in Schedule 1 of the application for injunction.

[98] Pursuant to that direction the appellant swore an affidavit dated 3 September 2013 which together with various appendices were filed with the Court on 6 September 2013. The appellant responded in part to the matters identified in our direction. Evidence was provided for example about the location of the various properties that he and his co-respondents were occupying when the matter came before Judge Coxhead in December 2012. On the other hand, no information was provided as to what had been done in response to undertakings given before Judge Clark in 2009 and for which Judge Coxhead had sought further information. Nor was information provided as to the income the appellant, his brother and extended whānau had been receiving from the campground operation. Significant parts of the affidavit were objectionable on a number of grounds and after hearing from counsel at the commencement of the hearing on 10 September 2013 we excluded significant sections of the affidavit from the record. Mr Nicholls then gave evidence and was cross-examined with respect to what remained. He was not a convincing witness.

[99] Having now heard from Mr Nicholls we are not satisfied that Judge Coxhead's decision to refuse to hear from Mr Nicholls led to a denial of Mr Nicholls' right to a fair

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[57] *Nicholls v Nicholls – Part Papaaroha 6B* (2009) 120 Hauraki 116 (120 H 116) at [115]-[117].

hearing. We agree with Mr Wackrow that the issues for determination in this case fall within a narrow compass. There was more than sufficient evidence of probative value before Judge Coxhead from which he was entitled to conclude that the trustees had made out a case for injunction and recovery of the lands. There is nothing in those parts of the affidavit of Mr George Nicholls dated 3 September 2013 which remain on the record, nor his cross-examination evidence, that would lead us to a different view.

[100] Therefore, this aspect of the appeal must fail.

The Predetermination and Bias Issue

[101] At several points in his written submissions dated 30 July 2013 Mr Kahukiwa invited this Court to find that Judge Coxhead was in effect biased against his client.[58]

[102] In his written submissions he contended that **"**his client can demonstrate that the lower Court got it so wrong that, that it was actually perverse to him and that the orders complained against ultimately have the appearance of bias about them".

[103] He went on to argue that it is open to this Court to infer bias because of the number of errors his client has identified. If that inference is drawn he requests referral back to a different Judge of the Māori Land Court.

[104] We note Judge Coxhead heard a related application in 2009. While he ultimately found in favour of Mr Nicholls, he made a number of observations which were critical of the conduct of Mr Nicholls and his associates. Mr Kahukiwa points to those observations and the adverse findings and orders from December 2012 as evidence of predetermination or bias on the part of Judge Coxhead.

[105] These allegations are made in the context of a broader submission made by way of what are described as 'opening remarks.' In that respect Mr Kahukiwa submitted that a central issue in the appeal is the "utter failure of the lower Court, inclusive of its registry, to uphold, for one of its "beneficiaries," a cornerstone of the scheme of Te Ture Whenua

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58 Submissions of Counsel for the Appellant dated 30 July 2013 at [11], [17] & [69.1(c)].

Māori Act 1993, which is their right to the occupation and utilisation of their whenua taonga tuku iho".[59]

The Law on Bias

[106] This is not a case where presumptive bias arises because the presiding judge holds a pecuniary interest. The allegation is one of apparent bias. In the *Saxmere* case,[60] the Supreme Court confirmed that the governing principle was that identified by the Court of Appeal in the *Muir* case.[61] A Judge is disqualified if an "open 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".[62]

[107] Both the Court of Appeal and the Supreme Court emphasise that apprehension of bias requires a logical connection between what is said to raise the risk that a Judge might decide a case other than on its legal and factual merits and the nature of the deviation from that requirement said to arise. In this case no such logical connection has been established either in evidence or in argument. There is simply an assertion of predetermination or bias.

[108] In the *Muir* case the Court of Appeal notes that it is only in the rarest of cases that a Judge's prior ruling or judicial criticism might lead a person to question whether they would remain impartial in any subsequent proceedings. As the Court of Appeal says:[63]

> The reasons for this are straight forward. It is common sense that people generally hate to lose, and their perception of a Judge's tendency to rule against him or her is inevitably suspect. As Keith Davis has said, "almost any intelligent person will initially assert that he wants objectivity, but by that he means biases that coincide with his own biases."... Every judicial ruling on an arguable point necessarily disfavours someone – Judges upset at least half of the people all of the time – and every ruling issued during a proceeding may thus give rise to an appearance of partiality in a broad sense whoever is disfavoured by the ruling. But it is elementary that the Judge's task is to judge. Indeed the very essence of the judicial process is that the evidence will instil a judicial bias in favour of one party and, against the other - that is how a Court commonly expresses itself as having been persuaded.

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59 Ibid at [1].
60 *Saxmere Company Limited v Richard King and Others* [2009] NZSC 27.
61 Ibid at [3].
62 *Muir v Commissioner Inland Revenue* [2007] NZCA 334.
63 Ibid at [98]-[99].

Discussion and Reasons

[109] In terms of the broader argument made regarding the role of the Court and the learned judge, we note Mr Nicholls has attempted to place emphasis on his rights to occupy ancestral land. He is, however, very much a minority shareholder holding less than 3% of the beneficial ownership, but as Mr Wackrow points out he and his associates (including non-owners) remain in practical control of a major share of the land and the income stream from it.[64]

[110] Mr Nicholls characterises his occupation as that of a kaitiaki and Mr Kahukiwa made much of the fact that the orders made under appeal would remove Mr Nicholls from his ancestral land. The case for the trustees is essentially that Mr Nicholls and his associates have selfishly assumed occupation, pay no rent or rates and have in fact diverted income from the estate and the trust for their sole benefit and in doing so seek to prioritise their minority interest in the land over all other beneficial owners.

[111] In our view, Mr Nicholls' disregard for the interests of the other owners (to whom he is closely related) means that it was entirely open to the lower Court to find that he and his associates had been acting in a selfish manner. There was uncontroverted evidence that since assuming occupation in 2003, Mr Nicholls and his associates have used intimidation to force occupancy, that they have paid no rates or rent and there was reasonable cause to infer that he has deprived the other owners of the income necessary to meet the rates and other debt liability on the land.

[112] We note that in his affidavit dated 2 November 2012, Mr Mark Nicholls included a table showing income from the Oamaru Bay Tourist Park from the period 2005 to 2012. As at 2004/2005 there were two income streams into the bank accounts of the estate (and then from 2011 to the trusts accounts). One income stream is from the flats, cabins and campsite and the other is from the rentals paid by permanent caravans and occasional caravan occupation. Between 2005 and 2008 the income ranged between $188,809.93 and $253,186.00. That income declined rapidly following the assumption of control of the camp ground by Mr Nicholls brother William and then by Mr Nicholls himself, so that from 2009 the income reduced to $141,000.00 and by the year ending 2012 it was down to

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64 Submissions of Counsel for the Respondents dated 29 July 2013 at [132].

$12,712.00 and from April to August 2012 it is down to $1,752.00.[65] We consider this evidence demonstrates that there has been a significant diversion of income away from the estate and the trust.

[113] There was credible and reliable evidence before Judge Coxhead which formed the basis for his view that:[66]

> All respondents in my view, have taken a very selfish position and appear to have no problem with prioritising their occupation and rights to the detriment of other owners and also to the detriment of the land blocks which potentially could have had the mortgage discharged and be free from any encumbrances.

[114] At paragraph [54] of his oral decision, Judge Coxhead addressed the trustees' claim for recovery of rental and mesne profits. Judge Coxhead said:[67]

> [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 flats, cabins and tent sites; and what arrangements the respondents have made for payment of tax obligation in 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.

[115] It is noteworthy that Mr Nicholls did not comply with that direction and neither, when given the opportunity to do so, did he provide this Court with information concerning what has happened to the income that he and his brother and extended whānau had received from the campground operation since they assumed effective control several years ago.[68] When cross-examined on this matter Mr Nicholls was evasive.

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65 Affidavit of Mark Nicholls dated 2 November 2012, Exhibit "J" at 742.
66 50 WMN 10-16 at [37].
67 Ibid at [15].
68 2013 Māori Appellate MB 281-284 (2013 APPEAL 281) at [9].

[116] Taking all these factors into account we find that reasonable inferences were drawn by Judge Coxhead. We do not see predetermination or bias and therefore this aspect of the appeal must fail.

[117] We also note for completeness, the evidence submitted to us by the trustees in reply to Mr Nicholls affidavit, that when Mr Nicholls did make a contribution towards refinancing the debt in 2003, he did so on the basis that he would receive a fee of $7,500 and interest at the rate of 18% per annum (4% above that charged by the finance company whose debt they were seeking to discharge).[69]

Concluding Observations

[118] The parties to these proceedings and the beneficiaries of the WT Nicholls Trust are the fortunate recipients of substantial taonga tuku iho. Regrettably the divisions within the whānau have led to a prolonged period of fighting over this legacy. Very substantial sums have been spent on litigation. The litigation will address immediate rights but it will not restore relationships or supplant the absence of respectful tikanga within the whānau that will ensure that this legacy is properly managed in honour of the tūpuna who have gone before and the uri to come. He kai a te rangtira he kōrero. It is time for the whānau to turn towards each other and away from the Courts.

Conclusion of Judgment

[119] We delivered a reserved judgment on 3 October 2013 dismissing the substantive appeal and the appeal against the stay of proceedings. These reasons explain why the substantive appeal was dismissed.

Costs

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69 Affidavit of Viv Nicholls dated 9 September 2013 at [32].

[120] We have already received submissions from Mr Wackrow on Costs (in response to our decision of 3 October 2013). Mr Kahukiwa is to provide submissions in response by 6 December 2013.

[121] Mr Wackrow may file any further submissions in reply by 13 December 2013.

A copy of this decision is to be distributed to all parties.

C L Fox (Presiding)	S F Reeves	M J Doogan
DEPUTY CHIEF JUDGE	**JUDGE**	**JUDGE**