IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20190002142
A20190002476

UNDER	Section 58 Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An order made on 12 December 2018 at 182 Taitokerau MB 166-181
AND	Waima C30A and Waima Topu B Blocks
BETWEEN	HIWI RANIERA HOHEPA First Appellant
AND	HAAMI PIRIPI, JADE BARKER, JEAN CASSIDY, COLIN FITZPATRICK, PATU HOHEPA, WIREMU KIRE and JOHN HENRY MAC, as Trustees of the Waima Topū B Trust Second Appellants
AND	NGAHUIA BANKS, REVEREND STEWART HOHEPA, JASON GATES, DANIELLE HOHEPA, EDWARD HOHEPA, JULIAN HOHEPA, ELIZABETH PARI, SHARLEEN TARATU, MARLEINA TE KAAWA, as trustees of the Daddyboy Raua ko Hiria Hohepa Whanau Trust Respondents

Hearing:	6 August 2019, (Heard at Whangārei)
Court:	Judge M J Doogan (Presiding) Judge P J Savage Judge D H Stone
Appearances:	S Grant, E James for Hiwi Hohepa T K Williams, C Linstead-Panoho for the Waima Topū B Trust C Terei, S M Downs for the Daddyboy Raua ko Hiria Hohepa Whanau Trust
Judgment:	27 September 2019

JUDGMENT OF THE MĀORI APPELLATE COURT

Copies to:
S Grant, E James, Akarana Chambers, PO Box 1296, Shortland Street, Auckland, erin@erinjames.co.nz
R Smail, Smail Legal Limited, PO Box 89160 Torbay, Auckland 0742, roimata@smail.nz
C Terei, Tukau Law, 91 Hupara Road, RD 2, Kaikohe, Northland 0472, chelseaterei@tukaulaw.co.nz
T K Williams, Wackrow Williams & Davies Ltd, tekani@wwandd.co.nz

Introduction

[1] Waima C30A is a one-acre block located near the rural community of Taheke, west of Kaikohe. By 1958 it was owned solely by Eruini Turi. He had lived there with his son, Hiwi Hohepa for years. Together they had built a house on it. Around this time and as was common, Hiwi moved away to work. He was away for over 50 years. During that time his father, Eruini, authorised the neighbouring Waima Topu B Trust (the Trust) to graze the block in exchange for payment of the rates. Eruini passed on in 1989. Hiwi Hohepa returned to the block in 2009 to spend the rest of his years there. There was one problem. Someone else was already living there.

[2] That was because in 2002 the trustees of the Trust granted a licence to occupy the block to Pihema and Hiria Hohepa on the mistaken belief that they owned the block. They warranted to Pihema, Hiria and third-party lenders, that they owned it. Pihema and Hiria built their home on the block, and their descendants live there still. The house is now owned by the Daddyboy Rāua ko Hiria Hohepa Whānau Trust (the Pihema Whānau Trust).

[3] Hiwi Hohepa is now old and of failing health. He wishes to live on his land and for the house there to be removed. He seeks reimbursement for the alternative accommodation and storage costs he has incurred since he returned home in 2009. He also seeks damages for the stress and inconvenience he has suffered.

[4] In the lower Court, Judge Armstrong agreed that the house on the block should be removed. He ordered the Trust to meet those costs. He also ordered the Trust to pay damages to Hiwi Hohepa and the owners of the block of $100 per annum from 2 April 2002 until the house is removed. He declined to order that the alternative accommodation and storage costs Hiwi has incurred since 2009 should be reimbursed. Nor did he consider an award of damages for stress and inconvenience should be made.

[5] Hiwi Hohepa appeals against the decision to not order the reimbursement of his costs or award him damages. The Trust cross-appeals against the finding that it should pay for removing the house and pay damages to Hiwi of approximately $1,700. The Trust says that the Pihema Whānau Trust should meet some (if not all) of those costs. The Pihema Whānau Trust disagrees.

The appeal and the issues

[6] The appeal was heard in Whangārei on 6 August 2019.

[7] The issues arising on appeal are:

(a) Has a trespass occurred over the block?

(b) If so, who has committed trespass?

(c) What are the available remedies against any trespasser?

(d) What remedies (if any) should be granted in the circumstances?

Submissions

[8] Counsel for Hiwi Hohepa, Ms Grant, submitted that the learned Judge at first instance erred in the following ways in respect of his refusal to award damages:

(a) The loss suffered by Hiwi Hohepa was the loss of exclusive possession of the block. Compensation for this loss should have been awarded as a matter of course, subject to Hiwi Hohepa taking reasonable steps to mitigate this loss.

(b) Consequential damages are recoverable for expenses incurred, provided they are not too remote. Hiwi Hohepa incurring alternative accommodation costs was "the most obvious consequence" of being denied exclusive possession of the block. The learned Judge therefore erred in refusing to award consequential damages.

(c) The lower Court held that Hiwi Hohepa did not suffer any loss, as he did not prove that he was not able to live on the remainder of the block not occupied by the Pihema Whānau Trust. The learned Judge erred in that it was not for Hiwi Hohepa to prove this. Instead, that burden of proof lies with the Trust.

(d) The learned Judge erred in refusing to grant general damages for stress, frustration and inconvenience because the Trust did not deliberately grant the

licence to occupy over the block or act in a high-handed way. Conduct of the parties is relevant, but not determinative. General damages are available where a person's privacy and quiet enjoyment of land has been interfered with. The lower Court failed to apply the general principle that these types of damages are recoverable. It is highly appropriate that such damages are awarded in this case.

(e) The Trust had actual or constructive knowledge that they did not own the block. The learned Judge erred in finding that the Trust did not have knowledge that, in granting the licence to occupy in 2002, they were permitting a trespass to occur.

[9] By way of relief, Ms Grant sought that the judgment in relation to damages be set aside, and that damages be awarded to Hiwi Hohepa as set out in the statement of claim (together with interest and costs).

[10] Counsel for the Trust, Mr Williams, supported some aspects of the lower Court decision, but appealed others. He argued:

(a) The Trust did not have actual or constructive knowledge that they did not own the block when they granted the licence to occupy. The learned Judge did not err in making this finding.

(b) The learned Judge did not err in finding that Hiwi Hohepa failed to establish causation (and therefore loss) because he did not prove that he could not reasonably occupy the remainder of the block.

(c) Nor did the Judge err in failing to award compensatory or consequential damages. Compensatory damages are not appropriate because there has been no damage to the land. Consequential damages are not appropriate either, because the case law does not support such damages being awarded on the present facts and Hiwi Hohepa did not demonstrate that he was prevented from building on, or using, the remainder of the block.

(d) The lower Court did not err in refusing to award damages for stress, frustration and inconvenience. The Trust supports the reasoning of Judge Armstrong in this respect.

(e) However, the learned Judge did err in fact and law in granting damages to Hiwi Hohepa for use of the block by the Trust, on the basis that he did not make a finding of trespass and no such finding can be sustained against the Trust. The Trust has not entered the land – only the Pihema Whānau Trust has done that. The intrusion by the Pihema Whānau Trust on the block did not directly result from actions of the Trust. In the alternative, if damages are awarded, liability should run from 2009 (when Hiwi Hohepa sought to return to his land) rather than 2002 as awarded (being a difference of $700).

(f) The learned Judge also erred in fact and law in finding that the Trust was required to meet the costs of removing the house from the block. It is not just and equitable in the circumstances to place the entire burden on the Trust when the Pihema Whānau Trust and Hiwi Hohepa have contributed to the house being placed on the wrong land. The lower Court also failed to properly consider alternatives to the removal of the house. Mr Williams proposed an alternative grant of relief in this respect, allowing Hiwi Hohepa to occupy a site on the Trust's land, that the house on the block remain there until the licence to occupy expires, and the removal costs on expiry should be shared by the Pihema Whānau Trust and the Trust on a 60/40 basis. If, however, the Trust is required to remove the house now, the costs should be shared between the Pihema Whānau Trust (60/40) and the Pihema Whānau Trust should pay for all upgrades that prove necessary as a result of the moving process.

[11] By way of relief, the Trust sought orders to dismiss Hiwi Hohepa's appeal, overturn the order for the Trust to pay Hiwi Hohepa $100 per annum from April 2002 until the date the house is removed from the block, and alternative orders in relation to the removal of the house from the block.

[12] Counsel for the Pihema Whānau Trust, Ms Terei, submitted that the Pihema Whānau Trust should not be held liable. She argued that the Pihema Whānau Trust has done nothing wrong and has been prepared to take appropriate steps to address the issues.

New evidence on appeal

[13] At the 6 August 2019 hearing, pursuant to s 55(2) of Te Ture Whenua Māori Act 1993 (the Act) we heard new *viva voce* evidence from Ellen Erina Brown and Heeni Pou about the house that Hiwi Hohepa and his father, Eruini, had built on the block. It was referred to as the "bach". This evidence was subsequently confirmed and clarified in a written brief of evidence.[1] Following the filing of this written brief, counsel for the Trust indicated that he did not wish to cross-examine this evidence, and instead he filed a brief of evidence from Desmond Pouri Warmington dated 19 August 2019. This brief confirmed that the bach would have been uninhabitable when it was demolished by Pihema Hohepa shortly before he built on the land. Counsel for Hiwi Hohepa did not seek leave to cross-examine this evidence but filed submissions on 11 September 2019 relating to its relevance and weight. Counsel for the Trust filed submissions in response dated 20 September 2019.

Law

Review of judicial discretion

[14] This is a case involving a wrongly placed structure. The starting point is s 24 of the Act. This section provides that the Court may exercise with respect to Māori freehold land all of the powers conferred on a court by sub-part 2 of Part 6 of the Property Law Act 2007 (the PLA). There is no dispute regarding the application of the PLA. Relief may be granted if it is just and equitable in the circumstances to do so.[2] That jurisdiction is discretionary.

[15] Amongst the factors the Court may consider are the reasons the wrongly placed structure was put in place, the conduct of the parties and the extent to which any person may have been unjustifiably enriched because the owner of the land has become the owner of the wrongly placed structure.[3]

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[1] Dated 20 August 2019.
[2] Property Law Act 2007, s 323(2).
[3] Section 324.

[16] If the Court decides to grant relief it may make a number of orders. Those of immediate relevance are:

(a) Giving Hiwi Hohepa the right to possession of all or part of the house and associated infrastructure;

(b) Requiring the Pihema Whānau and/or the Trust to remove the house and any other fixtures or chattels; and

(c) Requiring Hiwi Hohepa to pay reasonable compensation to the Pihema Whānau if he is granted possession of all or some of the improvements.[4]

[17] A wrongly placed structure obviously gives rise to issues of trespass; issues of negligence may also arise. Any award of damages is discretionary.

[18] We are therefore asked to review the exercise of judicial discretion. It is well established that an appellate court may only intervene in an exercise of discretion by a lower court if satisfied that:[5]

(a) The lower court acted on an error of law or a wrong principle;

(b) The lower court failed to take into account a relevant consideration;

(c) The lower court took into account an irrelevant consideration; or

(d) The lower court was plainly wrong.

[19] We approach the appeal on this basis.

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[4] Above, n 2 at s 325(1)(b), (c) and (d).

[5] *Kacem v Bashir* [2010] NZSC 112 at [32]. See also *Matthews v Matthews – Estate of Graham Ngahina Matthews* [2015] Māori Appellate Court MB 512 (2015 APPEAL 512) at [56].

The law of trespass

[20] This is a case involving trespass to land. The relevant legal principles are as follows:[6]

(a) Trespass requires a positive voluntary act. There is some debate about whether trespass to land requires the landowner to prove that a trespasser acted intentionally or negligently,[7] but it is clear that honest mistake is no defence.[8]

(b) There are five ways in which a person may commit trespass to land. Of relevance are direct entry by the trespasser, and causing a thing or person to enter another's land. The slightest crossing of the boundary is sufficient for trespass by direct entry.[9] In terms of indirect trespass, unauthorised entry must follow *directly* from the defendant's act.

(c) Regarding damages for trespass, no proof of damage is required. A successful plaintiff is entitled to an award of nominal damages as recognition and vindication of a possessory right. In this context, the amounts are usually token.[10]

(d) If a trespasser wrongfully makes use of the land, mesne profits are recoverable. This is calculated at a reasonable rate of remuneration for the full period of the unlawful use of the land.[11] Awards of mesne profits are overwhelmingly found in lessor-lessee disputes and are often described as "the name given to damages for trespass against a tenant who holds over after the lawful determination of the tenancy".[12]

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[6] Stephen Todd (gen ed) *Todd on Tort* (8th ed Thomson Reuters, Wellington 2019.
[7] At 9.2.02.
[8] At 9.2.02, footnote 6.
[9] *Ellis and Loftus Iron Co* (1874) LR 10 CP 10 (Comm Pleas) at 12.
[10] See for example *Cousins v Wilson* [1994] 1 NZLR 463 (HC) ($25 awarded); *Dehn v Attorney-General* [1988] 2 NZLR 564 (HC) ($1 awarded); *Zondag v Zondag* HC Hamilton CIV-2003-419-328, 19 June 2007 ($1 awarded); *Ogle v Aitken* [2017] NZHC 1799, [2018] NZAR 1898 ($1,000 awarded).
[11] Above, n 6 at 9.2.07, footnote 280.
[12] *Hooker v Director-General of Conservation* (2012) 38 Taitokerau MB 219 (38 TTK 219) at [20] – [22].

(e) Damages are recoverable for consequential loss (such as expenses incurred as a result of the trespass) so long as it is not too remote.[13] *Mayfair v Pears* is the leading authority and was relied on in, and considered by, the lower Court.[14] Although the Court of Appeal in that case held that the consequential loss claimed was too remote, it did not rule out damages for unintended or unforeseeable consequences provided they result directly from the trespass. There is a duty to take reasonable steps to mitigate any loss suffered.[15] If the trespasser considers that the steps taken in mitigation are not reasonable, the trespasser must show why that is the case.[16] All the circumstances of the case are relevant in assessing reasonableness.[17]

(f) General damages may be awarded for interference with privacy and quiet enjoyment of land, and for distress and anxiety caused by the intrusion.[18]

(g) Aggravated damages may be awarded in the case of deliberate trespass in arrogant disregard for ownership rights.[19] Exemplary damages may be awarded as punishment to the trespasser and to deter others if the trespasser's actions are outrageous or subjectively reckless.[20]

(h) A person who commits trespass is called a tortfeasor. More than one person can be liable as a tortfeasor on the same facts. "Joint" tortfeasors commit the same tort. "Several" tortfeasors are responsible for different torts resulting in the same damage. We are concerned here with "joint" tortfeasors. That is because the Trust authorised the trespass and the Pihema Whānau Trust have trespassed. Joint tortfeasors are each liable in full for the entire loss. Contribution as between joint tortfeasors can be sought under the Law

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[13] *Taylor v Auto Trade Supply Ltd* [1972] NZLR 102 (SC) at 118; *Clearlite Holdings Ltd v Auckland City Corp* [1976] 2 NZLR 729 (SC); *Bown v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).
[14] *Mayfair v Pears* [1987] 1 NZLR 459 (CA).
[15] *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Rail Co of London* [1912] AC 673.
[16] Most recently discussed in *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 536 (HC). See also *Lagden v O'Connor* [2003] UKHL 64 at [34].
[17] *Hawkes Bay Protein Limited v Davidson* [2003] 1 NZLR (HC) at 547.
[18] *Grieg v Grieg* [1966] VR 376 (VSC), *Ramsay v Cooke* [1984] 2 NZLR 680 (HC) at 687; *Trustees Executors Agency Co of New Zealand Ltd v Butler* HC Dunedin CP107/92, 18 July 1994; *TCN Channel Nine Pty Ltd v Anning* [2002] NSWCA 82, (2002) 54 NSWLR 333, *Seagar v Brady* HC Auckland HC174/96, 5 May 1997.
[19] *Ramsay v Cooke* [1984] 2 NZLR 680 (HC).
[20] *Couch v Attorney General* [2010] 3 NZLR 149 at [238].

> Reform Act 1936.[21] The right to recover contribution is a statutory right in the nature of an action for damages.[22]

[21] We apply these principles.

Has a trespass occurred over the block?

[22] There was a verbal agreement between Eruini Turi and the Trust to graze the block. Eruini died in the late 1980s and the land passed to his successors, including his son Hiwi. Neither Eruini or Hiwi authorised any other person or thing to enter or be on the block. There is an unauthorised house on the block and people enter onto the block to use the house. Trespass has occurred and is occurring.

Who has committed trespass?

What is the position of the Pihema Whānau Trust?

[23] Every person who enters the block without the consent of the owners is trespassing. Those persons currently enter on the purported authority of the Pihema Whānau Trust. The Pihema Whānau Trust also owns the unauthorised house on the block. The Pihema Whānau Trust is trespassing as a result.

What is the position of the Trust?

[24] Mr Williams initially argued that the Trust has not trespassed on the land. He said that the building of the house, and the intrusion by Pihema Hohepa (and presumably his invitees and descendants) on the block did not follow directly upon the Trust's acts, but were merely the indirect or consequential result of a series of events which led to the house being built on the wrong land. We disagree. The house was built on the block as a direct consequence of the Trust representing that it owned the block and granting a licence to occupy over it. It is the most obvious consequence of the Trust's acts. Mr Williams ultimately agreed that the Trust has trespassed and the salient issue relates to remedy. The Trust has trespassed and is continuing to trespass.

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[21] Section 17.
[22] *Collinson v Wairarapa Automobile Assoc Mutual Insurance Co* [1958] NZLR 1 (CA) at 17.

Honest mistake and negligence

[25] It is accepted that neither the Trust nor Pihema Hohepa deliberately sought to build on the block. The Trust was inadvertent in granting the licence to occupy, because it mistakenly believed that it owned the associated land. This error gave rise to submissions from counsel on the law of negligence. Negligence is also relevant because s 323(4) of the PLA makes it clear that granting relief for a wrongly placed structure does not deprive a person of any claim for damages for any negligent act or omission. At first instance, Judge Armstrong did not make an express finding that the trustees of the Trust were negligent, although he did find that they ought to have known that they did not own the block when they granted the licence to occupy.

[26] What are we to make of these honest mistakes? The cases regarding trespass to land to which we were referred all seem to involve deliberate or knowing trespass, rather than trespass by honest mistake. *Mayfair v Pears* involved a deliberate trespass (the unlawful parking of a car in a building) and was primarily concerned with liability for consequential damage caused when the car exploded.[23] *Matchitt v Whangara B20 Incorporation* involved a claim of deliberate trespass and resultant damage to chattels left exposed to the elements.[24] *Ramsay v Cooke* involved a deliberate and arrogant trespass, warranting the award of aggravated damages.[25] *Seagar v Brady* involved a deliberate trespass relating to the pruning of a significant pohutukawa tree.[26] *Roberts v Rodney District Council* involved a deliberate trespass relating to the laying of a sewer pipe.[27] *Duncan v Taylor* involved a deliberate act to build, and therefore trespass, on cross-leased land.[28]

[27] In *Hooker v Director-General of the Department of Conservation,* Judge Harvey found that the Department of Conservation was "negligently contributing" to trespass by the public over private land.[29] Although there are some similarities with the present facts, it was not a case of trespass by honest mistake. The Department of Conservation was aware that, at high tide, walkers on a coastal track had to enter private land. The Department simply

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[23] Above, n 14.
[24] *Matchitt v Whangara B20 Incorporation* 2009) 191 Gisborne MB 249 (191 GIS 249).
[25] Above, n 19.
[26] *Seagar v Brady* HC Auckland 174/96, 5 May 1997.
[27] *Roberts v Rodney District Council (no 2)* [2001] NZLR 402 (HC).
[28] *Duncan v Taylor* (2010) 2 NZCPR 235.
[29] Above, n 12.

failed to take steps to stop that from happening. In that sense, the Department was aware that trespass was being committed. There was no honest mistake. There was a deliberate act by the Department, or more accurately a deliberate omission to act.

[28] The fact that there are very few authorities on trespass by honest mistake is perhaps understandable as it is unusual for a trespasser to honestly believe that they had sufficient rights to the land on which they were trespassing. But that is exactly was has happened here.

[29] Looking further afield to the Canadian case of *Whitmore v Chaster*.[30] That case involved a person removing a hedge even though she honestly believed that the hedge was on her property. The British Columbia Provincial Court described this situation as a "negligent trespass" because she had not taken adequate measures to confirm that the hedge was on her property. Importantly, the Court held this was not merely a technical trespass as the neighbour had lost privacy and security following the hedge's removal.

[30] This is a case of negligent trespass on the Trust's part. The Trust did not take proper care to confirm that it owned the block before granting rights to Pihema Hohepa to use it. The Trust was negligent in granting the licence to occupy to the Pihema Whānau Trust. The Trust further warranted that it owned the block when it entered into a tripartite agreement with the Pihema Whānau Trust and Housing New Zealand relating to the house that was to be erected on the block. This warranty was absolute. It was not expressed as being made after reasonable inquiry, or to the best of the trustees' knowledge. The Trust was also negligent to give such an absolute warranty.

[31] It is relevant to note that there was evidence to show that the Trust knew they did not own this land. On 15 May 1990, the then Chairperson of the Trust and brother of Pihema Hohepa, Dr Patu Hohepa, wrote to Hiwi Hohepa reminding him that his father owned the block, and that the Trust was paying the rates in return for grazing rights. This letter was sent from the Trust, and Dr Patu Hohepa signed it as Chairman.

[30] *Whitmore v Chaster* 2013 BCPC 364.

What remedies are available for the trespass?

[32] The available remedies for trespass (including negligent trespass) include:

(a) An order restraining any continuing trespass;

(b) Nominal damages, as of right and without proof of damage;

(c) Mesne profits, which can be awarded because there is a grazing licence between the Trust and the owners of the block;

(d) Damages for consequential loss, provided the loss is not too remote;

(e) Damages for interference with privacy and quiet enjoyment of land, and for distress and anxiety caused by the intrusion;

(f) Aggravated damages, if the actions of the tortfeasors are in arrogant disregard for Hiwi Hohepa's rights; and

(g) Exemplary damages, if the tortfeasors' conduct is outrageous or subjectively reckless.

What remedies (if any) should be granted here?

[33] Quite appropriately, Hiwi Hohepa did not seek aggravated or exemplary damages.

Order restraining continued trespass

[34] It is clear that an order to restrain the continued trespass by requiring the removal of the house is an available remedy. No party challenged this order of the lower Court. The house must be removed. We deal with who should meet the associated costs when we discuss the liability of joint tortfeasors.

Nominal damages

[35] Nominal damages are available as of right, as recognition and vindication of Hiwi Hohepa's rights over the block.

[36] Mr Williams submitted that nominal damages are not appropriate because they are intended to recognise possessory, rather than proprietary, rights. But, in this case, the possessor unlawfully occupies the block. In these circumstances, it is not fair and equitable for the owner of the block to be denied vindication of his rights simply because he is not in possession of the block.

[37] Nominal damages should be awarded. As the name suggests, the award should not be significant. We award $1,000 as nominal damages.

Use of land damages

[38] There is a grazing licence between the Trust and the owners of the block. There is sufficient nexus between the Trust and Hiwi Hohepa to consider an award of mesne profits. Although these awards are usually made when a tenant overstays under a lease or licence, we consider it appropriate to award an amount in recognition that the Trust has benefited from the use of the block in addition to grazing it. It has received $100 per annum since 2002 from the Pihema Whānau Trust as a licence fee. This is the amount of general damages awarded by Judge Armstrong and we agree that such an award should be made to Hiwi Hohepa. Whether the award is described as general damages, use of land damages or mesne profits is moot. The award is necessary to ensure that the relief granted in this case is just and equitable. It is not right that the Trust receive income for land it does not own; they should account for that income to the rightful owner.

Damages for consequential loss

[39] Consequential loss is recoverable, provided it is not too remote. We concur with the lower Court that the damage caused in *Mayfair v Pears* was not of the type of consequential loss claimed by Hiwi Hohepa. *Mayfair* concerned damage to buildings from an exploding car. Hiwi claims reimbursement of accommodation costs. We also concur with the assessment that the trespass was unintended in the present case, as was the damage caused

by the exploding car. However, intention is not the true test for liability. It is whether the loss arises directly from the trespass.

[40] A natural consequence of Hiwi Hohepa being excluded from the part of the block he wished to occupy was that he would need to find alternative accommodation. He could have potentially lived on the parts of the block that the Pihema Whānau Trust did not occupy, he could have purchased a house elsewhere or he could have rented elsewhere. These steps all arise directly from not being able to reside where he wanted on his land. Hiwi Hohepa chose to rent elsewhere. We consider the associated costs arise directly from the trespass. They are certainly not too remote.

[41] It must be proven, however, that the alternative accommodation costs incurred by Hiwi Hohepa were not unreasonable. That was for the Trust to prove and the Trust did not do so.

[42] It is at this point that we respectfully depart from the lower Court's reasoning. It was found that Hiwi Hohepa did not prove that he could not reside on the remainder of the block, therefore he did not prove any loss. Hiwi Hohepa did prove consequential loss, being his alternative accommodation costs. It was then for the trespassers to prove that those costs were unreasonably incurred because Hiwi Hohepa could have lived on the remainder of the block. Instead, the learned Judge held that burden of proof lay with Hiwi Hohepa.

[43] In principle, Hiwi Hohepa's accommodation costs should be reimbursed as consequential losses arising directly from the trespass. That would assume, however, that Hiwi could live on his land when he returned in 2009.

[44] We heard new evidence about whether Hiwi Hohepa would have been able to live in the "bach" built by him and his father, Eruini, in the 1950s, had it not been demolished to make way for Pihema Hohepa's house. On reviewing the new evidence and after taking into account the submissions filed, we do not think that would have been possible. By the time it was demolished around 2002, it was already in a dilapidated state. It comprised one room, it had no running water or electricity, and limited cooking facilities. It was used to store farm equipment and stock wandered in.

[45] Theoretically, Hiwi Hohepa could have lived on his land when he returned, but not in the bach. He would have needed to build or otherwise provide his own accommodation. If he built, he may still have had to live elsewhere during the construction phase. If he lived on the land on his return, the standard of accommodation would have been less than he enjoyed renting. This reality must be taken into account in assessing damages for consequential loss so that the relief granted is just and equitable in the circumstances, as required by s 323(2) of the PLA.

[46] We are reluctant to refer the assessment of damages for consequential loss back to the lower Court, as we consider it desirable to conclude these matters swiftly. Hiwi Hohepa's accommodation costs have been relatively modest. He sought a total of $56,811.80 for the period from 2009 to 16 November 2017, plus a further $106.40 per week until the house is removed. We determine that Hiwi Hohepa is entitled to be reimbursed his alternative accommodation costs, minus a discount of 40% to reflect that his living conditions, had he decided to live on the block when he returned in 2009, would have been of a lower standard than his rental accommodation. This calculation produces an amount of $34,087.08, plus a further $63.84 per week from 16 November 2017.

[47] We are not prepared to award reimbursement of Hiwi Hohepa's storage costs as damages for consequential loss. The evidence before the Court indicates that there would have been no storage facilities on the block in 2009.

Damages for interference with privacy and quiet enjoyment, and stress, frustration and inconvenience

[48] We are satisfied that Judge Armstrong did not err in his assessment of whether to award damages for interference with privacy and quiet enjoyment, or stress, frustration and inconvenience. It was within his discretion to not award these damages. On appeal, there is no valid reason to review the exercise of this discretion.

Fixtures and improvements

[49] Judge Armstrong ordered that the house, and all associated fixtures, chattels and infrastructure should be removed from the block. The house should be removed, that much is agreed. We heard submissions on whether all the associated fixtures, chattels and infrastructure should be removed also.

[50] Clause 9 of the licence to occupy between the Trust and the Pihema Whānau Trust deals with compensation on determination of the licence. It grants a right, but not an obligation, to the Pihema Whānau Trust to remove the house and improvements. The Trust has the option to purchase the improvements. There is a procedure to agree or determine a fair value. Clause 9 does not otherwise deal with the situation if the Pihema Whānau Trust leaves the house or improvements on the land.

[51] Under the licence to occupy, the Pihema Whānau Trust has the right to decide the improvements that should be removed from the block. It is just and equitable to allow that choice to be made.

[52] If the Pihema Whānau Trust decides to leave improvements on the land, ownership of those improvements will revert to Hiwi. Because those improvements would have remained on the land by deliberate choice of the Pihema Whānau Trust, Hiwi Hohepa should not be required to pay any compensation to the Pihema Whānau Trust for them. If those improvements remaining on the land cause a diminution in its value, then the Pihema Whānau Trust should meet that diminution in value.

Liability between the Trust and the Pihema Whānau Trust

[53] The Trust and the Pihema Whānau Trust are joint tortfeasers. They are therefore jointly liable to Hiwi Hohepa in full. They may seek contribution from each other under s 17 of the Law Reform Act 1936. The Trusts made full arguments on contribution between them as tortfeasors. We have sufficient information to make a determination on contribution.

[54] We agree with Judge Armstrong that the Trust should meet the costs to remove the house, for the reasons he gave. The only evidence of those costs was an estimate produced in evidence by the Pihema Whānau Trust for approximately $66,000. That estimate included costs to reinstate the house elsewhere, which are not removal costs. By our calculations, the estimated removal costs would appear to be in the vicinity of $10-20,000.

[55] The reinstatement costs are a different matter. We would expect that repositioning the house on Trust land will necessarily involve some improvements or betterment in favour of the Pihema Whanau Trust. To that extent, we would expect that the Pihema Whānau Trust

should pay for those improvements. The remaining relocation costs should be met by the Trust.

[56] The Trust should pay an amount of $100 per annum from 2002. That sum has already been paid by the Pihema Whānau Trust to the Trust as part of the licence agreement. The Trust should now pay that money, being $1,700 to 2019, to Hiwi Hohepa.

[57] As for the partial reimbursement of Hiwi Hohepa's accommodation costs, although both Trusts were honestly mistaken, on the evidence the Pihema Whānau Trust have not done anything wrong. Mr Williams submitted that the Trust relied on Pihema Hohepa himself in choosing the location for the house, so he must be responsible in part. But the evidence shows that the Trust also sought confirmation of the location from others. Further, it was the Trust that warranted that it owned the block when it did not. It was the Trust that held a grazing licence over the block, of which it should have been aware. In these circumstances, we consider it just and equitable that the Trust be liable in full for these costs.

[58] The award of nominal damages is intended to recognise and vindicate Hiwi Hohepa's rights. Both the Trust and the Pihema Whānau Trust have trespassed in violation of those rights. Nominal damages should be met equally by the Trust and the Pihema Whānau Trust.

[59] The Pihema Whānau Trust should be solely liable for any diminution in value of the block caused by any improvements that the Pihema Whānau Trust decides to leave on the block.

Interest

[60] Hiwi Hohepa claimed interest. Section 24B of the Act provides:

> The court, in its proceedings, has the same powers to award interest on any debt or damages as the District Court has under Part 1 of the Interest on Money Claims Act 2016 in its own proceedings.

[61] The transitional provisions of the Interest on Money Claims Act 2016 effectively provide that section 62B of the District Courts Act 1947 continues to apply to these proceedings. In *Lee v Mangapapa B2 Incorporation* the Māori Land Court, referring to this Court's decision in *Adlam v Savage – Lot 39A Sec 2A Parish of Matata and Lot 39A Sec 2B*

No 2B no 2A Parish of Matata, held that a defendant who has had use of money that should have been made available to the plaintiff should compensate the plaintiff by paying interest.[31] In *Nicholls v Nicholls – Koromatua 3A Block*, the Māori Land Court confirmed that an award of interest is appropriate where a respondent has had use of money that should have been available to the applicants.[32]

[62] We have awarded as damages partial reimbursement of Hiwi Hohepa's accommodation costs. The Trust has not had the use of that money. An award of interest is not appropriate in those circumstances.

Decision

[63] The order at paragraph 73(a) of the Māori Land Court's decision is amended to permit the trustees of the Pihema Whānau Trust to decide which of the fixtures, chattels and infrastructure associated with the house (but not the house itself) should be removed from the Waima C30A block.

[64] The Māori Land Court's orders are otherwise confirmed. To avoid doubt, the Trust is to remove the house and any associated fixtures, chattels and infrastructure as selected for removal by the Pihema Whānau Trust from the block within 6 months of the date of this order.

[65] We grant the following additional orders:

(a) Nominal damages of $1,000 are awarded to Hiwi Hohepa. $500 is to be paid by the trustees of the Waima Topu B Ahu Whenua Trust. $500 is to be paid by the trustees of the Pihema Whānau Trust.

(b) Consequential damages of $34,087.08, plus a further $63.84 per week from 16 November 2017, are awarded to Hiwi Hohepa. The trustees of the Waima Topu B Ahu Whenua Trust are liable to pay this entire amount.

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[31] *Adlam v Savage - Lot 39A Sec 2A Parish of Matata and Lot 39A Sec 2B No 2B No 2A Parish of Matata* [2015] Māori Appellate Court MB 59 (2015 APPEAL 59) as referred to in *Lee v Mangapapa B2 Incorporation* (2017) 140 Waikato Maniapoto MB 83 (140 WMN 83).

[32] *Nicholls v Nicholls – Koromatua 3A Block* (2017) 154 Waikato Maniapoto MB 128 (154 WMN 128) at [70].

(c) If the Pihema Whānau Trust decides to leave any improvements on the block, and those improvements diminish the value of the block, the Pihema Whānau Trust must account to Hiwi Hohepa for that diminution in value.

[66] There are no awards as to interest or costs.

Pronounced at 5:00 pm at Wellington on Friday this 27th day of September 2019.

M J Doogan	P J Savage	D H Stone
JUDGE	**JUDGE**	**JUDGE**