IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20150005958
APPEAL 2015/19

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	TAHORAKURI A NO 1 SECTION 33A2 AHU WHENUA TRUST - an appeal against a reserved judgment at 125 Waiariki MB 260-266 on 13 August 2015
BETWEEN	SHANE MONSCHAU AND HARRY TE NGARU Appellants
AND	BRUCE BAMBER AND KATHLEEN BAMBER Respondents

Hearing:	17 February 2016 (Heard at Rotorua)
Court:	Deputy Chief Judge C L Fox (Presiding) Judge S Te A Milroy Judge S F Reeves
Appearances:	Mr Michael Sharp, Counsel for the appellants Mr Curtis Bidois, Counsel for the respondents
Judgment:	29 June 2016

RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] Tahorakuri A No 1 Section 33A2 is Māori freehold land containing 38.56 hectares. The Bamber Whānau Trust is one of the 17 owners of the block. In 2003 Kathleen Bamber, a beneficiary of the whānau trust, together with her husband Bruce Bamber ("the Bambers"), purported to lease the block to a third party, Gifford McFadden. The Bambers retained the proceeds of the arrangement with Mr McFadden rather than accounting for the money to all the owners of the block, despite various attempts by the owners to obtain information and an account in respect of the use of the land.

[2] An ahu whenua trust was constituted in respect of the land in November 2011.[1] In 2013 the trustees of the ahu whenua trust began proceedings in the Māori Land Court to recover the sum of $168,986.00 (being rental received less expenses) from the Bambers. The focus in the lower Court judgment was on any rental money owed to the co-owners prior to the formation of the Trust.

[3] In summary, the lower Court found that the trustees, in taking proceedings to recover the funds, were attempting to assert rights belonging to the co-owners of the land prior to the constitution of the trust. In constituting the trust the Court did not have the jurisdiction to vest such rights of the co-owners in the trustees, and, even if it did have such jurisdiction, the Court had not *actually* vested such rights in the trustees.

[4] The trustees appeal the decision of the lower Court.

Grounds of appeal

[5] The grounds of appeal are that the Court does have jurisdiction to deal with the appellants' claims as follows:

a) The Bambers leased out the land without the owners' consent, and an account of rentals was sought;

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1 43 Waiariki MB 290-300 (43 WAR 290-300).

b) Pursuant to s 220(2) of Te Ture Whenua Māori Act 1993 ("the Act") the claim related to a right "… to which the owners were entitled in respect of the land immediately before the vesting…" of the land into the trustees. Therefore the rights of the owners to require an account from the Bambers vested in the trustees; and

c) The lower Court wrongly held that the claims were not "in respect of the land" or the owners' rights in the land, but were claims in respect of money so that the rights did not vest in the trustees;

d) The claim was in fact based upon the owners' rights in the land and the Respondents' alleged infringement of those rights.

[6] The respondents oppose the appeal and argue that the lower Court was correct in its finding, and that the rights of the co-owners to the money claimed were not transferred to the appellants on constitution of the ahu whenua trust. The respondents do not accept that the appellants' claims were in respect of the land, and contend that the rights which vested in the trustees were limited to those expressed in the trust order.

[7] The respondents also raise two preliminary issues:

a) Whether the notice of appeal correctly alleges an error of law made by the lower Court; and

b) Whether the grounds of claim for an account of profits were properly pleaded.

[8] We will address the preliminary issues before considering the substantive issue of whether or not s 220(2) of the Act applies to vest in the trustees the rights of the co-owners to require an account of profits from the Bambers.

Preliminary issues

Does the notice of appeal correctly allege an error of law made by the lower Court?

[9] Respondent counsel submitted that the notice of appeal wrongly alleges that the lower Court found the appellants' claims were in respect of money. The respondents argued that, in fact, the lower Court found that the co-owners only had a *right* to the money. The question of whether the appellants' claims were in respect of land or money was not determined by the lower Court.

[10] The respondents argued that the appellants' case is predicated on a false premise, that the lower Court dismissed the appellants' claims because they were claims in respect of money. Accordingly, as the appeal is based on an error that did not occur, the Appellate Court does not have jurisdiction to hear the appeal.

Discussion

[11] The lower Court proceeded for the purposes of its judgment to presume that the plaintiff must succeed. On that basis the Court considered whether there was jurisdiction to vest the co-owners' rights to money into the trustees of the ahu whenua trust. In the result, the lower Court found that there was no such jurisdiction under s 220, which only provides for rights in respect of land to vest in the trustees.

[12] The respondents say the Court did not determine whether the appellants' claims were in respect of land or money. We do not accept the respondents' argument on this point. The judgment in the lower Court considers the wording of ss 220(1) and (2) and states:[2]

> [17] Both subsections refer to *"other assets"*. Section 220 is concerned with the form of the Vesting Order and what may be contained within its terms. It seems to me that the reference to other assets cannot mean that s215(1) is expanded or contradicted by a side wind. What then can other assets in the context of the Trust Order mean? It is to be remembered that s220 refers to and governs all of the different species of trusts under Part 12 of the Act. One only has to look at Putea trusts which can be constituted in respect of interests in Māori land and monies. Whānau trusts can be constituted in respect of shares in an incorporation and beneficial interests in Māori land. In my view those are the other assets that are referred to in s220 and s215(1) simply means what it says. Subsection 5 of 215, when referring to other assets, means the fruits or profits, whether in money or other forms of assets generated by the ahu whenua trustees in administering the land. The rights

[2] *Monschau v Bamber – Tahorakuri A No 1 Section 33A2 Ahu Whenua Trust* (2015) 125 Waiariki MB 260 (125 WAR 260).

> of the co-owners prior to the formation of the trust in this particular case, do not fall within the meaning of the words "other assets." The Court could not vest those rights in the trustees on that basis.
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> [18] The other possibility is contained within the words *"together with all rights and remedies (if any), to which the owners were entitled in respect of the land immediately before the vesting."* The possibilities are that the co-owners were creditors, beneficiaries of a trust, or holders of a chose in action immediately before the vesting with consequent rights against the respondents. **The short answer is that their rights were not in respect of the land, but in respect of the money**.
>
> (Emphasis added)

[13] In our view these paragraphs of the judgment clearly amount to a finding that the co-owners in these circumstances had a right to money (if anything) and that such a right could not be passed on to the incoming trustees.

[14] The grounds of appeal refer to s 220 of the Act and take the view that the claims were in fact a right "in respect of the land immediately before the vesting" and that the Court erred in determining the opposite. The grounds of appeal refer directly to the specific paragraphs in the judgment.

[15] We consider that there is no merit in the respondents' argument that the notice of appeal does not allege an error of law.

Were the grounds of claim for an account of profits properly pleaded in the lower Court?

[16] The respondents submitted that claims in trespass, mesne profits, or a claim under the *statute of 4 and 5 Anne* were not pleaded by the appellants in the lower Court, and there is resulting prejudice to the respondents in being required to respond to unpleaded allegations.

[17] In reply, the appellants referred to their pleadings dated 10 July 2014, filed in the lower Court. Those pleadings contained the claims regarding constructive trust, unjust enrichment, trespass, and that the Bambers received a grazing fee without any legal basis for granting a lease over the land. Further, while the appellants accepted that the pleadings do not specifically set out a claim for an account for profits, they note that the opening submissions filed before the lower Court hearing dated 14 July 2014 go through the cause of action and the appellants' claim to an account of profits. Accordingly they argue that the respondents' complaint that these claims were not pleaded is incorrect.

[18] The appellants also highlighted paras [5] and [6] of the lower Court judgment where the Judge expressed his view that the duty of account to co-owners would be on the basis of *statue 4 and 5 Anne*, and the claim against the non-owner would be mesne profits in trespass. The Judge went on to set out the issue as being whether the right for rent money, whether in trust or as a simple debt or a chose in action, could be vested in the trustees of the ahu whenua trust on the creation of that trust. The appellants argue the grounds of appeal therefore concern that issue.

[19] In addition, the appellants noted the following comments of the Judge when the trust was constituted, which they say shows the Court considered the constitution of the trust as a way to pursue an account for profits:[3]

> I have also heard how three of the owners want, essentially, to look after the money on their own, but what I have also heard is that there does not appear to be any process or avenue for any monies to be realised and to be appropriately distributed. Therefore, the Court will make an order for the establishment of an ahu whenua trust.

Discussion

[20] As noted, submissions received from the respondents prior to the appeal hearing were that the claims in constructive trust, unjust enrichment, quantum meruit and trespass were never clearly put to the respondents in the lower Court. During the course of the hearing counsel for the respondents modified that position and it seems that the main complaint was in respect of a failure to plead the claim for mesne profits on trespass.

[21] Counsel for the appellants referred us to the statement of response and counterclaim dated 16 May 2014 filed by the respondents, where direct reference is made to quantum meruit, and to an express, constructive or resulting trust. These matters were raised by the respondents themselves, if only to allege that no claims could be made under those heads. We were also referred to the appellants' response to the respondents' affirmative defences and counterclaims. Paragraphs [16] and [17] of the appellants' response dated 10 July 2014 make claims regarding quantum meruit, a constructive trust and a remedial constructive trust. Paragraph [17](d) also refers to trespass by the respondents.

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[3] 43 Waiariki MB 296 (43 WAR 296).

[22] The minutes of the lower Court hearing of this matter, record that respondent counsel submitted the claims were not properly pleaded. The Judge rejected that argument saying:[4]

> "… the issue of constructive, implied or any other sort of trust you care to name has been well and truly signalled throughout the pleadings both by you and by Mr Sharpe…"

There can be no credible claim that the pleadings did not clearly signal the basis of the proceedings, and the respondents have not been prejudiced by any lack of notice or warning of the claims. Perhaps the only omission in the pleadings was a reference to "mesne profits", but nevertheless the pleadings do refer to the remedy of an account and to damages for trespass. Mesne profits are simply damages, not a new claim. Moreover, the judgment of the lower Court referred to mesne profits – in such circumstances no complaint can be made against the appellants' pleadings in the lower Court.

[23] Again we consider that there is no merit in the respondents' argument on this point.

Substantive issue

[24] Having addressed the preliminary issues, we now turn to consider the substantive issue of the appeal. In doing so we must consider the following:

a) Whether s 220(2) of the Act gives jurisdiction to the Court to vest the owners' rights to claims for damages or an account for profits or mesne profits in the trustees of an ahu whenua trust; and

b) Whether the Court did in fact vest such rights to the trustees on constitution of the trust in November 2011.

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4 100 Waiariki MB 183 (100 WAR 183).

Does s 220(2) of the Act give jurisdiction to the Court to vest the owners' rights to claims for damages or an account for profits or mesne profits in the trustees of an ahu whenua trust?

Appellants' submissions

[25] In essence the case for the appellants was that, although no direct authority on the point has been found, their claims in this case clearly relate to "rights …in respect of the land" rather than simply claims in respect of money, and accordingly come within the ambit of s 220(2).

[26] In line with their interpretation of s 220(2), the appellants argued that their claims against the respondents fit within the proper criteria. They say such claims are clearly more than just claims in respect of money. The remedy of damages by way of mesne profit allows the Court to assess appropriate compensation for unauthorised use of the land. The claim against Mrs Bamber to account for rent is clearly a claim that relates to the land and the owners' interests in it, and gives the Court discretion as to what amount to award, after allowances for such matters as expenditure and effort applied to the land. Further, the constructive trust claims clearly relate to the owners' interests in the land and are generally considered to involve equity principles in protecting equitable rights and interests in the land. Similarly, an account of profits is based on protecting property rights.

[27] Finally, the appellants noted that the establishment of the ahu whenua trust was sought and ordered by the lower Court to allow the owners to deal with the long-running issue of the Bambers taking rental without all owners' permission. If the trustees could not bring such a claim then the constitution of the trust could be considered a wasted exercise.

Respondents' submissions

[28] Respondent counsel submitted that there was no error in the lower Court's finding that the right to the money claimed prior to the establishment of the ahu whenua trust, along with the right to bring a claim for that money, remained solely with the co-owners. Such right arose prior to the formation of the trust and the rights were not transferred by vesting order on constitution of the trust.

[29] The respondents submitted that the Court did not equate "rights and remedies…in respect of the land" with the land law concept of an interest in land, rather the Court gave examples of the types of interests that s 220 refers to. The only commonality among those examples was not that they create an interest in land; it was that the rights all touch upon the land itself. Thus the lower Court did not find that the rights that could be transferred under s 220(2) are limited only to those rights that equate to an interest in land.

[30] The respondents submitted that previous rights held by the co-owners *did* vest in the trustees on constitution of the trust; however such rights are limited to those expressed in the trust order. They noted that sub-cl 3(b)(xvi) of the trust order expressly empowered the trustees to obtain and enforce judgments against lessees on the same basis as any former trustees. However, they say that the trust order is silent as to claims regarding co-owners' right to monies. If the trustees were intended to assume those rights, that would be provided for in trust order.

[31] The respondents did not accept that the claim by the appellants must also be a claim in respect of land. As noted earlier, they contend that no claims of trespass, mesne profits, rents, or for an account were pleaded in the lower Court. They say the appellants' claims were specifically pleaded as claims in money and there was never any suggestion that the respondents held the land on any form of trust. Further, as far as a constructive trust was pleaded and pursued, the sole subject of the trust was money.

The Law

[32] Relevant to this issue is the interpretation of s 220 of the Act along with the wider statutory interpretation in the context of the Preamble and s 2 of the Act.

[33] The relevant statutory provisions are as follows:

> **220 Vesting order**
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> (1) On constituting any trust under this Part, the court may, by order, vest the land and other assets in respect of which the trust is constituted in the responsible trustees or a custodian trustee upon and subject to the trusts declared by the court in a separate trust order.
>
> (2) The vesting order shall take effect according to its terms to vest the land or other assets in the person or persons named in the order, solely or as joint tenants, as the case may require, without any conveyance, transfer, or other instrument of

> assurance, together with all rights and remedies (if any) to which the owners were entitled in respect of the land immediately before the vesting but subject to any lease, licence, mortgage, charge, or other encumbrance to which the land or assets may be subject at the date of the making of the order, and the fact that the land or other assets is or are held by that person or those persons on trust shall be stated in the vesting order.

[34] These sections can be compared with s 438 of the Māori Affairs Act 1953:

> **438 Court may vest land in trustees**
>
> (1) For the purpose of facilitating the use, management, or alienation of any Māori freehold land, or any customary land or any [[General land]] owned by Māoris, the Court, upon being satisfied that the owners of the land have, as far as practicable, been given reasonable opportunity to express their opinion as to the person or persons to be appointed a trustee or trustees, may, in respect of that land, constitute a trust in accordance with the provisions of this section.
>
> …
>
> (5) The trusts declared by the Court pursuant to this section in respect of any land shall be set forth in a separate trust order, but that order, notwithstanding any other provision of this Act, shall not be capable of registration under the Land Transfer Act 1952. Any trust so declared may authorise or direct the trustees to use and manage the land for any purpose, or to subdivide the same, or to alienate or dispose of the same, or any part thereof, or any interest therein, in any manner whatsoever, and whether for consideration or otherwise. The order made by the Court may confer on the trustee or trustees such powers, whether absolute or conditional, as the Court thinks fit, but, subject to any express limitations or restrictions, the trustees shall have all such powers and authorities as are necessary for the effective performance of the trusts.

[35] Both counsel made reference to the case *Crawford v McGregor*.[5] That case dealt with an action for damages for breaches of covenant under a lease which had expired prior to the constitution of a trust constituted in respect of land pursuant to s 438 of Māori Affairs Act 1953. The High Court gave judgment in the *Crawford* case in 1985, prior to commencement of the Act. The case was therefore determined under the relevant provisions of the Māori Affairs Act 1953.

[36] In interpreting s 438 of the Māori Affairs Act 1953, the High Court found that the powers that could be vested in the trustees were conditioned by s 438(1). Accordingly, the High Court found that only those powers which were necessary for the purpose of facilitating the use, management or alienation of the land were vested in the trustees. On this interpretation, the power to seek damages for breaches of the covenants of a lease, which had expired before the trust was set up, could not pass to the trustees, because the

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5 *Crawford v McGregor* HC Palmerston North A87/81, 29 July 1985.

right to seek damages was vested in the owners prior to the setting up of the trust, and was not necessary for the purpose of the trust.

[37] The High Court held that the statutory provisions of s 438 of the Māori Affairs Act 1953 only gave jurisdiction to the Māori Land Court to confer powers which were reasonably incidental to the performance of the trust. Justice Ongley said:[6]

> I am unable to see how an order divesting [the former lessors] of that property [the right of action for breach of covenant under the expired lease] in favour of trustees can on any reasonable construction be regarded as the conferring of a power reasonably incidental to the trusts which may be conferred under subs (5) or how it can be brought within the purposes of facilitating the use, management and alienation of land which by virtue of subs (1) founds the Court's jurisdiction to act under s 438.

[38] Justice Ongley also considered the meaning of s 438(10) but found that there was nothing in the subsection which indicated that the right of action could be acquired by the trustees by way of the vesting order. Justice Ongley went on to say:[7]

> The short answer however is that the property in issue here, that is, the right of action for breaches of covenant, was never owned by the trustees and so does not fall within the subsection.

[39] The law regarding rights of co-owners as between themselves also has implications for the appropriate remedy, if the appeal is successful. In *Principles of Real Property Law* it states:[8]

> **13.002 The rights of co-owners as between themselves**
>
> Because co-owners have unity of possession, they are all concurrently entitled to use and enjoy the land, or if they are not in occupation of it themselves, to receive the rents and profits in appropriate shares. While co-owners share in the occupation and use of the land, and apportion the associated expenses and, if any, profits, few difficulties arise. But when this no longer happens, disputes can arise between the co-owners.
>
> Co-owners as such do not stand in a fiduciary relationship to one another, so that one co-owner cannot, by merely leaving the management of the property to the other, impose upon that other an obligation of a fiduciary character. If the parties are able to reach agreement as to future use and occupation of the land, the past financial difficulties can be resolved by an action of account or for contribution to jointly owned debts. If such agreement is not possible, it may be necessary to determine the co-ownership by bringing proceedings for partition or sale, which may also include an application for an accounting adjustment.
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> The financial difficulties which may arise can be considered under three heads: occupation fee; expenditure; rents and profits.

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6 *Crawford v McGregor* HC Palmerston North A87/81, 29 July 1985, at 6.
7 Ibid, at 6 -7.
8 G W Hinde, N R Campbell & P Twist, *Principles of Real Property Law* (LexisNexis, Wellington, 2007) at [13.002].

> …
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> *(b) Expenditure*
>
> Expenditure can take various forms, for example, repairs and improvements, rates, mortgage payments, insurance. The right of one co-owner to recover a proportion of such payments from the other depends upon the underlying nature of the obligations to make the payments and upon the context in which the claim is made.
>
> *(c) Rent and profits*
>
> Just as a co-owner in sole possession of the land may incur expenditure in relation to that possession, so such an owner in sole legal possession may receive the whole of the rents and profits from the land. The right of the other co-owners to recover their share is uncertain.
>
> By s 27 of the statute 4 and 5 Anne, c 3, (generally referred to as the Administration of Justice Act 1705), one co-owner formerly had the right to recover from another co-owner any rent or other revenue received from some tenant or third party in excess of that other co-owner's share. This provision has now been repealed as a part of the law of New Zealand without being replaced by a modern provision to the same effect. Various effects have been attributed to this repeal, and the result remains uncertain.
>
> If the right survives the repeal as an independent action in account, it may be invoked either in partition actions or independently and is not restricted to circumstances where the person receiving more than his or her share is in sole possession. It applies, however, only to rents and profits received from a third party, and does not apply to remuneration received for the co-owner's own work on the land, for example if the property were run as a boarding house. Where a proportion is recoverable by other co-owners, the defendant co-owner may have a claim for the expenses incurred in generating that income, such as improvements to enable the property to be let or otherwise increasing the rental received.

Lower Court Interpretation of s 220 of the Act

[40] In his decision, Judge Savage noted that the issue of whether the Court had *jurisdiction* to vest the rights of the co-owners in the trustees of an ahu whenua trust, was not raised during the hearing. In preparing the final judgment he became concerned about the jurisdiction issue and gave directions dated 5 June 2015 inviting submissions from the parties on this point, and referring them to the judgment of *Crawford*.

[41] In the lower Court Judge Savage stated:[9]

> [10] … I believe there was an attempt [by the legislature] to deal with this issue [the effect of the *Crawford* case] so those rights could pass to that trustee.

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[9] *Monschau v Bamber – Tahorakuri A No 1 Section 33A2 Ahu Whenua Trust* (2015) 125 Waiariki MB 260 (125 WAR 260).

[42] He then considered the interpretation of ss 215 and 220 of the Act and came to the view that subs (5) of s 215, when referring to other assets:[10]

> [17] … means the fruits or profits, whether in money or other forms of assets generated by the ahu whenua trustees in administering the land. The rights of the co-owners prior to the formation of the trust in this particular case, do not fall within the meaning of the words "other assets."…

[43] The lower Court interpreted the words in s 220(2) "together with all rights and remedies (if any), to which the owners were entitled in respect of the land immediately before the vesting" to mean that the co-owners in these circumstances had rights in respect of money, but not in respect of the land. He further explained that finding by stating:[11]

> [20] … The transaction that created that right involved the land, but the right to the money is not a right in relation to the land. The right would continue even if the co-owners no longer had any rights in relation to the land. There is no link.
>
> I therefore hold that the Court could not pass these co-owners' rights to the incoming trustees in the circumstances of this case.

[44] The Judge went on to find that even if he was wrong in his interpretation of s 220, the vesting order did not in fact vest the owners' rights to make such claims in the trustees. He relied on s 219(2) of the Act which states that the vesting order takes effect according to its terms to vest the land or other assets, and the fact that the land or other assets are held on trust "shall be stated in the Vesting Order". As the vesting order was silent in respect of these rights, the judge came to the conclusion that no such rights passed to the trustees.

Discussion

[45] With respect we find ourselves unable to agree with the learned Judge's findings. Our reasons relate to the following matters:

a) The principles of interpretation of the Act set out in the Preamble and ss 2 and 17 as applied to s 220; and

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10 Ibid.

11 *Monschau v Bamber – Tahorakuri A No 1 Section 33A2 Ahu Whenua Trust* (2015) 125 Waiariki MB 260 (125 WAR 260).

b) The particular circumstances surrounding the constitution of the Tahorakuri A No 1 Section 33A2 Ahu Whenua Trust.

Statutory Interpretation – Preamble and Section 2 the Act

[46] Section 2 of the Act requires the Māori Land Court to interpret the provisions of the Act in a manner "that best furthers the principles set out in the Preamble to this Act." The Preamble reaffirms the exchange of kāwanatanga for the protection of rangatiratanga of Māori in respect of their taonga, and also recognises that land is a taonga tuku iho of *special significance* to Māori people. The Court is required to promote and facilitate the retention of land in the hands of the owners, their whānau and hapū and to facilitate the occupation, development and utilisation of the land for the benefit of those people. The Preamble goes on to refer to the desirability "to establish mechanisms to assist Māori people to achieve the implementation of these principles."

[47] Sections 215 and 220 must be read within the broad context set out in the Preamble and s 2, particularly as these are provisions intended to "establish mechanisms" to assist Māori to utilise their land for the benefit of *all* the owners. These mechanisms are required because many complex and difficult issues arise in respect of multiply-owned Māori land, which frustrate the full use and administration of the land. The various proceedings that have come before the Court in respect of this land amply demonstrate the problems for co-owners in obtaining satisfaction from one of their number who is using the land for his or her own benefit, without consultation and without accounting to the other owners.

[48] We also note that Part 12 of the Act includes a number of provisions, apart from s 220, which are intended to give a wider ambit to the powers and responsibilities of trustees than those provided in s 438 of the Māori Affairs Act 1953. For instance s 226(1) of the Act states that the Court may confer on the trustees "such powers… as the Court thinks appropriate having regard to the nature and purposes of the trust." The reference to "the nature" of the trust as well as to its purposes requires that, in conferring powers on the trustees, the Court must consider that the trust is not just an efficient way to develop and utilise the land, but the trustees are also the representatives of, and the vehicle for the expression of the owners' collective will in relation to the land. This is one way in which

the ‘rangatiratanga’ of the Preamble finds expression in the mechanisms established in the Act.

[49] Other statutory provisions in the Act which expand the nature and purposes of an ahu whenua trust, include s 215(6) and its accompanying provisions, s 218 (providing jurisdiction for the Court to give the trustees power to distribute income for Māori community purposes), s 229 (allowing the Court to authorise new ventures, so that a trust is not confined to its original purposes), s 243 (allowing trustees to use the income of the trust to acquire land as investment land) and s 245 (allowing trustees to apply to court for power to hold income for charitable purposes). Thus the scheme of the Act supports the view that trustees of an ahu whenua trust on the constitution of the trust, assume all legal rights and remedies of ownership of the land, which they may exercise or pursue on behalf of the owners. That interpretation is reinforced in the Court’s standard ahu whenua trust order which, apart from express restrictions, gives the trustees the power to deal with the assets of the trust as they see fit for the purposes of the trust.

[50] We therefore agree with counsel for the appellants that ss 215 and 220 of the Act must be interpreted in the wider context of the Act as a whole. We consider that ss 215 and 220 empower the trustees to pursue any prior remedies in respect of the land, as well as to manage and utilise the land for the future.

[51] We consider the lower Court erred in finding that the claims advanced by the appellants were solely claims in respect of money rather than “in respect of the land”. We acknowledge that the remedy sought by the appellants is a monetary remedy, but that is often what is sought by lessees under a breach of lease, by mortgagees where there is a breach of mortgage, or by those who have the benefit of an easement where they have been prevented from receiving the benefit of such easement. These remedies depend on interests in land. A claimant might also seek remedies such as specific performance. It is not the nature of the remedy that makes the claim one “in respect of the land.” Rather, it is its connection with the land that determines whether, in the context of the Act, it is one which seeks to preserve or give effect to the rights of the owners in relation to the land.

[52] The lower Court took the view that these claims were in respect of money, and that the co-owners would have these rights even if their connection with the land was severed. As the judgment put it, "[t]here is no link".[12] That is an unnecessarily narrow view of the effect of s 220(2) of the Act. As the learned Judge observed, "the transaction that created the right involved the land…"[13] There is nothing in s 220(2) which suggests that the use of the land by a co-owner or third party, that wrongs the owners in some way, cannot be seen as a right in respect of the land. If the legislature had intended that only those rights which constitute an interest in land could be vested in the trustees then it would have used more precise language.

[53] Moreover, we consider that s 220(2) as enacted is sufficient to overcome the result in *Crawford*. The language used in s 220(2) is capable of that interpretation and it was the view of the learned Judge in the lower Court that that was the legislature's intention. Further, the lease in *Crawford* had expired, so in fact the owners were left with a claim to monetary compensation. It would be an incongruous result if trustees could be vested with the power to make a claim in the *Crawford* circumstances under the 1993 Act, but not where a third party may be liable for trespass or account of profits for wrongful use of the land, a use which, in this case, continued over a considerable period of time. We do not think the legislature could have intended such a result, and we are strengthened in that view by the use in s 220(2) of the words "*all* rights and remedies" (emphasis added).

[54] We, therefore, interpret s 220(2) of the Act as giving the Court jurisdiction to vest the trustees with all such rights and remedies of the owners as existed prior to the constitution of the trust, concerning or involving their rights as owners to control or use the land, but subject to the encumbrances listed in the section. We note that counsel for the respondent seemed to agree with this interpretation, and his submissions focussed on whether the Court had in fact vested such a right in the trustees via the trust order. We turn now to discuss this issue.

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12 *Monschau v Bamber – Tahorakuri A No 1 Section 33A2 Ahu Whenua Trust* (2015) 125 Waiariki MB 260 (125 WAR 260) at [20].

13 Ibid.

Did the Court in fact vest the owners' rights to claims for damages or an account for profits or mesne profits to the trustees on constitution of the trust?

Appellants' submissions

[55] The appellants argued that the rights and remedies in respect of the land would not need to be stated in the trust order as they are included through the further provisions of s 220(2) of the Act.

[56] The appellants noted that pursuant to cl 3A of the trust order, the trustees have the general powers of owners of the land, and that would include by way of s 220(2) the ability to pursue any rights relating to the land. It was submitted that the clauses in the trust order which give specific examples of the powers the trustees may exercise are not exclusive.

Respondents' submissions

[57] The respondents submitted that vesting orders under s 220(2) take effect according to their terms, and the wording of s 220(2) expressly provides "...the fact that the land or other assets is or are held by that person or those persons on trust shall be stated in the vesting order." The rights that vested in the trustees are therefore limited to those expressed in the trust order. As the vesting order is silent about the rights the co-owners had to the money immediately prior to constitution of the trust, the only plausible conclusion is that such rights did not vest.

[58] The respondents also noted that if the appellants' arguments were correct, there would be no need for the Court to specify in the trust order the other rights of the co-owners that passed to the trustees, such as the right against previous lessees and the right to represent co-owners in zoning matters, which are both expressly provided for in the trust order. No additional rights should therefore be implied into the trust order.

[59] Further, the respondents submitted that at the time the ahu whenua trust was constituted the Judge had knowledge of the claimed rights, but did not intend to vest such rights in the trustees. They say the Judge merely intended that the trustees would investigate such matters, and accordingly the terms of the vesting order and trust order reflect that intention.

Discussion

[60] It is common ground that neither the vesting order, nor the trust order makes any reference to the vesting in the trustees of any rights the owners might have to pursue the relevant remedies in relation to the use of the land prior to the constitution of the ahu whenua trust.

[61] We note the trust was constituted by an order made on 2 November 2011.[14] The order was made at a hearing before Judge Coxhead where the reasons for the constitution of the trust were discussed. At the hearing Mrs Bamber referred to the fact that for 16 years there had been no agreement in the family about such things as leasing and an easement. She was against the formation of the trust because, as she put it, "I don't believe it's going to be in my interest".[15] Tere Te Ngaru, one of the supporters of the application to form a trust, stated that there had been an informal lease (with the Bambers) from 1983 to 1993 which was agreed to by the owners, but that since then the owners had not received any compensation or information as to transactions involving the land, apart from the fact that any rental was being paid to Bruce Bamber.[16] Asked what then happened, Mr Te Ngaru replied "Exactly, then what? We're at a loss, so this is why we have to form the ahu whenua trust."[17]

[62] In response to this information Judge Coxhead said "Okay, I am going to deal with this, and then one of the issues for the trustees to do, if I establish the trust, one of the issues for the trustees to do will be to look at what has happened with past funds, if any, that have been provided from the lease."[18]

[63] Eliza Phillips also gave evidence as follows:[19]

> …I'd just like to point out that an ahu whenua trust was attempted about 18 to 20 years ago by myself, to try and work it out with the family. The reason for that was because Kathy and her husband have solely leased those lands on their own regard. Judge Savage brought that to everybody's attention and I think if you bring it forward, he actually asked Kathy to present and produce that information to the Court. Today, I don't know if that information has been presented. So, these are well minuted in the Court books. I, my understanding, is I

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14 43 Waiariki MB 290-300 (43 WAR 290-300).
15 43 Waiariki MB 292 (43 WAR 292).
16 43 Waiariki MB 295 (43 WAR 295).
17 Ibid.
18 Ibid.
19 43 Waiariki MB 296 (43 WAR 296).

> understand why Kathy would be objecting to setting up an ahu whenua trust, because for all these years she has been a sole beneficiary of the money that has belonged to the whenua.

[64] Judge Coxhead gave his decision as to whether a trust should be constituted. He referred to the need to formalise leasing arrangements and to a matter involving easement discussions with Mighty River Power. Later he said:[20]

> "… what I have also heard is that there does not appear to be any process or avenue for any monies to be realised and to be appropriately distributed. Therefore, the Court will make an order for the establishment of an ahu whenua trust."

[65] Having made the decision that the trust should be constituted, the Judge went on to consider the appointment of trustees. After some discussion he decided on the appointments and then said:[21]

> "Also, these trustees, once they are appointed, one of the issues that they will need to explore is what has been happening with the land with regards to the last five or so years, or even longer."

[66] Counsel for the respondents argued that these comments did not show that Judge Coxhead intended to vest the rights or claims the owners had in respect of the actions of the Bambers in the trustees. Rather, these comments indicated only that the Judge expected the trustees to investigate the issue, no more. The appellants took the opposite view.

[67] We note that it seems clear from the comments of the supporters of the application before Judge Coxhead, that the actions of the Bambers since 1993 were of considerable concern to them, that they wanted an account for the money received by the Bambers over those years, and they expected the lower Court to assist in solving that issue. In response, Judge Coxhead proceeded to make orders to constitute the trust and appoint trustees, and it cannot be doubted that in part it was to take such actions as might be necessary to pursue and seek any remedy that may be available against the Bambers.

[68] The next question is whether the vesting order made by Judge Coxhead needed to state that the Court was vesting the rights and remedies the owners might have in the trustees so that they could take the relevant proceedings against the Bambers.

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20 Ibid.

21 43 Waiariki MB 298-299 (43 WAR 298-299).

[69] In the decision being appealed, Judge Savage focused his discussion on s 215(5) of the Act. The relevant parts of that section provide:

> **215 Ahu whenua trusts**
>
> …
>
> (2) An ahu whenua trust may be constituted where the court is satisfied that the constitution of the trust would promote and facilitate the use and administration of the land in the interests of the persons beneficially entitled to the land.
>
> …
>
> (5) … The land, money, and other assets of an ahu whenua trust shall be held in trust for the persons beneficially entitled to the land in proportion to their several interests in the land.

[70] At para [23] of his judgment, the Judge said:[22]

> [23] …The application to create the ahu whenua trust referred to nothing but the land. Nobody could have assumed that such an application would involve "other assets" or other rights...

[71] Judge Savage emphasised the fact that s 215(5) requires that the land and other assets are stated in the vesting order.

[72] It was his view that if the assets of the trust involved money set aside in a bank account for the owners of the land, or farm machinery or structures on the land which might or might not be deemed fixtures, he would have expected the trust order to specify such assets. The problem is that at the time that the trust was constituted, Judge Coxhead did not have conclusive evidence before him that the co-owners had viable claims and remedies that could be pursued against the Bambers. Rather, the trustees were to investigate and determine what, if any, claims could be taken and what remedies should be pursued.

[73] We consider Judge Savage gave undue emphasis to what "land, money and other assets" were identified in the vesting order of the trust, whilst failing to correctly interpret and apply s 220(2). It was not necessary for the vesting order made by Judge Coxhead to state that the Court was vesting the rights and remedies the owners might have in the trustees so that they could take the relevant proceedings against the Bambers.

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[22] *Monschau v Bamber – Tahorakuri A No 1 Section 33A2 Ahu Whenua Trust* (2015) 125 Waiariki MB 260 (125 WAR 260).

[74] At the time of constitution of the trust there may be various breaches of the owners' rights in respect of the land, which are, at that stage, undiscovered by the owners. We consider that it would be a strange interpretation of s 220(2) if the trustees were not able to take claims to enforce those rights on behalf of the owners.

[75] Our interpretation is reinforced by the wording in s 220(2). This section refers to the vesting of "the land or other assets…" and then goes on to say "… together with all rights and remedies (if any)…" That seems to us to suggest that the legislature did not intend that the "land, money and other assets" are the same as the "rights and remedies", but rather that the rights and remedies relate to the land and assets.

[76] We would not, therefore, expect the rights and remedies to be listed in the vesting order. It might not be possible to list such rights or remedies for the reasons given above. We consider the better interpretation of ss 215(5) and 220(2) of the Act is that the vesting order is to vest the land and any other tangible or material assets, including bank accounts and the like, in the trustees, but that the rights and remedies in relation to any claims regarding the land or assets simply pass with the vesting of the land, money, or other assets.

[77] We therefore find that on the vesting of the land in the trustees of the Tahorakuri A No 1 Section 33A2 Ahu Whenua Trust, the rights and remedies of the owners relating to the management, control or use of the land, including rights to take the claims referred to in these proceedings, passed to the trustees. Pursuant to s 220(2) of the Act the trustees have the ability to take proceedings in relation to those rights.

[78] The appeal is upheld. However, we consider that the matter must be sent back to the lower Court for hearing and determination on the merits of any claims that the trustees may have against the respondents. The lower Court will need to consider whether any further evidence and submissions relating to those claims should be heard.

Decision

[79] The appeal is allowed. Pursuant to ss 56(1)(d) and (e) of the Act the Māori Land Court is directed to determine whether any further evidence and submissions should be

heard, to conduct a hearing accordingly, and to make a final determination on any claims made by the appellants against the respondents.

[80] Submissions as to costs from the appellants are to be filed with this Court within four weeks of the date of this decision. The respondents are to be file any response14 days after those submissions are served on them. The appellants are to file any reply submissions no later than seven working days thereafter.

This judgment will be pronounced at the next sitting of the Māori Appellate Court.

C L Fox **DEPUTY CHIEF JUDGE** (Presiding)	S Te A Milroy **JUDGE**	S F Reeves **JUDGE**