IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA23/2019
[2020] NZCA 346

BETWEEN	GEORGE TAMA NICHOLLS Appellant
AND	MARK STEVEN NICHOLLS, AIRINI PIRIHIRIA TUKERANGI, DELACE WILLIAM JAMES, KAHUTOROA MATAIA TUKERANGI, VIV TAMA NICHOLLS, ANITA MARI NORMAN AND SARAH JANE NICHOLLS AS TRUSTEES OF THE AHU WHENUA TRUST KNOWN AS THE W T NICHOLLS TRUST Respondents

Hearing:	5 May 2020
Court:	Brown, Clifford and Gilbert JJ
Counsel:	J P Kahukiwa for Appellant D E Wackrow and C M T Linstead-Panoho for Respondents
Judgment:	13 August 2020 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The appellant (Mr Nicholls) and his brother were co-owners (among others) of Māori freehold land at Oamaru Bay until 15 August 2011 when that land was vested in an ahu whenua trust, the W T Nicholls Trust (the Trust). The respondents are the trustees of the Trust (the Trustees). Having obtained an injunction restraining Mr Nicholls and others from occupying the land, the Trustees sought an order for recovery of rental income received by Mr Nicholls and his brother and an order that they pay mesne profits for their unlawful occupation.

[2] On 21 December 2017 the Māori Land Court made orders pursuant to ss 215 and 220 of Te Ture Whenua Māori Act 1993 (the Act) requiring:[1]

(a) for the period prior to the constitution of the Trust, Mr Nicholls and his brother to account to the Trustees for the amount of $442,593.00, less their share (as co-owners) calculated on a pro rata basis (liability order 1); and

(b) for the period following the constitution of the Trust, Mr Nicholls to pay to the Trustees the amount of $391,824.00 (liability order 2);

in both instances with interest at the rate of five per cent.

[3] Mr Nicholls' appeal to the Māori Appellate Court was dismissed in a judgment delivered on 7 December 2018.[2]

[4] Mr Nicholls now appeals under s 58A of the Act challenging the jurisdiction of the Māori Land Court and the Māori Appellate Court to make liability order 1 and the manner of assessment of both liability orders.

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1 *Nicholls v Nicholls – Koromatua 3A* (2017) 154 Waikato Maniapoto MB 128 (154 WMN 128) [Māori Land Court judgment].

2 *Nicholls v Nicholls – Koromatua 3A* [2018] Māori Appellate Court MB 604 (2018 APPEAL 604) [Māori Appellate Court judgment].

Factual background

[5] The genesis of this protracted litigation was noted by the Māori Appellate Court in an earlier judgment in the dispute in this way:[3]

> [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 subject of these proceedings are beachfront and hilltop land at Oamaru Bay and an adjacent commercial caravan park and holiday flats.
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> (Footnote omitted.)

We briefly summarise the background which is recited in detail in the several previous judgments.

[6] The ten children of Mr Nicholls' grandfather, Wiremu Tawhia Nicholls, succeeded to his considerable land interests. In the case of the beachfront land and 22.87 hectare camping ground, known as the Oamaru Bay Caravan Park and Tourist Flats the subject of this appeal (the Oamaru Bay land), each sibling was allocated a tenth share. In due course Mr Nicholls and his siblings became co-administrators of the share of their father, Wiremu Uru Nicholls.

[7] From some time in 2008, Mr Nicholls (together with some others) occupied the Oamaru Bay land without the consent of the majority of owners. A number of co-owners, who had not been in possession of the Oamaru Bay land at the time of Mr Nicholls' occupation, sought an injunction in the Māori Land Court for trespass under s 19 of the Act.

[8] In a judgment dated 5 October 2009 declining the application, Judge Coxhead explained that in the normal run of cases involving Māori land, co-owners cannot bring an action for trespass against another co-owner unless the legal ownership of the land is vested in a trust or incorporation for the reason that co-owners have equal rights to possession of the land.[4] While noting there may be special circumstances where one

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3 *Nicholls v Nicholls – Papaaroha 6B* [2013] Māori Appellate Court MB 598 (2013 APPEAL 598).
4 *Nicholls v Nicholls – Papaaroha 6B* (2009) 120 Hauraki MB 116 (120 H 116) at [96].

co-owner may be successful against another in an action for trespass, the applicants could not sustain such an action when they were not in possession at the time of the challenged occupation.[5]

[9] However Judge Coxhead observed:

> [112] The respondents have taken, what I consider to be a very selfish approach to these land blocks. They also seek to use "tikanga" arguments to justify their presence on the lands. It became clear to me that this was not about tikanga. They have used intimidation actions to get on the land, potentially at the expense of the WT Nicholls Estate and possibly at the expense of Estate lands.

The Judge directed that the Court was to facilitate a meeting of owners to consider what might be an appropriate structure for the administration of the Māori freehold land of the W T Nicholls Estate.

[10] Consequent upon those meetings, on 15 August 2011 the Māori Land Court made an order under ss 215 and 219 of the Act establishing the Trust as an ahu whenua trust. At the same time a vesting order was made under ss 220 and 222 of the Act vesting the relevant land in the Trustees.

[11] On 24 October 2012 the Trustees filed a fresh application against Mr Nicholls and the other occupiers of the Oamaru Bay land seeking orders for recovery of the land, injunctive relief and orders for recovery of rental income and mesne profits. On 21 December 2012 Judge Coxhead granted an injunction under s 19(1)(a) of the Act restraining Mr Nicholls from entering or occupying the lands comprising the Oamaru camping ground without the consent of the Trustees and under s 20(d) an order for recovery to the Trustees of the Oamaru Bay land.[6] Mr Nicholls was directed to provide documentation concerning rental and other income received.[7]

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5 At [105].
6 *Nicholls v Nicholls* (2012) 50 Waikato Maniapoto MB 10 (2012 WMN 10).
7 See [81] below.

[12] Mr Nicholls' appeal against that judgment was dismissed on 3 October 2013 with reasons to follow.[8] In the reasons for judgment delivered on 22 November 2013 the Māori Appellate Court made the following concluding observations:[9]

> [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 uri to come. He kai a te [rangatira] he kōrero. It is time for the whānau to turn towards each other and away from the Courts.

[13] Mr Nicholls lodged an appeal to this Court from the Māori Appellate Court judgment. However his appeal was deemed abandoned on 6 June 2014, he having failed to lodge a case on appeal and apply for a fixture in accordance with r 43 of the Court of Appeal (Civil) Rules 2005.

[14] Compliance with the directions of Judge Coxhead concerning rental and other income received was deferred pending the outcome of the appeal to the Māori Appellate Court. On 3 December 2013 Mr Nicholls filed a memorandum and an affidavit which provided unsubstantiated figures for the total income received from caravans, cabins and the campground and expenditure for the 2011, 2012 and 2013 years.

[15] The Trustees then filed a memorandum requesting the Court of its own initiative make orders for the provision of information from other sources, namely the Bank of New Zealand and Hauraki Taxation Service Ltd. On 9 June 2014 Judge Coxhead made orders pursuant to s 69(2) of the Act requiring:[10]

(a) the production by the Bank of New Zealand of all bank statements for the accounts held in the name of the Oamaru Bay Holiday Park and the Oamaru Bay Family Holiday Park from 1 January 2008; and

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8 *Nicholls v Nicholls* [2013] Māori Appellate Court MB 515 (2013 APPEAL 515).
9 *Nicholls v Nicholls – Papaaroha 6B*, above n 3.
10 *Nicholls v Nicholls – W T Nicholls Trust* (2014) 78 Waikato Maniapoto MB 107 (78 WMN 107) at [28].

(b) the production by Hauraki Taxation Service Ltd of any documents which Mr Nicholls had provided to them for the preparation of accounts for the Oamaru Bay Holiday Park and the Oamaru Bay Family Holiday Park business.

Still further directions designed to obtain relevant information were made on 29 October 2014 and 13 February 2015.[11]

[16] On 25 June 2015 the Māori Land Court engaged Jefferies Nock and Associates, chartered accountants, to carry out a review and analysis of the financial accounts of the Oamaru Bay Holiday Park, and provide a report to the Court regarding its income, expenditure and overhead obligations. That report filed on 2 May 2016 indicated that over a seven year period from 2009 to 2015 gross income had been derived of $834,000.00 (GST exclusive).

[17] In support of their claim the respondents commissioned a mesne profits valuation assessment from Deane and Co Ltd, chartered accountants. Their report dated February 2017 identified a total mesne profit loss of $394,216.00 for the period 15 August 2011 to 14 January 2014. In respect of the period prior to 15 August 2011 the mesne profits loss was assessed by the Trustees to be $342,370.00.[12]

The Māori Land Court judgment

[18] The Trustees claimed for recovery of rental income in the amount of $442,593.00 for the period prior to the Trust's constitution from Mr Nicholls and his brother and $391,824.00 for the period post-constitution from Mr Nicholls solely. They also claimed mesne profits of $342,370.00 for the period prior to the Trust's constitution and $394,216.00 post-constitution.

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11 *Nicholls v Nicholls – W T Nicholls Trust* (2014) 88 Waikato Maniapoto MB 205 (88 WMN 205); and *Nicholls v Nicholls – W T Nicholls Trust* (2015) 93 Waikato Maniapoto MB 74 (93 WMN 74).

12 This figure was obtained by subtracting from $689,466.00 (the losses for 2009-2015) the amount of $347,096.00. However the Trustees' assessment appears to include the mesne profits loss for part of 2014 and all of 2015. We calculate the amount to be $283,469.00.

[19] Judge Coxhead commenced by noting the conclusions in the report of Jefferies Nock and Associates:[13]

> [9] In summary, the report analysed five bank accounts over a seven-year period. The report found that there was a total income of $834,000 (excluding GST) received through the bank accounts and a net surplus of just over $500,000 was calculated (ignoring purported lease rental expenditure which could not be verified). Assets of $43,212 have been acquired, although their current state and value are uncertain. Significantly, the report found that there were personal drawings taken from the Oamaru Bay Holiday Park accounts estimated to be at least $400,000 between the 2009 to 2015 financial years.

[20] In relation to the income received prior to the Trust's constitution, Mr Kahukiwa for Mr Nicholls contended that the Court did not have jurisdiction to make an order in favour of the Trustees because the rental income did not come from an interest in land but from contractual arrangements between Mr Nicholls and itinerant users of the land who were licensees. It was said that the arrangements were therefore in personam and did not run with the land.

[21] Judge Coxhead concluded that there was nothing in s 220 that suggested that the use of land by a co-owner or third party could not be seen as a right "in respect of the land" in terms of s 220(2). Adopting the approach of the Māori Appellate Court in *Monschau v Bamber*, the Judge concluded that the Trustees were able to recover rental income on behalf of the co-owners for the period prior to the constitution of the Trust.[14]

[22] Citing *Eriwata v Trustees of Waitara SD Sections 6 & 91 Land Trust* the Judge concluded that subsequent to the constitution of the Trust Mr Nicholls (and the other respondents) no longer had rights as co-owners because the legal title to the Oamaru Bay land was vested in the Trustees.[15] As beneficial owners Mr Nicholls (and the other respondents) no longer had power to control the use and occupation of the land. Hence they had no right to receive the rental income and they were required to account for it.

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13 Māori Land Court judgment, above n 1.

14 At [40], citing *Monschau v Bamber – Tahorakuri A No 1 Section 33A2* [2016] Māori Appellate Court MB 286 (2016 APPEAL 286).

15 At [27]–[28], citing *Eriwata v Trustees of Waitara SD Sections 6 & 91 Land Trust – Waitara SD Sections 6 & 91* (2005) 15 Aotea Appellate MB 192 (15 WGAP 192) at [5] and [8].

[23] However the Judge concluded that the claim for mesne profits for wrongful use and the claim for compensation in terms of the rentals derived were overlapping claims.[16] While satisfied that the grounds for an award of mesne profits had been made out, the Judge declined to make such an award for the reason that it would require the respondents to pay twice.[17] Orders were made to the effect of those detailed in [2] above. An order was made under s 24B of the Act for an award of interest at five per cent on the amounts ordered to be paid.

The Māori Appellate Court judgment

[24] The Māori Appellate Court agreed with Judge Coxhead that in the period prior to the formation of the Trust Mr Nicholls owed a duty to account to the other owners for the revenue received in excess of his share, citing the following extract from *New Zealand Land Law*:[18]

> Where one co-owner has received more than his or her share of the rents [or] revenues from the common property, the Statute of Anne imposes a liability to account for the excess so received to the other co-owner(s). In *Henderson v Eason* a distinction was drawn between rents and other revenues actually received from a tenant or third party, which must be accounted for, and, on the other hand, profits a co-owner might make through his or her use and occupation of the co-owned property, which he or she may retain …

[25] The issue whether on the constitution of the Trust any right to an account had been transferred to the Trustees received greater attention. The Court rejected Mr Kahukiwa's argument that *Monschau* was not binding, stating:

> [22] It is trite law that the Act must be interpreted and applied in a manner that furthers the principles and objectives set out in the Preamble, ss 2 and 17. These include the retention of land in the hands of the owners, and the effective use, management and development of the land by or on behalf of the owners. An ahu whenua trust is established 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. We affirm the principle in *Monschau* that s 220 must be considered in light of the principles and objectives set out in the Preamble, ss 2 and 17 of the Act, and also in accordance with the purpose of an ahu whenua trust per s 215(2).

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16 At [61].
17 At [64].
18 Māori Appellate Court judgment, above n 2, at [12], quoting Tom Bennion and others *New Zealand Land Law* (2nd ed, Brookers, Wellington, 2009) at [6.6.07].

> [23] The difficulties of administering multiply-owned Māori land where no management structure is in place is well known to this Court. The principles of unity of possession between co-owners can often give rise to disputes between owners as to the utilisation, occupation and development of the land. The constitution of an ahu whenua trust was intended to empower the owners through the election of trustees with the authority to achieve the effective utilisation of their lands. Section 220(2) provides that the land or other assets are vested in the trustees "together with all rights and remedies (if any) to which the owners were entitled in respect of the land immediately before the vesting". We have found that the owners were entitled to revenue arising from the operation of the camp ground before the vesting. This is a right and remedy contemplated by s 220(2), which transferred to the trustees because of the vesting order.
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> (Footnote omitted.)

[26] The Court also rejected Mr Kahukiwa's contentions that the right to an account of revenue is not a right in respect of land but is a right in personam, and that no rights or remedies were transferred to the Trustees in this case because the vesting order did not expressly vest those rights and remedies in them. The Court considered that the correct interpretation of s 220(2) was that a vesting order need not make express the preservation of rights or remedies, an interpretation which the Court considered gave effect to the principles and objectives of the Act as well as the purpose of an ahu whenua trust.[19]

[27] The Court also rejected the argument that a deduction should be made for expenses incurred by Mr Nicholls in the operation of the campground and an allowance for his efforts, observing that Mr Nicholls had not produced evidence demonstrating what a reasonable deduction should be or evidence of time and effort put into running the campground.[20] Turning to the issue of a duty to account to the Trustees following the constitution of the Trust, the reasoning of the Court differed from that of the Māori Land Court. The Court observed that when a trust is created, the trustees are the legal owners of the land. The previous owners then become beneficial owners. There is no corresponding duty for a beneficial owner to account to the legal owner for revenue derived from the operation of the land.[21] Although the relevant principles were recognised by Judge Coxhead in following *Eriwata*, the Court concluded that the Judge erred in granting an order requiring Mr Nicholls, a beneficial

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19 At [26]–[30].
20 At [33]–[37].
21 At [41].

owner, to account to the Trustees, the legal owners, as if he owed to them a duty to account for revenue.

[28] The Court noted that *Eriwata* established that a beneficial owner making use of the land without authority from the trustees commits a trespass and that the Māori Land Court had previously found that Mr Nicholls had trespassed when it granted an injunction prohibiting him from entering or occupying the campground land.[22]

[29] The Court considered that damages should have been calculated on a mesne profit basis in the amount of the higher figure of $394,216.00 stated in the Deane and Co Ltd report. However as the difference from $391,824.00 was negligible the Court declined to increase the award.[23] The appeal against the award of interest was also dismissed.[24]

The issues on appeal

[30] In addition to challenging the key conclusions in the judgment of the Māori Appellate Court, the notice of appeal asserted that the Court erred in respect of liability order 1 by attributing to co-owners an entitlement to an account derived from the Statute of Anne (as interpreted in *Henderson v Eason*)[25] when that statute had been impliedly repealed in New Zealand by the Imperial Laws Application Act 1988.

[31] In a memorandum seeking leave to file a notice of appearance the respondents signalled that they intended to support the finding of a duty to account for reasons other than those contained in the judgment including that, whilst the Statute of Anne is no longer on the New Zealand statute book, the equitable principle which it embodied has survived.

[32] The respondents further recorded that, while supporting the Māori Appellate Court's findings upholding the post-Trust award, they contended that both an account

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22 At [42]–[43].
23 At [46].
24 At [49].
25 *Henderson v Eason* (1851) 17 QB 701, 117 ER 1451.

and a mesne profits approach to damages were available to them and that it was their choice as to which measure was to be adopted.

[33] In the fortnight prior to the appeal hearing Mr Kahukiwa filed amended submissions in which he invited this Court in effect to revisit the finding of Judge Coxhead in 2012 that following the Trust's acquisition of the property Mr Nicholls was a trespasser. Unsurprisingly this new line of argument was opposed by the Trustees. In a minute of 1 May 2020 we recorded that we would not hear argument seeking to impugn prior judgments to which the appellant was a party which had not been the subject of appeal. Similarly we do not address the contention which appears to be advanced in the Trustees' submissions that as a result of ouster Mr Nicholls was a trespasser in the period prior to the vesting of the property in the Trust.

[34] The parties were unable to settle on an agreed list of issues and filed separate lists. In light of the earlier finding that subsequent to the vesting of the property in the Trust Mr Nicholls had committed a trespass, shortly prior to the hearing Mr Kahukiwa elected not to pursue the argument that the Māori Land Court did not have jurisdiction under s 18 of the Act to make an order in respect of the period following the constitution of the Trust.

[35] With the benefit of focussed oral argument, we identified the following issues for determination:

(a) In New Zealand does a co-owner of property have a duty to account to other co-owners for income derived from the property?

(b) Does the Māori Land Court have jurisdiction under s 18(1) of the Act to make an order for such an account?

(c) Did the Trustees have standing to seek an order for an account by the previous co-owners in respect of the period prior to the constitution of the Trust?

(d) Was there an error in the process of determination of liability orders 1 and 2?

(e) Did the Trustees have a right of election in respect of the mode of assessment of damages in liability order 2?

A co-owner's duty to account for profits from shared property

[36] Mr Kahukiwa criticised the Māori Appellate Court's judgment for apparently accepting s 27 of the Administration of Justice Act 1705 (Eng) 4 & 5 Ann c 3, often referred to as the Statute of Anne, as the source of a co-owner's duty to account. It was common ground in argument before us that, so far as it applied in New Zealand, that statute was repealed by the Imperial Laws Application Act.

[37] It was apparent from the lengthy extract from *Principles of Real Property Law* in the Māori Land Court judgment that Judge Coxhead appreciated the state of the statute book. That extract included the following paragraph:[26]

> By s 27 of the statute 4 and 5, 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.

[38] By contrast, the judgment of the Māori Appellate Court, which contained the short extract from *New Zealand Land Law*[27] and a significantly longer quotation from *Henderson v Eason*,[28] could be read as proceeding on the footing that the Statute of Anne still applied in New Zealand. For this reason Mr Kahukiwa submitted that an error of law on the part of the Māori Appellate Court was apparent from the judgment.

[39] Ms Linstead-Panoho responded that the Court was aware of the repeal, pointing to excerpts from the transcript of the hearing on 11 May 2018 where the issue had been traversed. She submitted that, notwithstanding the passages quoted in

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[26] Māori Land Court judgment, above n 1, at [29], quoting G W Hinde and others *Principles of Real Property Law* (2nd ed, LexisNexis, Wellington, 2014) at [13.002].

[27] Bennion and others, above n 18, at [6.6.07]. See at [24] above.

[28] *Henderson v Eason*, above n 25.

the judgment, there was merely a failure of expression by the Court. She drew attention to the fact that the Court had made reference to its earlier judgment in *Monschau* which set out the passage to which Judge Coxhead had referred in the Māori Land Court decision.[29]

[40] We accept the Trustees' argument that, despite the infelicitous drafting, the Māori Appellate Court must have appreciated that the 1705 Act no longer applied in New Zealand. Nevertheless the source of a co-owner's duty to account which the Māori Appellate Court must have accepted is not apparent from the judgment. The identification of that source was the primary focus of this aspect of the appeal.

[41] Mr Wackrow submitted that the Statute of Anne had not been the only source for the duty to account between co-owners, drawing attention to the proposition in *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*:[30]

> Apart from statute, in equity there is ancient but frequently forgotten authority, *Strelly v Winson*, that one co-owner could be sued in account, but perhaps only at the suit of all the others.
>
> (Footnote omitted.)

[42] *Strelly v Winson* concerned the scenario where one of three part-owners of a ship refused to "fit out the ship to sea", the others did so without his consent and the ship was lost in the voyage. [31] Lord Keeper held:[32]

> In this case the loss of the ship shall be equally borne by all three; for though one of the partners did not consent to the fitting out of the ship, yet he would have been entitled to one-third part of the freight, and in this court should have had an account of the third part of the profits of that voyage: … and so where one tenant in common receives all the profits, he shall account in this court as bailiff to the other two for two-thirds.

[43] Mr Wackrow then drew attention to two decisions of the New South Wales Court of Appeal. In the first of those, *Forgeard v Shanahan,* to which Mr Wackrow had referred in the course of argument before the Māori Appellate Court, a majority

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29 At [37] above.
30 J D Heydon, M J Leeming and P G Turner *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths, Australia, 2015) at [26–130].
31 *Strelly v Winson* (1685) 1 Vern 297, 23 ER 480 (Ch).
32 At 297.

of the Court of Appeal concluded that there did not seem to be any action in equity which would render a co-owner in occupation liable to refund rents received.[33] Meagher JA described *Strelly v Winson* as a solitary and curious decision, being an Admiralty case which seemed to have wandered into the Chancery courts.[34] Dissenting, Kirby P explained that the Statute of Anne could be safely repealed by the Imperial Acts Application Act 1969 (NSW) because modern notions of equity render the instruction of the Statute of Anne unnecessary in contemporary circumstances.[35]

[44] However eight years later in *Ryan v Dries* a differently constituted Court of Appeal expressed the obiter view that *Strelly v Winson* is good authority for the proposition that a court exercising equitable principles would treat a co-owner collecting rent as an agent for all co-owners and liable to account to them.[36]

[45] We consider that the view expressed in *Ryan v Dries* and by Kirby P in *Forgeard* is the preferable view. We accept that *Strelly v Winson* is authority for the proposition that in equity a co-owner is liable to account to other owners for profits received from the shared property.

[46] Indeed recognition of the fact that equity is the source of a duty by co-owners to account is to be found in the judgment of this Court in *Coleman v Harvey.*[37] Somers J (with whose judgment Cooke P and Richardson J agreed) discussed the Statute of Anne in this way:[38]

> It has to be recognised, however, that there is a respectable line of authority supporting the proposition that in the case of sale by one co-owner the remedy of the other does not lie in an action for conversion. One enactment touched on the point. Under s 27 of the Administration of Justice Act 1705 (described in the Revised Statutes and *2 Halsbury's Statutes of England* (2nd ed) as 4 & 5 Anne c 3, but frequently referred to as chapter 16) actions of account could be brought and maintained by one joint tenant or tenant in common as against the other as bailiff "for receiving more than comes to his just share or proportion". Section 27, referred to in *Jacobs v Seward* (1872) LR 5 HL 464, was repealed in England by the Law of Property (Amendment) Act 1924.

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33 *Forgeard v Shanahan* (1994) 35 NSWLR 206 (CA).
34 At 222.
35 At 212.
36 *Ryan v Dries* [2002] NSWCA 3, (2002) 10 BPR 19,497 at [65] per Hodgson JA.
37 *Coleman v Harvey* [1989] 1 NZLR 723 (CA).
38 At 730.

> It must, I think, have been in force in New Zealand by virtue of the English Laws Act 1908 and remained so, despite its repeal in England, until January 1989 when the Imperial Laws Application Act 1988 came into force. The latter statute preserves only ss 9 and 10 of the 1705 Act. In equity a co-owner has been held liable to account at the suit of others: *Strelly v Winson* (1684) 1 Vern 277.

Jurisdiction under s 18(1) to order an account

[47] In the judgments of both the Māori Land Court and the Māori Appellate Court it appears to have been assumed that the general jurisdiction in s 18 of the Act empowered the making of an order for account. Mr Nicholls took issue with that assumption, making the point that the jurisdiction of the Māori Land Court is statutory. Unlike the High Court, it has no inherent jurisdiction, in particular equitable jurisdiction.

[48] The general jurisdiction of the Māori Land Court is conferred by s 18 which, to the extent relevant to this head of argument on appeal, provides:

> (1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:
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> (a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:
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> (b) to determine the relative interests of the owners in common, whether at law or in equity, of any Maori freehold land:
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> (c) to hear and determine any claim to recover damages for trespass or any other injury to Maori freehold land:
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> (d) to hear and determine any proceeding founded on contract or on tort where the debt, demand, or damage relates to Maori freehold land:
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> …

[49] A detailed definition of "alienation" in relation to Māori land is found in s 4. Although it includes the making or grant of any lease or licence of Māori land, it

excludes the granting of such a lease or licence or any interest in Māori land for a term of not more than three years, including any term or terms of renewal.

[50] Mr Kahukiwa submitted that s 18(1)(a) has no application because:

(a) the duty to account for money received is not an interest in land (money being neither fructus naturales nor fructus industrials); and

(b) the monies received were not the proceeds of an alienation, instead being money paid by itinerant users or licensees for periods of significantly less than three years and thus not characterised as alienations for the purposes of the Act.

[51] It was submitted that s 18(1)(c) was not applicable because in the period prior to the constitution of the Trust Mr Nicholls was not a trespasser, reliance being placed on among other things the judgment of Judge Coxhead of 5 October 2009.

[52] Mr Kahukiwa further submitted that s 18(1)(d) could not apply because:

(a) there is no contract between Mr Nicholls and the respondents, whether in their capacities as Trustees of the Trust or in their personal capacities as co-owners; and

(b) there was no finding that Mr Nicholls committed some other tort which was not trespass.

[53] It followed that the Māori Land Court lacked jurisdiction to entertain an application for an order that Mr Nicholls account for profits received in the period prior to the constitution of the Trust. Such a limitation of competence was said to be acknowledged in effect by the provision in s 18(2) that any proceedings commenced in the Māori Land Court may be removed for hearing into any other court of competent jurisdiction.

[54] In response Mr Wackrow argued that the order for account was not a money claim per se. It came within the ambit of s 18(1)(a) as a claim for possession of

Māori freehold land where one of the remedies sought was the recovery of money derived from the profitable use of that land. While recognising that s 18(1)(c) would normally be invoked in respect of a stranger, nevertheless, to the extent to which the claim against Mr Nicholls is based on trespass, it was contended that s 18(1)(c) also had application in the circumstances of this case.

[55] As Mr Wackrow observed, the several elements of s 18(1)(a) are expressed disjunctively. Further, we note the advice in s 2(1) that it is the intention of Parliament that the provisions of the Act shall be interpreted in a manner that best furthers the principles set out in the Preamble. The English version of the Preamble states:

> Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

The long title of the Act states that it is a statute to reform the laws relating to Māori land in accordance with the principles set out in that Preamble.

[56] Furthermore, s 2(2) states:

> Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

Both the Preamble and s 2 were invoked by Mr Wackrow in support of the Trustees' argument on the next issue of the Trust's standing but we consider they are of no less significance on the issue of the Māori Land Court's jurisdiction.

[57] In our view the application originally commenced on 24 October 2012 incorporated a claim in equity to the possession of Māori freehold land, seeking injunctive relief prospectively and an account of profits already derived

retrospectively. We reject the proposition that the request for an order for account was a money claim simpliciter. On the contrary it was a claim invoking the equitable jurisdiction collateral to an application for injunctive relief.

[58] Mr Wackrow also advanced a detailed argument directed to the application of s 18(1)(c), contending that in the period prior to the constitution of the Trust there was clear evidence of ouster on the part of Mr Nicholls such that he would be viewed as a trespasser. Given our conclusion as to the jurisdiction of the Māori Land Court on the basis of s 18(1)(a), resort to the ouster argument (which we do not consider appropriate to entertain)[39] is unnecessary. However, as the election not to pursue the jurisdictional challenge to liability order 2 reflected, the Trustees' claim in respect of the period following the constitution of the Trust falls within s 18(1)(c).

The Trustees' standing in respect of liability order 1

[59] The Trust was constituted as an ahu whenua trust under s 215(1) of the Act. Section 215(2) provides that 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. 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.[40] The constitution of an ahu whenua trust shall not affect any person's entitlement to succeed to any beneficial interest in any land vested in the trustees for the purposes of the trust.[41]

[60] The focus of this aspect of the appeal is s 220 which relevantly provides:

> **220 Vesting order**
>
> (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,

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39 See [33] above.
40 Section 215(5).
41 Section 215(8).

> 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.
>
> …

[61] The vesting order made on 15 August 2011 simply stated that orders were made pursuant to ss 220 and 222 of the Act that the Māori freehold blocks listed in sch A were vested in the main trustees as responsible trustees jointly with no survivorship.

[62] Mr Kahukiwa challenged the Māori Appellate Court's conclusion outlined at [24]–[26] above and invited us to adopt the interpretation of Judge Savage at first instance in *Monschau*.[42] In that case the trustees of an ahu whenua trust sought an order that one of the owners had to account for rent received from a lease to a third party prior to the constitution of the trust. Judge Savage determined:

> [20] … My finding therefore is that the co-owners only had a right to money. 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.

Judge Savage recorded that he was not at all comfortable with that conclusion and suggested that it was a matter that the legislature should consider in the review of the Act.[43]

[63] On appeal the Māori Appellate Court took a different view stating:[44]

> [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,

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

43 At [21].

44 *Monschau v Bamber*, above n 14.

> 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.

[64] Consequently, the Māori Appellate Court interpreted s 220(2) as giving the Court jurisdiction to vest the Trustees with all rights and remedies of the owners that 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.[45]

[65] The Māori Appellate Court in the present case adopted the same approach. We consider it was correct to do so.

Was there error in the process of determination of liability orders 1 and 2

[66] The focus of this aspect of the appeal was the process adopted by the Māori Land Court in its determination of the quantum of the liability orders.[46] Ground 1.2 of the notice of appeal alleged that Mr Nicholls was denied a fair hearing only in respect of liability order 2. However the issue whether deductions should have been made for expenses, profit and effort was identified in the Māori Appellate Court's judgment as applicable to both the pre-trust and post-trust periods. Hence we have construed the appellant's argument as applying to both liability orders.

The approach of the Māori Appellate Court

[67] It is convenient at the outset to recite in full the passages from the Māori Appellate Court judgment which are the target of the appellant's criticism:[47]

> *Should deductions have been made from any award pre-trust?*
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> [31] In the alternative, Mr Kahukiwa contended that if an award is to be made requiring the appellant to account to the trustees, proper deductions

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45 At [54].

46 While the formulation of this issue was drafted by this Court, both the appellant's and the respondents' lists of issues framed this question in terms of "process".

47 Māori Appellate Court judgment, above n 2.

should be made for expenses incurred in the operation of the camp ground, and an allowance for the appellant's effort.

[32] We accept that where revenue is recoverable by other co-owners, the respondent co-owner may have a claim for the expenses incurred in generating that income. Requiring the respondent co-owner to account for the gross revenue may result in an unjust enrichment for the other co-owners. We also accept that, in some circumstances, an allowance may be made for the owner's effort and contribution in generating the income.

[33] However, the appellant did not lead evidence in the Court below establishing and quantifying the costs incurred that he says should be deducted. Nor did he lead evidence, expert or otherwise, quantifying a deduction for effort.

[34] Mr Kahukiwa contended that the failure to file this evidence lies with the Court below. He submits the Judge should have framed the case on this basis, and directed or at least signalled to the appellant that this evidence was required. We do not agree. It was always for the appellant to frame and prepare his case, not the Judge. As the person owing the duty to account, he should have led clear and cogent evidence of where reasonable deductions should be made. He did not.

[35] The Judge did order the production of all relevant financial information concerning the camp ground from the bank, and the accountant, and ordered discovery by the appellant and others. The appellant was clearly on notice that these financial records were relevant, and was ordered to give discovery of the documents in his possession or control.

[36] The Judge also engaged an accounting firm, Jefferies Nock & Associates, to carry out a review and analysis of the camp ground financial records, and provide a report regarding its income, expenditure and overhead obligations. This report does list some expenses incurred. However, Mr Jefferies states in his covering letter that he could not accurately ascertain expenditure items as he was not provided with source documents. These expenses have been carried forward from draft general ledgers, prepared by Hauraki Taxation Services ("HTS"). HTS did not receive a lot of required information or documents and so their analysis was not finalised. It is not clear what source documents or information HTS relied on. We cannot be satisfied that the expenditure noted in the Jefferies report was actually and properly incurred in running the camp ground.

[37] The same applies to any proposed deduction for effort. We are not convinced this is a case where such a deduction should properly be made. Even if it were, the appellant has not produced evidence demonstrating what a reasonable deduction should be. In short, there is a similar lack of evidence of the time and effort that the appellant put into running the camp ground.

[38] We cannot be confident about the proper quantum of deductions for either expenses or effort, and therefore make none. Nor do we consider it necessary or appropriate to send the matter back to the Court below for further hearing. There is a need for finality in litigation. The appellant had the opportunity to furnish the information earlier in the process. These proceedings have consumed the time and resources of the parties for many years, and so it is necessary that they are concluded.

> [39] In any event, the obligation is on the defaulting party to produce cogent evidence demonstrating where reasonable deductions should be made. The Court below attempted to obtain this information by ordering the production of documents, ordering discovery, and by appointing Mr Jefferies to prepare his report. He attempted to do so but was unable to verify expenditure as no source documents were provided. The appellant cannot now seek a further hearing to try and fill the evidential holes in his earlier case. There is no basis to send this back for further hearing when the appellant had full opportunity to present this evidence. This is also consistent with the decision of this Court in *Wihongi v Samson - Otarihau 2B1C*.
>
> [40] Finally, Mr Kahukiwa contended a further deduction should be made for profit earned by the appellant. He cited *Henderson v Eason* which drew a distinction between rent and other revenue received from a tenant or third party, which must be accounted for, and profits a co-owner might make through the use or occupation of the co-owned property, which he or she may retain. The revenue in this case was obtained through use of the property by a third party namely the guests staying at the camp ground. This was not a profit the appellant made through his own use and occupation. The appellant is entitled to retain his share of the revenue based on his shareholding as an owner in the land. Judge Coxhead provided for this in his decision that the appellant is to account for the revenue less his share (as co-owner) calculated on a pro-rata basis. The appellant is not entitled to retain additional revenue as profit.
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> …
>
> *Should deductions have been made from any award post-trust?*
>
> [47] Like the situation pre-trust, Mr Kahukiwa argued that deductions should have been made from the award post-trust for expenses and effort. However, the same evidential problems apply. The appellant failed to take the opportunity to provide any relevant evidence before the Court below. Accordingly, we decline to make deductions in these circumstances.
>
> (Footnotes omitted.)

The appellant's argument

[68] Mr Kahukiwa submitted that the right to a fair hearing incorporates the principle of equality of arms, in particular that a party must have a reasonable opportunity of presenting his or her case to the Court under conditions which do not place him at a disadvantage. It followed in his contention that a reasonable opportunity includes being made aware of what the Court expects to hear from a party in order to resolve the issue fairly. Also said to be relevant was the principle that in relation to equitable remedies such as an account "an inquisitorial process is adopted, to ensure that equity is done".

[69] Posing the question "Did George receive a fair hearing?", Mr Kahukiwa submitted:

> 26. The [Māori] Appellate Court determined that the onus was on the unrepresented appellant to frame his case, since it was he who owed the duty to account. In doing so it shifted the burden of proof to George, who in effect was the defendant. No authority was cited to support this.
>
> 27. As a remedy in equity was being pursued (an account), the [Māori] Land Court was bound (at least in terms of process) to assume a more equitable process, rather than adversarial.
>
> 28. This was not done. George was not directed to produce evidence about his own circumstances during his operation of the Camping Ground (including his costs, risk, losses, improvements), and despite the trust being over all of the relevant lands of this [Whānau] the Trustees were not required to account for the financial dealings in relation to the Camping Ground and the other lands in the decade preceding 15 August 2011. As a result, the process was inadequate, and unfair to George.

[70] Mr Kahukiwa contended that the Māori Land Court did not apply the Statute of Anne-inspired process in that it failed to undertake an audit by way of inquiry, preferring instead to run an adversarial process in which Mr Nicholls had the onus to account for monies received. In particular he drew attention to s 27 of the Statute of Anne:[48]

> XXVII. And be it enacted by the authority aforesaid, That from and after the said first day of *Trinity* term, actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and also by one joint tenant, and tenant in common; his executors and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant, or tenant in common; and the auditors appointed by the court, where such action shall be depending, shall be, and are hereby impowered to administer an oath, and examine the parties touching the matters in question, and for their pains and trouble in auditing and taking such account, have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whole side the ballance of the account shall appear to be.

The nature of an account

[71] Although from at least the year 1200 there was an action of account at common law, as explained in *Meagher, Gummow and Lehane* an action of account was

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[48] Reference was also made to the chapter on Account in William Selwyn *An Abridgement of the Law of Nisi Prius* (10th ed, V and R Stevens and G S Norton, London, 1842) vol 1.

developed by the Chancery which became progressively more attractive as its common law counterpart became more Byzantine.[49] This was partly because of the difficulty attending the process under the old writ of account but primarily due to the advantage of compelling the party to account upon oath according to the practice of the Courts of Equity.[50]

[72] Today an account of profits is viewed as a restitutionary remedy which operates to strip a defendant of unlawful gains. The purpose of an account of profits is not to punish the defendant but to prevent his or her unjust enrichment.[51] The term profits denotes net profits: the defendant will usually be entitled to deduct legitimate expenses against gross receipts.[52] The focus on profits is apparent from *Strelly v Winson*:[53]

> … for though one of the partners did not consent to the fitting out of the ship, yet he would have been entitled to one-third part of the freight, and in this court should have had an account of the third part of the profits of that voyage: … and so where one tenant in common receives all the profits, he shall account in this court as bailiff to the other two for two-thirds.

[73] However the entitlement to deduct expenses is subject to the defendant adducing evidence as to the expenses incurred. As stated by Blanchard and Tipping JJ in *Chirnside v Fay* when discussing the decision of the High Court of Australia in *Warman International Ltd v Dwyer*:[54]

> [131] Their Honours emphasised that the rule requiring accounting for profits could be taken to the extreme of becoming a vehicle for the unjust enrichment of the plaintiff. They made the important point that the onus is on the errant fiduciary to satisfy the Court that an allowance should be made.

[74] Where a defendant fails to discharge that onus, the Court will not speculate as to possible expenses. This is demonstrated by this Court's judgment in *Crampton-Smith v Crampton-Smith.*[55]

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49 *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, above n 30, at [26–005].
50 *Attorney-General v Mayor of Dublin* (1827) 1 Bli NS 312 at 336–337, 4 ER 888 (Ch) at 898 per Lord Redesdale.
51 Peter Devonshire *Account of Profits* (Thomson Reuters, Wellington, 2013) at 8.
52 At 11.
53 *Strelly*, above n 31, at 297.
54 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433, citing *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (HC).
55 *Crampton-Smith v Crampton-Smith* [2011] NZCA 308, [2012] 1 NZLR 5.

> [70] The difficulty in the present case is that the sister made no attempt to place before the court any evidence to support the making of an allowance for the cost and effort involved in the construction of the townhouses. There is no room to permit the sister to have any further opportunity to present evidence on that subject. The hearing in the High Court was not split as between the issues of liability and quantum. If the sister had wished to advance the case for an allowance to be made, then the trial in the High Court was the time to do so. No explanation was offered for her failure to give evidence. Moreover, her counsel informed us explicitly that, even if a further opportunity were afforded to the sister to present evidence on this subject, she would not be in a position to place any such evidence before the Court. He said these were counsel's instructions.
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> [71] In these circumstances, it is not for the court to speculate as to how some form of just allowance might be made. In some cases, the court may be in a position to make some form of "rational approximation" of the profit which has been made. However, as Lord Mustill said in *Ryde Holdings Ltd v Rainbow Corporation Ltd*:
>
> > If the profit can be ascertained the trustee is made to yield it up. If, through the trustee's own act, it is completely incapable of ascertainment, even to the extent of a rational approximation, so that the choice lies between holding a trustee liable for nothing and holding him liable for all, the latter course must be chosen.
>
> (Footnote omitted.)

[75] We consider that these principles were correctly applied by the Māori Appellate Court, in particular at [33]–[34], [37]–[38] and [47].[56] Contrary to Mr Kahukiwa's submission, Mr Nicholls bore the onus to establish any expenses that were properly deductible from the rental and income he derived from the property.

[76] Turning to Mr Kahukiwa's characterisation of the process of account, we do not consider that a defendant's obligation to account is illuminated by a description of the accounting process as being either inquisitorial or adversarial. An account of profits is a remedy consequential upon liability having been established in a variety of circumstances, for example breaches of fiduciary duties and of duties of confidence and infringements of intellectual property rights as well as obligations among co-owners of property. The remedy is interrogative in nature, reflecting the reality that the information relating to income and profit will usually be in the defendant's own hands. As Mitchell McInnes observes, the process of account, like the process of tracing, is neither a cause of action nor a remedy, but rather a preliminary exercise by

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56 At [67] above.

which means a claimant can establish an evidentiary basis for the imposition of some form of liability on a defendant.[57] In some instances the process may appear inquisitorial where, as in the present case,[58] the Court makes orders for the provision of information by third parties.

[77] The references in s 27 of the Statute of Anne to auditing and auditors can be discerned today in pt 16 of the High Court Rules 2016 relating to accounts and inquiries. An accounting party is defined to mean the party required by an order for the taking of an account to account to the other party.[59] There is provision for the court to appoint an account-taker for the purposes of taking an account who may be the Registrar and/or an accountant.[60] However not infrequently the court will itself supervise the process, as illustrated in the account of profits in relation to the publication of the book *Soldier Five*.[61]

[78] In our view the approach adopted in this case was entirely orthodox. The only unusual feature is the lengths to which the Māori Land Court was required to go in order to conduct the account. The criticism levelled on the basis that the approach was adversarial rather than inquisitorial is misconceived.

Was the process unfair to Mr Nicholls?

[79] In order to evaluate the complaint that the process was unfair to Mr Nicholls it is instructive to trace the history of requests made in the course of this litigation for the provision of relevant information.

[80] At the conclusion of the judgment of 21 December 2012 granting an injunction Judge Coxhead made the following direction concerning the recovery of rental and mesne profits:[62]

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57 Mitchell McInnes "Account of Profits for Common Law Wrongs" in Simone Degeling and James Edelman (eds) *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) 405 at 407–408.

58 Judge Coxhead's order of 9 June 2014 at [15] above.

59 High Court Rules 2016, r 16.1.

60 Rule 16.6.

61 *Her Majesty's Attorney-General for England and Wales v R* HC Auckland CIV-1998-404-343, 5 August 2005; and *Attorney-General for England and Wales v R* [2007] 2 NZLR 347 (CA).

62 *Nicholls v Nicholls*, above n 6. See at [11] above.

> 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 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 obligations [if] any. This is to be provided within 30 days.

[81] The appeal to the Māori Appellate Court was part-heard on 29 and 30 July 2013 for the reason that the Court granted Mr Nicholls leave to adduce additional evidence. In a direction of 1 August 2013 the Court said:[63]

> [9] … 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.
>
> (Footnote omitted.)

The hearing resumed on 10 September 2013.

[82] The reasons for judgment recorded that no information was provided by Mr Nicholls as to the income which he, his brother and extended whānau had been receiving from the campground operation.[64] After referring to [54] of Judge Coxhead's decision the Māori Appellate Court stated:

> [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. When cross-examined on this matter Mr Nicholls was evasive.
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> (Footnote omitted.)

[83] On 1 November 2013 Judge Coxhead convened a telephone conference to ascertain progress in compliance with his earlier directions. He granted Mr Nicholls

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63 *Nicholls v Nicholls* [2013] Māori Appellate Court MB 281 (2013 APPEAL 281).
64 *Nicholls v Nicholls – Papaaroha 6B*, above n 3, at [98].

and the other respondents 30 days within which to provide the documentation previously requested.[65] The response of Mr Nicholls of 3 December 2013 was described by Judge Coxhead in his judgment of 9 June 2014 in this way:[66]

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

[84] The Trustees then filed a memorandum dated 5 December 2013 requesting that the Court of its own initiative make orders requiring production of information. That led to Judge Coxhead making the orders on 9 June 2014.[67]

[85] On 16 December 2013 Mr Kahukiwa filed a memorandum opposing the Trustees' request and reiterating the submission previously made that the Māori Land Court lacked jurisdiction to compel Mr Nicholls to deliver up documents. The Trustees' request was opposed on the further ground that the receipt of rental information filed on behalf of Mr Nicholls on 3 December 2013 was a satisfactory response to the Court's request for information.

[86] The Trustees acknowledge that during the period that followed from approximately January 2014 to March 2017 Mr Nicholls chose not to be represented. However they submit that he actively engaged with the Māori Land Court and at all times was aware of his right to be represented by counsel.

[87] In response to Judge Coxhead's order of 9 June 2014, on 4 July 2014 Hauraki Taxation Service Ltd advised the Court it held no working papers and that all papers had been returned to Mr Nicholls, as requested, in about October 2013.

[88] Consequently the Court then sent to Mr Nicholls a direction that all the documentation which he had produced to Hauraki Taxation Service Ltd was to be filed with the Court by 22 August 2014. Mr Nicholls responded in an email of 21 August

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65 *Nicholls v Nicholls – W T Nicholls Trust* (2013) 67 Waikato Maniapoto MB 170 (67 WMN 170).
66 *Nicholls v Nicholls – W T Nicholls Trust*, above n 10.
67 See at [15] above.

2014 in which he appeared to suggest that boxes of his belongings which had been stored with various members of his whānau had suffered water damage or rat infestation.

[89] Judge Coxhead convened a further telephone conference on 22 December 2014 in which Mr Nicholls did not participate. However the Court sent the minutes of the conference to Mr Nicholls and requested his views on the steps which the Court contemplated as follows:[68]

> 1 The Court making a discovery order for the *George Nicholls [Whānau] Trust* who the Court has been advised had a bank account with Kiwibank and funds were deposited with that account relevant to the period that Goerge Nicholls acted as the Manager of the Oamaru Camping ground.
>
> 2 The Court seeking a report from a forensic accountant to review the documentation provided by way of discovery and provide a report to the parties and the court about how the funds have been received, applied or misapplied by Mr George Nicholls (and others associated with Mr George Nicholls) during the period that he was acting as Manager for the camping ground.
>
> 3 The costs of the report being paid for through the [Māori] Land Court Special Aid Fund.

Mr Nicholls responded in an email of 9 February 2015.

[90] After making inquiry of two accountant firms in Hamilton as to the costs of providing the proposed report, the Māori Land Court made the appointment of Jeffries Nock and Associates Ltd in July 2015. After the accountants' report was distributed, on 9 May 2016 the Court issued a direction that all parties had one month to consider the report. On 30 May 2016 Mr Nicholls sent an email to the Court, commenting on various aspects of the report. A further telephone conference was convened on 23 June 2016 in which Mr Nicholls participated.

[91] On 12 December 2016 the Court issued a direction that the Trustees had until 10 February 2017 to supply additional information which they considered was required before the Court could make orders regarding the recovery of rental income

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68 *Nicholls v Nicholls* (2014) 91 Waikato Maniapoto MB 139 (91 WMN 139).

and the mesne profits which they sought. On 16 February 2017 the Trustees filed a detailed memorandum together with the Deane and Co Ltd report.[69]

[92] At this juncture Mr Nicholls re-engaged counsel. Mr Kahukiwa filed a detailed memorandum dated 24 March 2017 which reiterated the view that the claim for recovery of rental income was misconceived because the Court had no jurisdiction to determine the matter. A memorandum in reply was filed by the Trustees dated 10 April 2017. The Māori Land Court judgment was issued on 21 December 2017.

[93] From our review of the lengthy process which culminated in the Māori Land Court judgment it is apparent that Mr Nicholls was afforded ample opportunity to respond to the Court's very clear directions and requests for information. The only response of any consequence was the one page spreadsheet with handwritten figures described by Judge Coxhead.[70] We note that by far the largest of the unsubstantiated figures of expenditure to which the Judge referred was described as "Other", totalling in excess of $75,000.00 for the three year period addressed.

[94] In addition Mr Wackrow drew attention to Mr Nicholls' response of 30 May 2016 to the report of Jeffries Nock and Associates. He observed, and we agree, that that response did not take the matter any further by way of disclosure from Mr Nicholls or provide any other evidence or information relating to steps taken by him.

[95] We do not consider that there is any basis for a complaint of unfairness concerning the process which was followed. If Mr Nicholls is aggrieved at the outcome, in our view that cannot be as a result of the process itself but rather because of his reluctance to properly engage with it. The observations of Tipping and Blanchard JJ in *Chirnside v Fay* appear apt:[71]

> It was not the purpose of the surrogate accounting exercise upon which the Court was engaged to apply a sanction or punishment for the breach of duty. The true purpose of the exercise was to fix compensation or damages on the basis of disgorgement of profits properly analysed. While a refusal to make an allowance or its lack of liberality, if that course is appropriate, could

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69 At [17] above.
70 At [83] above.
71 *Chirnside v Fay*, above n 54, at [142].

> be seen as having penal effect, the reason for such an outcome is simply that the errant fiduciary will have failed to satisfy the Court of the justice of making any or a more liberal allowance. That this might be seen, at least by the fiduciary, as penal is understandable but it is important there be no confusion between effect and purpose.

Did the Trustees have a right of election in respect of the mode of assessment of damages in liability order 2?

[96] It will be recalled that the Māori Land Court had before it reports from Jefferies Nock and Associates and Deane and Co Ltd. The former presented an analysis of the trading activity of the business known as Oamaru Bay Holiday Park to the extent that such could ascertained from bank statements provided by the Māori Land Court. The report concluded that for a period of seven years from 2009 to 2015 income of $834,000 (GST exclusive) could be ascertained from the bank statements provided.[72] That amount was apportioned by the Trustees as to $442,593.00 for the period prior to the constitution of the Trust and $391,824.00 for the subsequent period.

[97] The mesne profits valuation assessment of Deane and Co Ltd calculated what was described as the "total mesne profit loss" for the period 15 August 2011 to 14 January 2014 of $394,216.00.[73]

[98] As earlier noted Judge Coxhead declined to order an award of mesne profits because he considered, correctly, that to do so would amount to a double recovery.[74] However the Māori Appellate Court concluded that the Māori Land Court erred in granting liability order 2 because it amounted to a requirement that Mr Nicholls account to the Trustees as if he owed a duty to account for revenue. The Māori Appellate Court explained:[75]

> [46] The Judge ought to have calculated the amount that the appellant owed the trustees as mesne profit based on his trespass. The award of mesne profit, based on the Deane report, would have been higher than the existing order to account for revenue. So, although the Judge's approach was technically in error, we decline to make a higher award because the different is negligible.

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72 At [16] above.
73 At [17] above.
74 At [23] above. See Māori Land Court judgment, above n 1, at [61].
75 Māori Appellate Court judgment, above n 2.

[99] In a memorandum to this Court seeking leave to file a notice of appearance the respondents explained their position as follows:

> 13. … the respondents support the resultant finding of the Māori Appellate Court that the post-trust award against the appellant be upheld. However, the respondents do not support the reasoning of the Appellate Court that the Judge in the lower Court erred in making an award on the basis of an account to co-owners. The respondents submit both an account and mesne profit approach to damages were available to the respondents and as such either approach should be upheld, and we submit it is the claimants choice as to which measure.
>
> (Footnote omitted.)

[100] The Trust's claim in respect of the period following the constitution of the Trust was in trespass. As stated in *Todd on Torts*:[76]

> Where the defendant wrongfully makes use of the plaintiff's land, the plaintiff is entitled to recover by way of damages (generally called "mesne profits") a reasonable rate of remuneration for the full period of unlawful use, regardless of any actual loss suffered by the plaintiff or any actual benefit derived by the trespasser. This strict "user principle" is justified by the need to remove any financial incentive to interfere with the possessory rights of others.
>
> (Footnotes omitted.)

Hence the Trust was entitled to an award of damages calculated on a mesne profits basis.[77]

[101] However a person entitled to possession of land can also formulate a claim by reference to the value of the benefit which an occupier has received. As Hoffmann LJ explained in *Ministry of Defence v Ashman:*[78]

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[76] Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 520. The same passage from the seventh edition was quoted at [43] of the Māori Appellate Court judgment, above n 2.

[77] The meaning of "mesne profits" is explained in Daniel Greenberg (ed) *Jowitt's Dictionary of English Law* (5th ed, Sweet & Maxwell, London, 2019) vol 2 at 1596: "Profits derived from land whilst the possession of it has been improperly withheld: that is, the yearly value of the premises. Mesne profits are the rents and profits which a trespasser has, or might have, received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed. A claim for rent is therefore liquidated, while a claim for mesne profits is unliquidated".

[78] *Ministry of Defence v Ashman* [1993] 2 EGLR 102 (CA) at 105.

> A person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two alternative bases. The first is for the loss which he has suffered in consequence of the defendant's trespass. This is the normal measure of damages in the law of tort. The second is the value of the benefit which the occupier has received. This is a claim for restitution. The two bases of claim are mutually exclusive and the plaintiff must elect before judgment which of them he wishes to pursue.

That analysis was endorsed by Barker J in *Roberts v Rodney District Council*.[79]

[102] The statement by the Māori Appellate Court at [46] is ambiguous. It can be viewed, in the way the respondents have read it, as suggesting that the only method of calculation of damages for trespass is on a mesne profits basis. If that was the intended meaning of the paragraph then we would agree with the respondents that it was in error.

[103] However the paragraph follows a discussion which first acknowledges the total mesne profit figure calculated by Deane and Co Ltd of $394,216.00 and then records the fact that the Judge proceeded to order Mr Nicholls to account to the Trustees in the lesser sum of $391,824.00, being the revenue received subsequent to the constitution of the Trust. We consider that it is possible that the Māori Appellate Court was intending to say no more than that, since the Trust would have had a right of election, liability order 2 should have been for the larger sum.

[104] For the avoidance of doubt we record that we agree with the tenor of the respondents' submission in their memorandum that damages for trespass may be assessed either on a mesne profit basis or by reference to the loss suffered as a consequence of the trespass. The person entitled to possession of the land has an election as to which measure to adopt, which must be exercised before judgment.

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[79] *Roberts v Rodney District Council* [2001] 2 NZLR 402 (HC) at [15]–[16].

Result

[105] The appeal is dismissed.

[106] The appellant is in receipt of legal aid. There is no order for costs.

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