IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 76/2020
[2021] NZSC 8

BETWEEN	GEORGE TAMA NICHOLLS Applicant
AND	MARK STEVEN NICHOLLS, AIRINI PIRIHIRA 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

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	J P Kahukiwa for Applicant D E Wackrow and C M T Linstead-Panoho for Respondents
Judgment:	19 February 2021

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order as to costs.

REASONS

[1] The applicant is a beneficial owner in 27 multiply-owned Māori freehold land blocks (the land) vested in the trustees of the W T Nicholls Trust. The Trust is an Ahu Whenua Trust under s 220 of Te Ture Whenua Maori Act 1993 (the Act). From 2010, the applicant operated a coastal holiday park for profit on that part of the land situated at Oamaru Bay, north of Coromandel town. He had taken over the holiday park

business from his brother, who is also a beneficial owner in the land. The brother had operated the holiday park since 2007.

[2] The W T Nicholls Trust was established in 2011, a year after the applicant took over the park. The trustees brought proceedings against the applicant and his brother seeking their removal from the land and requiring them to account to the Trust for income from the camping ground since its inception. The brothers opposed the proceedings generally on the basis that the Māori Land Court had no jurisdiction to require them to give an account. In December 2012, the Māori Land Court made orders excluding the brothers from the land. In December 2017, following a lengthy process in which the Court supervised a taking of account, the Court ordered:[1]

(a) that the brothers pay the trustees $442,593.00, less their share as co-owners, in relation to income obtained prior to the formation of the trust; and

(b) that the applicant alone account to the trustees for $391,824.00 obtained after the Trust was established.

[3] Appeals by the applicant to the Māori Appellate Court and the Court of Appeal were dismissed in December 2018[2] and August 2020.[3] He now seeks leave to appeal to this Court.

The judgments below

[4] It is necessary for these purposes only to summarise the findings of the Court of Appeal, as they are broadly consistent with those of the Māori Land Court and the Māori Appellate Court. The Court of Appeal identified five issues for resolution as follows:[4]

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1 *Nicholls v Nicholls – Koromatua 3A* (2012) 154 Waikato Maniapoto MB 128 (154 WMN 128) (Judge Coxhead) at [82]–[83].
2 *Nicholls v Nicholls – Koromatua 3A* [2018] Māori Appellate Court MB 604 (2018 APPEAL 604) (Judge Wainwright, Judge Harvey and Judge Armstrong).
3 *Nicholls v Nicholls* [2020] NZCA 346 (Brown, Clifford and Gilbert JJ) [CA judgment].
4 At [35].

(a) 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 the two orders to account?

(e) Did the trustees have a right of election in respect of the mode of assessment of damages in the second order to account?

[5] The Court of Appeal answered questions (a)–(c) and (e) in the affirmative. In light of the grounds upon which the applicant advances his application, it is necessary only to address that Court's treatment of the first three questions.

[6] On the first question, the Court found that co-owners of multiply-owned land owe a duty in equity to account to the wider beneficial ownership for profits from their shared property.[5] The Court considered that the repeal by the Imperial Laws Application Act 1988 of most of the Administration of Justice Act 1705 (Imp) 4 & 5 Ann c 3 (an Act which provided expressly for the duty) did not affect the result in light of the separate source for the duty in equity.[6]

[7] On the second question, the Court was satisfied that s 18(1)(a) of the Act provided the Māori Land Court with the necessary jurisdiction to require the brothers to give an account. That section relevantly provides that the Court has jurisdiction to "hear and determine any claim, whether at law or in equity, to the … possession of Maori freehold land". The Court noted that the original application in the Māori Land

5 At [45]–[46], citing *Strelly v Winson* (1684) 1 Vern 297, 23 ER 480 (Ch); and *Coleman v Harvey* [1989] 1 NZLR 723 (CA).
6 At [41]–[46].

Court was one in equity for possession of the land and for an account to be given. The order sought was founded on the trustees' right of possession. It was not a money claim simpliciter.[7]

[8] On the third question, the Court considered the trustees had the power to seek an account from a co-owner by the terms of s 220(2). The effect of this subsection is to vest the land in the trustees, together with "all rights and remedies … to which the owners were entitled in respect of the land immediately before the vesting". Since, the Court of Appeal reasoned, the account related to income from the land, the trustees' right to apply for and the Court's jurisdiction to order it were included within that description.[8]

Submissions

[9] Consistent with his approach in the Courts below, Mr Kahukiwa for the applicant challenges two aspects of the Court of Appeal's decision. He proposes to argue, should leave be granted, that:

(a) the Māori Land Court does not have jurisdiction under s 18(1)(a) to order a giving of account as between beneficial owners; and

(b) trustees do not have the power under s 220(2) to seek remedies against co-owners, by way of account for money they may have received.

[10] Mr Kahukiwa argues these issues involve important matters of principle so far as the jurisdiction of the Māori Land Court is concerned, and so gave rise to a matter of general or public importance. He also submits that in any event, a substantial miscarriage of justice may occur unless the appeal is heard.

[11] In relation to the first issue, the applicant submits that the Act's focus is the relationship between Māori owners and their ancestral lands. The Act is not particularly concerned with relationships between owners inter se. Further, an order for account is, he submits, "usually characterised as a bailment over money", and does

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7 At [57].
8 At [64]–[65].

not arise from the land itself. Section 18(1)(a), he argued, requires a connection to the land, so it cannot provide a proper foundation for jurisdiction. Finally, on this ground, Mr Kahukiwa submits that the lack of any express reference in the Act to the availability of the particular remedy sought and the narrow focus of the Act in terms of s 2 both suggest that such a power was never intended.

[12] In relation to the second issue, the applicant argues essentially that the function of trustees under the Act is to manage land, not to pursue money claims between owners. Such claims are insufficiently connected to the land to come within the vesting provisions of s 220.

Analysis

[13] It is not necessary in the interests of justice to grant leave to appeal in this case. Although issues in relation to the jurisdiction of the Māori Land Court may well involve matters of general or public importance, no such matter arises in this application. That is because the proposed grounds of appeal have insufficient prospects of success. For that reason also, there is no basis upon which it might be considered that a miscarriage may occur (in the sense articulated in *Junior Farms Ltd v Hampton Securities Ltd (in liq)*[9]) unless the appeal is heard.

[14] The application for leave to appeal is therefore dismissed.

[15] As to costs, Mr Kahukiwa has noted that the applicant has applied for legal aid and been refused. He advises the applicant is currently awaiting the result of an application to reconsider the refusal. In light of those circumstances, we make no award as to costs.

Solicitors:
Corban Revell, Auckland for Applicant
Wackrow Williams & Davies Ltd, Auckland for Respondents

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9 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.