

**IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT**

A20130002948

UNDER Section 58, Te Ture Whenua Māori Act
1993

IN THE MATTER OF W T Nicholls Trust – an application to stay
orders made by the Māori Land Court on
21 December 2012 at 50 Waikato-
Maniapoto 10-16 pending an appeal of
those orders

BETWEEN GEORGE TAMA NICHOLLS
Applicant

AND MARK STEVEN NICHOLLS, AIRINI
PIRIHIRIA TUKERANGI, DELACE
WILLIAM JAMES, KAHUTOROA
MATAIA TUKERANGI, VIV TAMA
NICHOLLS, ANITA MARI NORMAN
AND SARAH JANE NICHOLLS
(TRUSTEES OF THE W T NICHOLLS
TRUST)
Respondents

Counsel: Mr J Kahukiwa & Ms D Takitimu, for the applicant
Mr T K Williams & Ms R L Gray, for the respondents

Judgment: 30 April 2013

RESERVED JUDGMENT OF JUDGE C T COXHEAD

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Introduction

[1] Mr George Tama Nicholls (Applicant) has appealed against orders made by the Māori Land Court in December 2012 at 50 Waikato-Maniapoto MB 10-16. He has also applied to stay the enforcement of the orders until the determination of the appeal.

[2] The Chief Judge of the Māori Land Court has referred this application to me for determination.¹

Background

[3] The Applicant is one of a number of people against whom orders were made on 21 December 2012.

[4] The other respondents in that matter were William Ohomauri Daniel (Taniora) Pomana Nicholls, Zena Lynda Nicholls, Cherie Povey and Arohaina Povey. None of who have appealed the orders of 21 December 2012, nor have they applied for a stay.

[5] The orders made on 21 December 2012 were:²

- (a) Orders by way of injunction against all the respondents, that they are not to enter and/or occupy the lands being Oamaru camping ground, without the consent of the trustees;
- (b) Orders by way of injunction against all the respondents that they are not to occupy any of the other properties situated in the Oamaru Bay as noted in schedule 1 of the application, without the consent of the trustees. They have 30 days in which to vacate those lands;
- (c) An order for recovery to the trustees of the Oamaru lands occupied by the respondents:
 - i. In terms of the camping grounds;

¹ 53 Waikato-Maniapoto MB 250.

² 50 Waikato-Maniapoto MB 16.

ii. In terms of other properties as noted in schedule 1 of the application, they have 30 days in which to vacate those lands.

[6] Mr George Tama Nicholls filed an appeal on 5 February 2013 against the injunction order.

[7] On 6 March 2013 Mr George Tama Nicholls filed an application for a stay of enforcement of the injunction order, including by way of transmission to the High Court, pending the determination of the appeal.

[8] The Respondents in this application are the Trustees of the W T Nicholls Trust. They oppose the granting of a stay.

Who should be dealing with this stay application?

[9] Before proceeding to consider the substantive stay application, I will address a jurisdictional issue which was raised by the Applicant in submissions in reply as to which Court - the Māori Land Court or the Māori Appellate Court - should determine the application.

[10] Counsel for the Applicant submits that pursuant to the Māori Land Court Rules, the Chief Judge should have referred the application for stay to the Māori Appellate Court coram appointed to hear the appeal.

[11] The Respondents contend that the Applicant's reply submissions on this matter should be disregarded because they are not in response to issues raised in the memorandum of the counsel for the Respondents, and further because this jurisdictional issue has already been decided by the referral of the application to the Māori Land Court.

[12] Counsel for the Applicant has informed the Court that the jurisdictional issue was raised before the presiding judge for the appeal at a teleconference on 5 April 2013 where the presiding judge, Deputy Chief Judge Fox, stated that counsel was entitled to make written submissions on the matter.³

³ Memorandum of Counsel for the Applicant dated 18 April 2013.

[13] It is the jurisdictional issue which is being contested. It has been raised and clearly needs to be decided within the context of this application.

Procedural background for this issue

[14] On 14 March 2013, the Chief Judge referred the application to me stating that:⁴

It is common practice that, other than in exceptional circumstances, where there is concurrent jurisdiction between an appellate court and the court appealed from to consider an application for stay, the application should be filed with the court appealed from.

[15] On 8 April 2013, Deputy Chief Judge Fox, as the presiding judge for this appeal, released a direction noting that I am dealing with the stay of orders, and directing that the appeal be set down tentatively for August 2013, and if a stay is not granted, the Māori Appellate Court coram will be convened to set a date for an urgent hearing of the appeal.⁵

[16] On 12 April 2013, counsel for the Applicant filed a reply memorandum stating that the application for stay ought not have been referred to the lower court, but rather that it should be dealt with by the coram appointed to hear the appeal. Counsel submits that *McGechan on Procedure* classes an application for stay as an interlocutory application, and there is no reason why an application for stay in the Māori Land Court would be any different. Accordingly, counsel for the applicants argues that it should be dealt with by the Māori Appellate Court pursuant to rule 8.17 of the Māori Land Court Rules 2011.

[17] Rule 8.17 states that preliminary and interlocutory matters to be determined before the hearing of appeal may be determined by the Chief Judge, before the appointment of the appeal panel, or the presiding Judge of the Māori Appellate Court, after the appointment of the panel.

[18] Counsel for the Applicant further submits that despite there being no explicit reference to the power to grant a stay under s 58, the Māori Land Court jurisdiction does have that power, and that was recognised in *Taueki – Horowhenua 11 (Lake) Māori Reservation Trust* (2012).⁶

⁴ 53 Waikato Maniapoto MB 250-251.

⁵ 2013 Māori Appellate Court MB 156-158.

⁶ *Taueki - Horowhenua 11 (Lake) Maori Reservation Trust* (2012) 279 Aotea MB 102 (279 AOT 102).

[19] As noted above, counsel for the Respondents has objected to the reply submissions of 12 April 2013 being considered. However as I have already indicated, I am of the view that this jurisdictional issue has been raised and needs to be dealt with in the context of this application.

Who grants stays of execution and stays of proceedings pending appeals in the civil courts?

[20] The rules regarding the power to grant stays pending appeals in the District Court, High Court, Court of Appeal and Supreme Court all state that an appeal does not operate as a stay of proceedings appealed against or a stay of execution of any judgment or order appealed from. All sets of rules then go on to state that there is concurrent jurisdiction empowering either the court which will hear the appeal or the court appealed from (or decision-maker) to order a stay of the proceedings appealed against or a stay of execution of any judgment or order appealed from.

[21] The Supreme Court Rules 2004 state that pending the determination of the application or the appeal, the court appealed from or the Supreme Court may, on application, order a stay of the proceeding in which the decision was given or a stay of the execution of the decision.⁷

[22] The Court of Appeal (Civil) Rules 2005 state that pending the determination of an application for leave to appeal or an appeal, the court appealed from or the Court may, on application, order a order a stay of the proceeding in which the decision was given or a stay of the execution of the decision.⁸

[23] The High Court Rules state that pending the determination of an appeal, the decision-maker or the court may order a stay of proceedings in relation to the decision appealed against, or order a stay of enforcement of any judgment or order appealed against.⁹

⁷ Supreme Court Rules 2004, r 30.

⁸ Court of Appeal (Civil) Rules 2005, r 12.

⁹ High Court Rules, r 20.10.

[24] The District Courts Act 1947 states that notice of appeal shall not operate as a stay of proceedings under the decision appealed from unless the court or a Judge so orders.¹⁰ The District Court Rules 2009 state that an appeal does not stay proceedings on the decision appealed from unless the court or decision-maker orders it.¹¹

Who grants stays pending appeals in the Māori Land Court jurisdiction?

[25] In relation to appeals from provisional determinations, s 59 of Te Ture Whenua Māori Act 1993 states that:

- (4) When leave to appeal is so given, the Māori Land Court may either stay further proceedings in the matter or continue the same, but no final [order](#) shall be made until the appeal has been finally disposed of or dismissed.

[26] There is no equivalent provision relating to appeals from final decisions. Section 58 makes no mention of stays of proceedings or stays of execution of orders.

[27] The Court is explicitly empowered to grant stays in three sections: s 59, as above, s 43, and s 79. Section 43 gives the powers to grant a stay pending a rehearing. Section 79 gives the power to grant a stay in the event that a party defaults on a deposit ordered as security for costs.

[28] Despite this lack of explicit jurisdiction under s 58, stays have been granted pending appeals of final orders on a number of occasions in both the Māori Appellate Court and the Māori Land Court.

[29] In the Māori Appellate Court case of *Tito v Tito - Mangakahia 2B2 No 2A1A*,¹² the applicant sought a stay of proceedings from the Māori Appellate Court pursuant to r 12(3) of the Court of Appeal (Civil) Rules 2005. The application for a stay was made in relation to two decisions: the decision of the Māori Appellate Court dated 23 February 2011 at 2011 Māori Appellate Court MB 86-101; and the interim injunction order of the Māori Land Court dated 19 August 2011 at 26 Taitokerau MB 267-269. The application requested the above orders be stayed pending the outcome of an appeal to the Court of Appeal.

¹⁰ District Courts Act 1947, s 84.

¹¹ District Court Rules 2009, r 14.11.

¹² *Tito v Tito - Mangakahia 2B2 No 2A1A* (2011) 2011 Māori Appellate Court MB 527 (2011 APPEAL 527).

[30] The Māori Appellate Court considered the test relied on in *Clarke v Karaitiana*¹³ as set out in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*.¹⁴ The Māori Appellate Court found that the appeal would not be rendered nugatory if the stay was not granted. The application was declined. The Māori Appellate Court stated that the application for stay in respect of the Māori Appellate Court order was declined for not meeting the test for a stay, but:¹⁵

In respect of the application to stay Judge Ambler's decisions of 19 August, we have no jurisdiction to consider this matter. The applicant's rights of redress in relationship to their decision are for rehearing (s 43, Te Ture Whenua Māori Act 1993) or appeal (s 58, Te Ture Whenua Māori Act 1993).

[31] The Māori Appellate Court also dealt with a stay application in *Naera v Fenwick - Whakapoungakau 24 Trust*.¹⁶ In this case, the applicants sought a stay of parts of the Māori Land Court orders pending the outcome of their appeal of those orders to the Māori Appellate Court by applying to the Māori Appellate Court pursuant to ss 43 and 67(2) of Te Ture Whenua Māori Act 1993. The application states:¹⁷

This application is made pursuant to ss 43 and 67(2) Te Ture Whenua Māori Act 1993 and the inherent jurisdiction of the Court to control its own processes. It has been concurrently filed in both the Māori Land Court and the Māori Appellate Court given that the matter is already subject to an appeal to be heard very shortly.

[32] The Māori Appellate Court considered the application, again applying the test relied on by the Court of Appeal in *Clarke v Karaitiana*.¹⁸ The Māori Appellate Court stated that:

Having carefully considered the submissions of the application, we are not persuaded that the appeal which will consider the refusal by Judge Harvey to remove the trustees would be rendered nugatory if the stay was not granted.

¹³ *Clarke v Karaitiana* [2010] NZCA 486 at [14].

¹⁴ *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC).

¹⁵ *Tito v Tito - Mangakahia 2B2 No 2A1A* (2011) 2011 Maori Appellate Court MB 527 (2011 APPEAL 527) at [29].

¹⁶ *Naera v Fenwick - Whakapoungakau 24 Trust* (2011) 2011 Māori Appellate Court MB 301 (2011 APPEAL 301).

¹⁷ Application of counsel for the appellants, Helen Aikman, for stay pending appeal, 6 July 2011.

¹⁸ *Clarke v Karaitiana* [2010] NZCA 486, at [14].

[33] In the case of *Taueki - Horowhenua 11 (Lake) Māori Reservation Trust* (2012),¹⁹ Mr Philip Taueki applied for a stay of proceedings pursuant to s 43 of Te Ture Whenua Māori Act 1993 pending the outcome of his appeal of orders made by the Chief Judge. The Chief Judge found that despite the application having been made under the incorrect section, there was jurisdiction to order a stay of execution in limited circumstances where the right of appeal would be rendered nugatory if a stay was not granted. However, the Chief Judge, here the lower decision-making court, dismissed the application. On the issue of jurisdiction to grant a stay, the Chief Judge stated:

Jurisdiction

[8] Mr Taueki makes his application for a stay of proceedings under section 43(1) of Te Ture Whenua Māori Act 1993. This section gives the Court the power to issue a stay of proceedings where it has ordered that an application be reheard pursuant to section 43.

[9] Mr Taueki has not applied for a rehearing of his application. A stay of proceedings therefore cannot be granted pursuant to section 43(1) of the Act.

[10] The Māori Land Court also has the power to grant a stay of proceedings pursuant to section 59(4) of the Act where leave is given to appeal from a provisional determination of the Court. However section 58, under which Mr Taueki appeals my final orders, does not contain any explicit power for the Court to grant a stay of execution. With the exception of incorrectly relying on section 43, Mr Taueki has not directed me to any other statutory authority under which the Māori Land Court may issue such a stay in relation to an appeal against final orders to the Māori Appellate Court. Notwithstanding I am required to consider whether the Māori Land Court has the jurisdiction to grant a stay as requested.

[11] It has been recognised in the High Court has the power under its inherent jurisdiction to grant a stay of execution, in addition to its statutory authority to grant such a stay prescribed by the High Court Rules (*Pinson v Pinson* (1991) 5 PRNZ 177). Exercise of this power under the High Court's inherent jurisdiction, rather than under the procedures set out in the High Court Rules, must only apply in special circumstances, "[f]or example if there was some question of an abuse of the process of the Court or where the efficacy of an appeal would be forever destroyed were [the High Court] not to rapidly intervene" (*Sutherland v Sutherland* [1995] NZFLR 935).

[12] The Māori Land Court does not possess any inherent jurisdiction, other than where it has been accorded the same powers and authorities of the High Court in respect of trusts under section 237 of Te Ture Whenua Māori Act 1993. While the original application to the Court was for the removal of a trustee under the Court's trust powers, the power to issue a stay of execution cannot properly be interpreted as a part of the "powers and authorities of the High Court in respect of trusts", and the Māori Land Court accordingly does not have the authority to issue a stay in reliance on the High Court's inherent jurisdiction.

[13] The only remaining ground on which the Court might issue a stay of proceedings, without there being explicit statutory authority to do so, is in accordance with the principle set out by the Court of Appeal in *McMenamin v Attorney-General* [1985] 2 NZLR 274. That Court stated that "[a]n inferior Court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. This is implied as a matter of statutory construction. Such Court also has the duty to see that its process is used fairly. It is bound to prevent an abuse of that process."

¹⁹ *Taueki - Horowhenua 11 (Lake) Māori Reservation Trust* (2012) 279 Aotea MB 102 (279 AOT 102).

[14] I agree with this principle and consider that the Māori Land Court does have the power to issue a stay of execution in respect of a final order that has been appealed to the Māori Appellate Court, but only in very limited circumstances. In my view, Parliament would not have legislated to allow the right of an appeal from a final order of the Court without the intention that that appeal have effect where the appellant is successful. Therefore, in the situation where an appellants right of appeal under section 58 would be rendered nugatory if a stay of execution were not granted, the Māori Land Court must have the authority to issue a stay. This is comparable to the High Court's assessment of its inherent power to grant a stay where the efficacy of an appeal would be destroyed were this Court not to intervene.

[15] In summary, I find that the Māori Land Court has the jurisdiction to issue a stay.

[34] In [Horowhenua \(11\) Lake \(2013\)](#),²⁰ Mr Philip Taueki applied for a stay of proceedings pursuant to s 43(1) and (3) of Te Ture Whenua Māori Act 1993 pending appeal. The application for a stay was made to the Māori Appellate Court as part of the appeal application. The lower court judge dealt with the application for stay, along with an application for directions from Ms Vivien Taueki. Judge Harvey, in an oral decision, dismissed the application for stay of proceedings stating that “Mr Taueki’s rights of appeal and review remain intact but I see no reason why a stay of proceedings must be granted in the present circumstances”.

The Māori Land Court Rules and interlocutory applications

[35] *McGechan on Procedure* states that “an application to stay the effects of a judgment may be made either to the decision-maker being appealed or to the High Court. This is done by way of interlocutory application”.²¹

[36] Rule 8.17 of the Māori Land Court Rules 2011 states in relation to interlocutory matters that:

- (1) Interlocutory and preliminary matters to be determined before the hearing of the appeal may be determined by—
 - (a) the Chief Judge, before the appointment of the appeal panel; or
 - (b) the presiding Judge of the Māori Appellate Court, after the appointment of the appeal panel.

²⁰ [Horowhenua \(11\) Lake \(2013\) 296 Aotea MB 91](#).

²¹ *McGechan on Procedure* (online loose-leafed, Brookers, accessed 26 April 2013) at [HR20.10.01].

[37] It is on this basis that the Applicant submits that an application for stay of proceedings or stay of execution of orders pending an appeal should be determined by the Māori Appellate Court, and not the Māori Land Court.

[38] Neither Te Ture Whenua Māori Act 1993 nor the Māori Land Court Rules 2011 define “interlocutory order”. Section 2 of the District Courts Act 1947, s 2 of the Judicature Act 1908, and s 4 of Supreme Court Act 2003 all define “interlocutory application” similarly as:²²

Interlocutory application—

- (a) means an application in a proceeding or intended proceeding for—
 - (i) an order or a direction relating to a matter of procedure; or
 - (ii) in the case of a civil proceeding, for some relief ancillary to the relief claimed in the pleading; and
- (b) includes an application for a new trial; and
- (c) includes an application to review a decision made on an interlocutory application

[39] Rule 8.17 of the Māori Land Court Rules is in the part of the Rules on appeals. This part of the Rules deals with notices of appeal, filing notices of appeal, notification of appeal, the Chief Judge’s responsibilities to set down the appeal, leave to appeal from a provisional or preliminary determination, leave to appeal out of time, notification in panui, records on appeal, hearing of further evidence, dismissal of appeals, conduct of hearings, reinstatement of appeals and withdrawal of appeals.

[40] Rule 8.17, on preliminary or interlocutory matters, in addition to stating who may determine them, lists some specific preliminary and interlocutory matters that may be dealt with under this rule, such as alternative procedures for disposal of the appeal, holding judicial conferences, amending the grounds for appeal, determining costs issues where the appeal is withdrawn, extending time for lodging security of costs, and reducing or waiving the security of costs ordered.

[41] Obviously, the Māori Land Court also has the power to deal with interlocutory applications made in relation to proceedings before that court.

²² Definition taken from Supreme Court Act 2003, the other Acts have almost identical wording.

[42] The question is, then, is an application for a stay pending an appeal an interlocutory application to be determined before that appeal (relating to the appeal proceedings), or an interlocutory application to be determined in relation to the lower court proceedings? Or is it both of these things?

[43] The definition of “stay of proceedings” in *Butterworths New Zealand Law Dictionary* is “an order made by a Court preventing an action further either before or after a determination by a Court in respect of the action”.²³ This indicates that a stay can be an application in relation to the Court being appealed from or the Court being appealed to.

[44] In my view a stay application is both an application in relation to the lower court proceedings (being the potential enforcement proceedings) and the appellate court proceedings (pending the appeal proceedings). It follows that concurrent jurisdiction exists to determine an application for stay pending an appeal. This is consistent with the civil court rules and the general approach of the civil courts.

Conclusion on this jurisdictional issue

[45] Although Te Ture Whenua Māori Act 1993 contains no specific provision for the Māori Land Court jurisdiction to order stays pending appeals of final orders, it has been held that the Māori Land Court does have that power, at least in limited circumstances where the appeal would be rendered nugatory if the stay was not granted.

[46] An application for a stay pending an appeal is both an interlocutory matter in relation to the appeal, and an interlocutory matter in relation to the lower court proceedings. It can therefore be dealt with by the Chief Judge before the appointment of the coram, or the presiding judge of the MAC coram once appointed pursuant to r 8.17 of the Māori Land Court Rules 2011, or it can be dealt with by the lower court. As concurrent jurisdiction exists, the question is which court should deal with such an application in the first instance.

²³ Spiller *Butterworths New Zealand Law Dictionary* (7th ed, LexisNexis, Wellington, 2011).

[47] Noting that while there is concurrent jurisdiction to determine applications for stays pending appeals in the civil courts, the general practice, specifically between the Court of Appeal and the High Court, is that an application for stay is to be made first to the court of first instance, unless special circumstances exist justifying initial application to the higher court.

[48] This is the common practice followed by the Chief Judge when referring this application to me.

[49] Having found that either the Māori Land Court or the Māori Appellate Court may deal with an application for stay of proceedings pending an appeal, I now turn to determine the application itself.

Applicant's submissions

[50] Mr George Tama Nicholls' stay application was filed pursuant to s 58 of Te Ture Whenua Māori Act 1993. He applies for an order staying any enforcement (including the way of transmission to the High Court) of the orders made on 21 December 2012 until the determination of the appeal in the Māori Appellate Court.

Grounds for Stay

[51] The grounds supporting his application are in summary:

- (a) There is prejudice to him by way of the said orders taking effect before the appeal is determined and this outweighs any prejudice to the beneficiaries of the relevant trusts. This is on the basis that:
 - i. He has been in contact with the bank representative responsible for the mortgage and has been assured that the bank does not view this account as in arrears and are comfortable of the current servicing of the debt and see no need for any remedial or urgent action;
 - ii. The cost of upheaval of the him having to move accommodation is significant;

- iii. The emotional toll on the him and his family if required to move off their ancestral land as a result of the Court orders is significant and should not unnecessarily be placed on them if an appeal against the order is in train;
- iv. The matter has been the subject of ongoing dispute between the parties for a protracted period of time. Given the long period of time this matter has been unresolved and the fact that certainty may be imminent, enforcement of the orders under appeal would be premature and potentially unnecessary.

[52] Further grounds for the stay application are that:

- (a) He is bona fide in the prosecution of the appeal;
- (b) The right of appeal will be rendered nugatory if no stay is ordered;
- (c) There is little or no prejudice or injury to the beneficiaries of the relevant trusts if the stay is ordered and in fact their commercial interests may be better protected by a stay than ordered in the interim period pending the outcome of the appeal to enable continuity in business proceedings;
- (d) It is in the interest of justice and the balance of convenience that the stay is granted.

[53] In reply submissions, Counsel submits that the enforcement of a permanent injunction against the Applicant and the forced removal from ancestral lands will cause irreversible harm.

Other directions

[54] The application also notes directions I made with regards to part of my decision on 21 December. In my direction I noted:

Counsel for the Applicants, have filed a memorandum with regards to that part of the application where, in my decision of 21 December I made a number of directions with

regards to the Respondent providing information to the Court within 30 days. The Respondents have not provided any information.

The Applicants have asked that I proceed to decide the outstanding part of their application.

I have been, as is the practice, notified by the Court that a number of decisions that I made in regards to this matter have been appealed.

The grounds for appeal appear to be applicable to the orders and directions made on 21 December 2012.

It appears it would be futile for me to complete a reserved decision with regards to the orders sought for the recovery of rental income given:

- (a) The likelihood, that the reserved decision would be appealed; and
- (b) Issues applicable to the hearing as a whole are under appeal.

Given the appeal that is currently with the Māori Appellate Court it is best that I pause making any decision until the appeal is completed.

[55] The Applicant makes the point that the same rationale I applied to the outstanding part of the application could also be applied in this situation.

Evidence of the Applicant

[56] The affidavit made by Mr George Tama Nicholls is in part related to the appeal of the decision I made in December but also raises issues with regard to Judge Milroy's decision in establishing the WT Nicholls Ahu Whenua Trust.

[57] Mr George Tama Nicholls states that he has asked his lawyers to appeal the orders of the Court, and his evidence suggests that he is appealing the injunction matter as well as the decision relating to the establishment of the Trust.

[58] In summary, the main contention is that he wishes to continue to occupy the land, and that he and his family would suffer emotional hurt and harm if removed from the land.

Respondents' submissions

[59] In summary, the Respondents submit that the application has not met the statutory or threshold requirements for applying for a stay of proceedings under Te Ture Whenua Māori Act 1993.

[60] Firstly, the Respondents contend that s 58 of the Act does not provide jurisdiction for the Court to grant orders for a stay of proceedings. Referring to the *Taueki – Horowhenua 11 (Lake) Māori Reservation Trust* (2012) decision, the Respondents submit that s 58 of the Act does not contain any explicit power for the Court to grant a stay of execution.²⁴

[61] Counsel for the Respondents further submits that the application does not meet the “very limited circumstances” threshold set out in paragraph [14] of the *Taueki* decision and, according to the Chief Judge in that decision, this threshold would only be met where an appellant’s right of appeal under s 58 would be rendered nugatory if a stay of execution were not granted. To this the Respondents say the Applicant’s legal and actual right to appeal the orders for an injunction and recovery of land would not be rendered nugatory if the order for an injunction is enforced by the High Court as there is nothing that cannot be remedied by the Māori Appellate Court if the Applicant is successful in his appeal.

[62] The Respondents submit that the Applicant has not pleaded or submitted that the Court should invoke its limited and inherent jurisdiction in this application for a stay of proceedings.

[63] The Respondents say the Applicant relies on the one ground only: that there is prejudice to the Applicant if a stay is not granted. Alleged or perceived prejudice to the Applicant is not a ground upon which the Court should exercise its limited and inherent jurisdiction and grant a stay of proceedings. Therefore, it is submitted that the Court has no jurisdiction, explicit or inherent, to hear or grant the application.

[64] In the alternative, the Respondents submit that even if the above is not accepted by the Court, the Applicant has failed to meet the test applicable to a stay of proceedings application.

²⁴ *Taueki – Horowhenua 11 (Lake) Māori Reservation Trust* (2012) 279 Aotea MB 101.

[65] The Respondents submit that:

- (a) The Applicant's right of appeal will not be rendered nugatory if a stay is not granted;
- (b) In this case the rights of the Applicant (the appellant in the appeal) to appeal are preserved and remedy can be provided if he is successful on appeal;
- (c) The trustees, the successful litigants, are entitled to the fruits of the judgments made in their favour;
- (d) While the Applicant will no longer be in occupation (illegally) or possession (wrongfully) of the land after the leaving the land, there is no possibility of the subject lands being alienated and they remain available for reoccupation by the Applicant, should he be successful on appeal and the Appellate Court makes orders to that effect. The subject lands are Māori freehold land and subject to the protections from alienation by the Act and the Trust Order of the WT Nicholls Trust. Further, the Applicant could pursue a claim for damages.
- (e) The Applicant and the other Respondents (in the Māori Land Court matter) have no legal right to occupy the subject land.

Implicit jurisdiction to grant a stay: does the Court have jurisdiction to grant a stay?

[66] The Applicant seeks a stay of proceedings pursuant to s 58 of the Act. As has been noted, s 58 does not contain explicit reference to any specific powers of the Court to grant a stay.

[67] The Court's ability to grant a stay was discussed above at paragraph [33] with reference to the decision of *Taueki – Horowhenua 11 (Lake) Māori Reservation Trust* (2012) which clearly established that the Māori Land Court does have the power to issue a stay of execution in respect of a final order that has been appealed to the Māori Appellate Court, but only in very limited circumstances where the right of appeal would be rendered nugatory if a stay were not granted.

[68] In *Tito v Tito - Mangakahia 2B2 No 2A1A*,²⁵ the Māori Appellate Court considered the test relied on in *Clarke v Karaitiana* as set out in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*.²⁶ The principles relied on were:

- (a) If no stay is granted will the appellant's right of appeal be rendered nugatory?
- (b) The bona fides of the applicants as to the prosecution of the appeal.
- (c) Will the successful party be injuriously affected by the stay?
- (d) The effect on third parties.
- (e) The novelty and importance of the question involved.
- (f) The public interest in the proceedings.
- (g) The overall balance of convenience.

The Applicant's submissions on irreversible harm

[69] The Applicant's main ground in support of his application is that there is prejudice to him if a stay is not granted.

[70] The Applicant has submitted that the enforcement of a permanent injunction against him would cause irreversible harm, both emotional and physical, in having to vacate the land in question. This is detailed in the application and also in the affidavit of George Tama Nicholls. The claim is that there is prejudice to him by way of the said orders taking effect before the appeal is determined and this outweighs any prejudice to the beneficiaries of the relevant trusts.

[71] I agree with the Respondents that this is not a principle referred to in any of the leading case authorities concerning stays of proceedings and stays of executions in this Court or the Māori Appellate Court. In this situation, the prejudice to the Applicant is not a

²⁵ *Tito v Tito - Mangakahia 2B2 No 2A1A* (2011) 2011 Māori Appellate Court MB 527 (2011 APPEAL 527).

²⁶ *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC).

ground that would justify the Court exercising its limited and inherent jurisdiction and grant a stay of proceedings. The prejudice to the Applicant in having to vacate the subject land and offer up physical, as opposed to legal, possession of the land does not negate or affect the Applicant's legal right to appeal. It has absolutely no bearing on the Applicant's appeal.

The threshold test: will the granting of a stay render the appeal nugatory?

[72] As held in *Taueki – Horowhenua 11 (Lake) Māori Reservation Trust* (2012), the threshold test to be met in order for a stay to be granted is that if a stay is not granted it will render the appeal to the Māori Appellate Court nugatory.

[73] The Applicant has made limited submissions on this point.

[74] The Māori Appellate Court has broad powers to remedy the situation if the appeal is successful. Those powers are contained in s 56 of Te Ture Whenua Māori Act 1993 which states:

56 Powers of Court on appeal

- (1) On any appeal, the Māori Appellate Court may, by order, do such one or more of the following things as it thinks fit:
 - (a) It may affirm the order appealed from:
 - (b) It may annul or revoke that order, with or without the substitution of any other order:
 - (c) It may vary that order:
 - (d) It may direct the Māori Land Court to make such other or additional order as the Māori Appellate Court thinks fit:
 - (e) It may direct a rehearing by the Māori Land Court of the whole or any specified part of the matter to which the order relates:
 - (f) It may make any order that the Māori Land Court could have made in the proceedings:
 - (g) It may dismiss the appeal.
- (2) The Māori Appellate Court, in the exercise of the jurisdiction conferred on it by this section, may exercise, as though it were the Māori Land Court, any of the discretionary powers conferred upon that Court.

[75] Therefore the Māori Appellate Court has the power to replace any order of the Māori Land Court, including referring the case back to the Māori Land Court or amending the Māori Land Court order as it sees fit. The orders being appealed can be cancelled, annulled, or varied.

[76] Pursuant to s 56, if the appeal is successful, the Māori Appellate Court has the power to provide the Applicant (the appellant in the appeal) with the ability to reoccupy the subject land, and the power to order costs.

[77] Importantly, the land will not be alienated pending the appeal. The lands are Māori freehold land and subject to protection from alienation by the Te Ture Whenua Māori Act 1993 and the Trust Order of the WT Nicholls Trust. There is no possibility of the subject lands being alienated before the appeal is decided, and they remain available for reoccupation by the Applicant should his appeal be successful.

[78] In short, the Māori Appellate Court has jurisdiction to remedy the situation relating to Mr George Tama Nicholls.

[79] Having considered the submissions, I conclude that the Applicant has failed to meet the threshold test. I am not persuaded that the appeal would be rendered nugatory if the stay was not granted. The appeal can continue and if successful the Māori Appellate Court has the ability to allow the Applicant to return and occupy the land.

[80] Having failed to meet the threshold test for the granting of a stay I do not see any need to consider the other principles upon which the Applicant and Respondents have made submissions.

Decision

[81] Given my reasons above the application is dismissed.

Pronounced in open Court at am/pm in Rotorua this 30th day of April 2013

C T Coxhead
JUDGE