

THE WAITANGI TRIBUNAL

Wai 3007

CONCERNING

the Treaty of Waitangi Act 1975

AND

an application for an urgent hearing by Patrick Nicholas on behalf of themselves and all te iwi Māori who support this claim

DECISION
ON APPLICATION FOR AN URGENT HEARING

12 March 2021

Introduction

1. This decision concerns an application for an urgent inquiry into Crown policy, acts and omissions in relation to the Criminal Proceeds (Recovery) Act 2009 ('the Act'). The application raises issues both generally and specifically, into the forfeiture orders granted by the High Court over 631, 633, 634 Maketū Road,¹ and the 'Odey Road property', which constitutes of a half share in Oteora 2A1 Block on Odey Road, Whakamarama.²
2. The application has been brought by Patrick Nicholas on behalf of himself and all te iwi Māori who support his claim.

Background

3. The land, which is in part the subject of the present claim and application, has been at the centre of ongoing litigation since at least April 2010 (Wai 3007, #3.1.6(a)).
4. It is important to note at the outset that the four properties are owned by Valentine Nicholas, the brother of Patrick Nicholas (the 'applicant'). As such, it was Valentine Nicholas who was a party to the proceedings described below.
5. On 4 May 2010, an asset restraining order was granted by consent over the Maketū Road properties as well as the Odey Road property (Wai 3007, #3.1.6(a)).
6. On 17 August 2016, forfeiture orders were granted by the High Court in respect of the four properties (Wai 3007, #3.1.6(a)).
7. On 19 October 2017, Valentine Nicholas appealed the forfeiture orders on the grounds that the properties are of cultural and spiritual significance and would bring undue hardship under s 56 of the Act.³ The Court of Appeal allowed the appeal and set aside the High Court judgment in part, with the matter remitted to the High Court in order to hear evidence on hardship relating to 633 Maketū Road and the half share in the Odey Road property (Wai 3007, #3.1.6(a)).
8. On 8 December 2017, an application to change the status of the four properties from general land to Māori freehold land, was heard before the Māori Land Court.⁴ The change of status was declined due to the encumbrances over the properties (Wai 3007, #3.1.6(a)).
9. On 5 July 2018, Woolford J found there was no evidence before the Court to satisfy it that Mr Nicholas would suffer undue hardship over the properties at issue. Justice Woolford accordingly upheld the original orders granted and also ordered the relevant properties be made the subject of the profit forfeiture order made on 17 August 2016 (Wai 3007, #3.1.6(a)).
10. Finally, on 13 August 2020, the Māori Land Court dismissed an application for an injunction against the Official Assignee (represented by the Auckland Crown Solicitor, Meredith Connell) from executing the forfeiture orders (Wai 3007, #3.1.6(a)).

¹ SAC29C/29, SA29C/25, and SA1416/66.

² *The Commissioner of Police v Valentine Barclay Nicholas* [2016] NZHC 1913.

³ *Valentine Barclay Nicholas v Commissioner of Police* [2017] NZCA 473.

⁴ *Valentine Barclay Nicholas – Lot 5 DP 34349 Blk IV Maketu SD* (2017) 176 Waiariki MB 273 (176 WAR 273).

Procedural History

11. On 24 September 2020, the Tribunal received a statement of claim and an application for an urgent hearing from the applicant (Wai 3007, #1.1.1).
12. On 24 September 2020, Judge Savage directed the Crown and any interested parties to respond to the application for an urgent hearing by midday, Thursday 8 October 2020 (Wai 3007, #2.5.1).
13. On 7 October 2020, counsel for the Crown filed a memorandum requesting that Judge Savage grant an extension until 16 October 2020 for the filing of the Crown's response to the application for an urgent hearing (Wai 3007, #3.1.2).
14. On 8 October 2020, Judge Savage granted the extension sought by the Crown (Wai 3007, #2.5.2).
15. The Tribunal received requests on behalf of the following parties, seeking to participate in these proceedings as interested parties in support of the application for an urgent inquiry:
 - a) Wai 2797, the Marine and Coastal Area (Takutai Moana) Act 2011(Kemara) claim by Rangi Kemara (Wai 3007, #3.1.4, received on 12 October 2020);
 - b) An unregistered claim by Alvina Edwards (Wai 3007, #3.1.4, received on 12 October 2020); and
 - c) Kelly te Heuheu acting on behalf of Valentine Nicholas as rightful owner of 631, 633, and 634 Maketū Road (Wai 3007, #3.1.5, received on 20 October 2020).
16. On 16 October 2020, counsel for the Crown filed a memorandum requesting that Judge Savage grant a further extension until Thursday 22 October 2020 on the basis that counsel was not in a position to file a response by the 16 October 2020 deadline (Wai 3007, #3.1.3). Counsel stated that the relevant agencies were giving this matter due and urgent consideration, and the further extension requested would be of value to the Tribunal and all parties in progressing this matter.
17. On 20 October 2020, Judge Savage granted the extension sought by the Crown (Wai 3007, #2.5.3).
18. On 23 October 2020, the Crown filed a memorandum in response to the urgency application (3007, #3.1.6).
19. On 28 October 2020, I granted the parties listed at paragraph [15] interested party status as they had satisfied me, that they had met the requirement of s 4A(1) of the Commissions of Inquiry Act 1908, being that they have an interest in the inquiry apart from any interest in common with the public (Wai 3007, #3.1.4)
20. On 28 October 2020, the applicant filed a memorandum in response to the submissions of the Crown (3007, #3.1.7).

Parties Submissions

Applicant's Submissions

21. The applicant submits that the forfeiture of the Maketū Road properties is in breach of the principles of the Treaty of Waitangi as those properties are ancestral and inherited land and have not been obtained from the profits of crime, nor been used for crime.

Further, the applicant submits that the Maketū Road properties are not tainted property, as defined by s 5 of the Act (Wai 3007, #1.1.1).

22. The applicant submits that the property on Odey Road, was claimed at the arrival of the waka; Te Arawa, when Hei named the land “Te Takapu o Waitaha”. The applicant further submits that the Odey Road property was confiscated by the Crown in the 1860’s and subsequently returned to Pirirakau hapū and Ngāti Ranginui iwi as a land grant. Finally, the applicant submits that the title to the Odey Road property was “Europeanised” by his great grandfather’s estate trustees (Wai 3007, #1.1.1 at [5]).
23. The neighbouring block, Oteora No. 2A, is Māori freehold land, which the applicant submits belongs to Pirirakau hapū. The applicant further submits that the Nicholas family are shareholders in this block.
24. The applicant submits that “these” are not land blocks obtained by criminal activity. In relation to this, the applicant further submits that the Odey Road property does not have road access, it is in native bush, surrounded by other native bush blocks, and thus is impossible to see the property be used for criminal activity (Wai 3007, #1.1.1, at [5]).
25. The applicant submits that the Court of Appeal “said that the evidence strongly suggests that the Whakamarama land is ancestral land originally belonging to Pirirakau” (Wai 3007, #1.1.1, at [5]).
26. The applicant submits that the Act allows the Crown to confiscate Māori land, ancestral land, and land owned by Māori, in the absence of charges being laid, a prosecution occurring, and without a resulting criminal conviction.
27. The Act does not require that police prove any offence has been committed before assets can be seized under the Act.
28. The Act requires that the standard of the balance of probabilities be applied when determining whether property is to be forfeited to the Crown on the basis that the assets were profits of crime rather than the standard of beyond reasonable doubt. The applicant submits that this places the onus on the owners to prove where they got the assets in question.
29. The applicant submits that Māori land, ancestral land, and land owned by Māori are not acquired by criminal activity, rather they were acquired by previous generations before the accused were even born and were passed on to the accused through inheritance.
30. The applicant submits that the Act is designed to establish a regime for the forfeiture of property that has been derived directly or indirectly from significant criminal offending, without the need for a conviction for said offending, as well as the forfeiture of instruments of crime when a conviction has been entered. The applicant submits that ancestral land is inherited and has not been gained from criminal offending.
31. The applicant submits that under the Act assets are forfeit as either the profits of crime, or as an instrument of crime. Section 5(1) of the Act defines an instrument of crime as “property used (wholly or in part) to commit or facilitate the commission of a qualifying instrument forfeiture offence” (Wai 3007, #1.1.1, at [5]).
32. The applicant submits that in the case of a civil confiscation case the process is the same as for instruments during the restraint phase. The applicant further submits that

unlike an instruments case, in a civil confiscation case, there is no need for a prosecution to occur, or even for charges to be laid.

33. The applicant submits that the legal test for civil confiscation matters is that on the balance of probabilities, the person has unlawfully benefited from significant criminal activity and that there has to be sufficient evidence to show that the assets are the profit of probable criminal offending, or that the assets are tainted by that offending. In relation to this, the applicant submits the Maketū Road properties are not tainted property as defined by s 5 of the Act.
34. The applicant submits that the legislation acts “as a civil forfeiture is in Rem and not in Personam” (Wai 3007, #1.1.1 at [8]).
35. The applicant submits that the difference between instruments forfeiture and civil forfeiture, is that civil forfeiture is a recovery of an asset (or value) for the state and is an action against the asset, as opposed to in an instrument forfeiture matter where the sanction is against the person or respondent. The applicant submits that in rem means, from Latin, “against a thing”, and concerns the status of a particular piece of property. The applicant submits that for instance, the in-rem jurisdiction refers to the power of a court over an item of real or personal property. Relying on the Legal Information Institute Legal Encyclopaedia, the applicant submits that in-rem jurisdiction is based on the location of the property and enforcement follows property rather than person.
36. The applicant submits that he and his whānau have been prejudicially affected and the Treaty of Waitangi has been breached by the Crown claiming against ancestral land owned by Māori. Further, the applicant submits that these matters are contrary to the articles and principles of Te Tiriti o Waitangi.

Interested Parties Submissions

37. The Wai 2797 and an unregistered claim by Alvina Edwards, direct particular attention towards s 18 of the Act which provides for specified individuals to apply for restraining orders. These interested parties submit that “there is potential for Māori land to be subject to the provisions of the Act wherefore the result of the same could be disproportionately severe for Māori” (Wai 3007, #3.1.4).
38. On this basis, the Wai 2797 and the unregistered claim support the granting of an urgent inquiry into the Wai 3007 claim (Wai 3007, #3.1.4).
39. Ms te Heuheu applied for and was granted interested party status acting on behalf of Valentine Nicholas, “the rightful owner of the land blocks to this claim”. For clarity, I note at this point that Ms te Heuheu’s authorisation to act on behalf of Valentine Nicholas is only in relation to 631, 633, and 634 Maketū Road (Wai 3007, #3.1.5(b), and that the Wai 3007 claim also concerns the land block on Odey Road, Whakamarama.
40. Ms te Heuheu submits that the Police have informed “the whānau once they get the go ahead, (the) Armed Offenders Squad are coming” (Wai 3007, #3.1.5 at [4]).
41. Ms te Heuheu submits that this is a whānau issue, not a mongrel mob gang issue as the Police have asserted through media (Wai 3007, #3.1.5 at [4]).
42. Ms te Heuheu is a cousin of both the applicant and his brother Valentine Nicholas, on whose behalf she is authorised to act (Wai 3007, #3.1.5 at [5]).

43. Ms te Heuheu asserts that “all land blocks” are ‘Historical Original Māori Land’ subject to the Māori Affairs Act 1953 (Wai 3007, #3.1.5 at [7]).
44. Ms te Heuheu submits that the Maketū Road properties were under one legal title, but that the land now has individual blocks owned by each sibling for land development compliance under the Regional Council. She further submits that as a collective, the blocks were developed into a papakainga for the whānau (Wai 3007, #3.1.5 at [15]).
45. Ms te Heuheu submits that the “previous provision of the [Māori Affairs] Act with one Māori landowner resulted in the land being diverted to general land by legal administration taking away Māori land status.” Ms te Heuheu further submits that the majority of Māori landowners were unaware of this law and that in fact, it was “a disturbing piece of legislation when the status became general land only, resulting in serious harm and grief to Māori.” Ms te Heuheu asks the Tribunal to consider this matter as it makes clear why the present claim exists (Wai 3007, #3.1.5 at [8] – [9]).
46. Ms te Heuheu submits that s 129(2)(c) of the Te Ture Whenua Māori Act 1993 / Māori Land Act 1993 was amended by s 19 of the Te Ture Whenua Māori Amendment Act 2002 which provides that (Wai 3007, #3.1.5 at [10]):

section 129(2) (c) of the [Te Ture Whenua Māori Act 1993] is amended by omitting the words “more than 4” and substituting the words “a Maori or by a group of”. The result of this amendment is that s 129(2)(c) of the Te Ture Whenua Māori Act now provides “for the purposes of this Act, land (other than Maori freehold land) that has been alienated from the Crown for a subsisting estate in fee simple shall, while that estate is beneficially owned by a Maori or by a group of persons of whom a majority are Maori, have the status of General land owned by Maori.”
47. Ms te Heuheu submits that (Wai 3007, #3.1.5 at [11]):

the current status of the land blocks was expected with the strict protection under the provisions of ‘General land owned by Māori’, was not to confiscate ancestral land by the ‘Asset and Profit Forfeiture Order’ under the ‘Criminal Proceeds (Recovery) Act’ and was alarming Mr Nicholas was found not guilty of all criminal drug charges. This Act is a clear Breach of the Treaty against Maori land owners, hapu and iwi.
48. Ms te Heuheu submits that Mr Nicholas sibling’s blocks on the same land title are Māori freehold land under the jurisdiction of the Māori Land Court. Ms te Heuheu further submits that the Official Assignee and Meredith Connell have control over Mr Nicholas’ three properties under a caveat which prevents the land from being included in the transfer to Māori freehold land. Further, Ms te Heuheu submits that “an appeal is awaiting a direction from the Chief Judge” (Wai 3007, #3.1.5 at [3] and [13]).
49. Ms te Heuheu submits that a letter was sent to Mr Nicholas to vacate his property by 28 September 2020. Further, Ms te Heuheu submits that the land blocks are in the process of being put on the market for sale (Wai 3007, #3.1.5 at [14]).
50. Ms te Heuheu submits that the properties on Maketū Road are wāhi tapu, containing the urupa where a kuia of the whānau is buried, as well as “all pepē pito” (Wai 3007, #3.1.5 at [20]).
51. Further, Ms te Heuheu submits that the Maketū Road properties are a papakainga for the Nicholas whānau, which includes tamariki and mokopuna and that the seizure of the properties highlights an abusive injustice which causes intergenerational hardship and harm (Wai 3007, #3.1.5 at [16]).

52. Ms te Heuheu also provides evidence of Ngāti Whakaue ki Maketū's ties to the rohe in which the Maketū properties sit (Wai 3007, #3.1.5 at [21]).

Crown's Submissions

53. The Crown opposes the application for urgency in respect of the specific claims relating to Patrick Nicholas and his whānau land (Wai 3007, #3.1.6).
54. The Crown submits that the land which is the subject of the claim has already been forfeited by orders of the High Court. There have been multiple proceedings in the High Court, Court of Appeal, and Māori Land Court in relation to the land and the forfeiture issues (Wai 3007, #3.1.6 at [20]).
55. The Crown submits that the applicant has not identified any current or pending Crown actions or policies from which he, or those he represents might suffer significant and irreversible prejudice. The Crown submits that there is no Crown action here at all because (Wai 3007, #3.1.6 at [21]):
- 21.1 The actor responsible for investigating and taking proceedings under the Act is the Commissioner of Police, acting independently of the Crown. The Crown points to section 92(1) of the Act which provides (Wai 3007, #3.1.6):
- In any matter relating to any decision to investigate any person or property or to take any proceedings under this Act, the Commissioner is not responsible to the Attorney-General or any other Minister of the Crown and must act independently.
- 21.2 The High Court, not the Crown, decides whether land should be forfeited and sold. The Crown submits that the relevant forfeiture orders in this case were made by Hinton J on 17 August 2016 and sealed by the High Court on 24 August 2016. The Crown further submits that two of those orders were confirmed following an appeal and subsequent reconsideration in the High Court in July 2018. The orders appoint the Official Assignee to execute the order. The Official Assignee is required by the Act to dispose of the properties specified in the order and apply the money in the way specified by the Act. The Crown submits that the Official Assignee therefore operates as a statutory officer performing the actions of the order as directed by the High Court
56. The Crown does not oppose the application for urgency insofar as it relates to claims concerning the Act itself, because (Wai 3007, #3.1.6 at [18.3]):
- 18.3.1 There are important questions about the extent to which the legislation represents a proper balancing of significant public policy issues concerning the retention and use of Māori land and the deterrence and prevention of crime, and in that regard whether the legislation is consistent with the principles of the Treaty of Waitangi;
- 18.3.2 If the legislation is not so consistent or does not represent a proper balance, there are likely a number of options for reform of the legislation and/or the policies and procedures underneath it; and
- 18.3.3 The Crown would welcome the Tribunal's views, findings, guidance and recommendations on these matters.
57. However, in light of the above, the Crown considers the Tribunal is best placed to consider whether or not "this category" of claims concerning the Act warrant an urgent hearing, taking into account the Tribunal's work programme and resources, and the prospect of a kaupapa inquiry including these claims in the future (Wai 3007, #3.1.6 at [18.4]).

58. The Crown submits that there are alternative remedies that either are or have been available to Patrick Nicholas through various appeal processes and through the Māori Land Court. There have been multiple proceedings in the High Court, Court of Appeal, and Māori Land Court in relation to the specific land and forfeiture issues raised by Patrick Nicholas (Wai 3007, #3.1.6 at [22]).

Applicant's Submissions in response to the Crown

59. In response to the Crown submitting that the applicant had not identified any current or pending Crown actions or policies from which he, or those he represents, might suffer significant and irreversible prejudice, the applicant submits there is no Crown action here at all (Wai 3007, #3.1.7)).
60. The applicant however highlights that the Crown has not provided any active protection, and submits that the Crown has failed to actively protect Māori from police bias, inequitable conviction rates, imprisonment, and property confiscation in regard to cannabis. Therefore, this is an omission of the Crown to actively protect Māori from these processes (Wai 3007, #3.1.7 at [6]).
61. The applicant submits that (Wai 3007, #3.1.7 at [6]):
- a) Māori have borne the brunt of biased cannabis enforcement;
 - b) Māori are three times more likely to be arrested and convicted of a cannabis related crime than non-Māori;
 - c) There are significant and life-long consequences arising from cannabis convictions which disproportionately impact rangatahi Māori; and
 - d) Māori are almost twice as likely as non-Māori to go to court over a first offence and nearly seven times more likely to be charged; and
 - e) There is unconscious bias, recognised by former Police Commissioner Mike Bush and current Police Commissioner Andrew Coster, on the part of Police towards Māori.
62. The applicant submits that in addition to this, there is the potential of a “tidal wave” of land confiscation occasioned by the Act (Wai 3007, #3.1.7 at [6]).
63. In response to the Crown’s assertion that there are alternative remedies that either are or have been available to the applicant, the applicant submits that this is not true as it is impossible to defend against imaginary crime claims because it is impossible to prove a negative. Further, the applicant submits that there are no remedies against an imaginary claim (Wai 3007, #3.1.7 at [7]).
64. The applicant submits that with a real crime, the Police make an allegation that at a certain time and at a certain place, a person did something illegal. When this happens, the accused is presumed innocent until proven guilty. If the person can prove that they were not at that place at that time, they have an alibi (Wai 3007, #3.1.7 at [7]).
65. The applicant submits that the present case is an example of an imaginary crime where there is no certain time, nor certain place, and as such there cannot be an alibi. The applicant further submits that in an imaginary crime such as this one, the accused is presumed guilty until proven innocent and that one cannot prove innocence against an imaginary claim (Wai 3007, #3.1.7 at [7]).

66. The applicant submits that one cannot prove universal or absolute non-existence (Wai 3007, #3.1.7 at [7]).
67. The applicant submits that as it is impossible to defend against an imaginary crime claim, there is no alternative remedy available (Wai 3007, #3.1.7 at [8.2]).
68. The applicant submits that he is ready to proceed urgently to hearing (Wai 3007, #3.1.7 at [8.3]).

Urgency criteria

69. The Waitangi Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

In deciding an urgency application, the Tribunal has regard to a number of factors. Of particular importance is whether:

- the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies
- there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- the claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- the claim or claims challenge an important current or pending Crown action or policy;
- an injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

70. The Waitangi Tribunal has stated on multiple occasions that it will only grant an urgent hearing in exceptional cases and where it is satisfied that adequate grounds for urgency have been made out. The applicant must establish that there is an exceptional case that warrants the diversion of the Waitangi Tribunal's resources from other inquiries and priorities to conduct an urgent inquiry into their claim.

Discussion

71. Before the Tribunal will grant an urgent application, the applicant's case has to be exceptional and demonstrate that the claim should be heard before all others and that the Tribunal should direct its limited staff and financial resources to that claim.
72. Should the applicant fail to satisfy the criteria outlined above, the claim for urgency will fail.
73. When considering the urgency criteria in respect to the applicant's claim and the submissions filed in support, key issues arise which make it difficult for this application to succeed. These issues relate to the jurisdiction of the Tribunal and the availability of alternative remedies which the applicant can pursue.

Jurisdiction

74. The Tribunal's ability to hear and make recommendations in relation to claims is set out in s 6 of the Treaty of Waitangi Act 1975, which states:

6 Jurisdiction of Tribunal to consider claims

- (1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
 - (a) by any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after 6 February 1840; or
 - (b) by any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after 6 February 1840 under any ordinance or Act referred to in paragraph (a); or
 - (c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
 - (d) by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

[...]

75. The Crown submits that the applicant has not identified any current or pending Crown actions or policies from which he, or those he represents might suffer significant and irreversible prejudice (Wai 3007, #3.1.6 at [21]). The Crown further submits that there is no Crown action here at all because the actor responsible under the Act is the Commissioner of Police, who they submit is statutorily independent from the Crown under s 92(1).
76. The Crown also submits that it is the High Court not the Crown who decides whether land should be forfeited and sold. Forfeiture orders were made in August 2016 and upheld on appeal. The Crown submits that the Official Assignee was appointed to execute the orders, and therefore they are operating as a statutory officer performing the actions as directed by the High Court (Wai 3007, #3.1.6 at [21]). The applicant

submits in response to the Crown that while he agrees that there may be no Crown action, the omission of the Crown to actively protect Māori from these processes remains a potential breach of the principles of the Treaty (Wai 3007, #3.1.7)

77. The jurisdiction of the Tribunal is clear. It relates specifically to actions or omissions of the Crown. Certain actions which the applicant is questioning, in relation to the specific forfeitures referred to in this claim, are Court actions not Crown actions.
78. The Tribunal's jurisdiction also does not provide the applicant the ability to re-litigate matters that have proceeded through the general courts, nor to question the processes or decisions of those Courts.
79. Further, the Tribunal does not have the jurisdiction to return general land that is not subject to a memorial allowing for such return. As the claims filed are not in respect to Crown actions and we simply do not have the jurisdiction to grant relief for the two forfeiture orders which are the core of the specific claims brought by the Nicholas whānau.

Alternative remedy

80. The Crown submits that there are alternative remedies available to the applicant through various appeal processes and through the Māori Land Court. There have been multiple proceedings in the High Court, Court of Appeal, and Māori Land Court in relation to the specific land and forfeiture issues raised in this claim.
81. In response to the Crown's assertion that there are alternative remedies that either are or have been available to the applicant, the applicant submits that this is not true as it is impossible to defend against imaginary crime claims because it is impossible to prove a negative. Further, the applicant submits that there are no remedies against an imaginary claim.
82. The applicant submits that the present case is an example of an imaginary crime where there is no certain time, nor certain place, and as such there cannot be an alibi. The applicant further submits that in an imaginary crime such as this one, the accused is presumed guilty until proven innocent and that one cannot prove innocence against an imaginary claim.
83. The applicant submits that as it is impossible to defend against an imaginary crime claim, there is no alternative remedy available.
84. I do not agree with the applicant. Proceedings relating to the forfeiture of the two properties were recently heard in the Māori Land Court. The Māori Appellate Court has received an appeal by Valentine Nicholas in relation to the Māori Land Court's decision in this matter which is yet to be determined.
85. It is only appropriate to let the appeal process take its course. Challenging the forfeiture of these properties through the courts is an appropriate alternative remedy available to Valentine Nicholas and, as can be seen, he is in the process of utilising this alternative remedy.

Wider issues

86. That being said, the claimant has brought to our attention the issues the forfeiture regime created by the Criminal Proceeds (Recovery) Act 2009 could place unduly on Māori. The Crown welcomes the Tribunal to inquire into the Act itself as they identify that there are important questions about the extent to which the legislation represents a proper balancing of significant public policy issues concerning the retention and use

of Māori land and the deterrence and prevention of crime, and in that regard whether the legislation is consistent with the principles of the Treaty.

87. This Act and general claim are an example of one particular issue Māori face within the wider criminal justice system and would therefore be most appropriately dealt with in a Justice System Kaupapa Inquiry. This will inquire into the whole Justice structure and deal with the way that the Justice system works or does not work for Māori. Bearing in mind the Tribunal's work programme, including the rescheduling of hearings and the diversion of resources, it is most appropriate that this general claim falls within the wider inquiry of the Justice System.

Decision

88. For the reasons set out above, I decline to grant an urgent hearing for this application.

The Registrar is to send a copy of this direction to the applicant, Crown counsel and those on the notification list for Wai 3007, the Criminal Proceeds (Recovery) Act 2009.

DATED at Gisborne this 12th day of March 2021

A handwritten signature in black ink, appearing to read 'W Isaac', followed by a period.

Chief Judge W W Isaac
Chairperson

WAITANGI TRIBUNAL