IN THE SUPREME COURT OF NEW ZEALAND

SC 7 /2010
[2014] NZSC 118

BETWEEN	JOHN HANITA PAKI, TORIWAI ROTARANGI, TAUHOPA TE WANO HEPI, MATIU MAMAE PITIROI AND GEORGE MONGAMONGA RAWHITI Appellants
AND	ATTORNEY-GENERAL OF NEW ZEALAND FOR AND ON BEHALF OF THE CROWN ("THE CROWN") Respondent
	MIGHTY RIVER POWER LIMITED First Intervener
	THE PROPRIETORS OF WAKATŪ; RORE PAT STAFFORD; AND RORE PAT STAFFORD, PAUL TE POA KARORO MORGAN, WAARI WARD-HOLMES, AND JAMES DARGAVILLE WHEELER AS TRUSTEES OF THE TE KĀHUI NGAHURU TRUST Second Interveners

Hearing:	19 and 20 February 2013
Court:	Elias CJ, McGrath, William Young, Chambers* and Glazebrook JJ
Counsel:	I R Millard QC, M P Armstrong and M S Smith for Appellants V L Hardy and D A Ward for Respondents J E Hodder QC and L L Fraser for First Intervener B W F Brown QC and K S Feint for Second Interveners
Judgment:	29 August 2014

* Chambers J died before this judgment was delivered. The remaining Judges have decided under s 30(1) of the Supreme Court Act 2003 to continue the proceeding to judgment.

JUDGMENT OF THE COURT

A The appeal is dismissed.

B No order for costs is made.

REASONS

ELIAS CJ

[1] The appellants claim on behalf of descendants of members of the hapu of Ngati Wairangi, Ngati Moe, Ngati Korotuohu, Ngati Ha, Ngati Hinekahu and Ngati Rakau who were awarded interests in land subdivided from the Pouakani block along the left bank of the Waikato River, by the Native Land Court in the late 19th century. Pouakani No 1 was vested immediately in the Crown by the Native Land Court for payment of survey and other costs on its partition from the larger Pouakani block in 1887. The remaining subdivisions were reinvestigated in 1891 following petitions by a number of hapu and chiefs who claimed to have been wrongly excluded or included in the wrong capacity in the titles. Following reinvestigation, Pouakani B8, B10, and C3 were purchased by the Crown from the Maori owners in 1892. Pouakani B6, which had been awarded to 242 owners, was subject to further subdivision in 1899, when the Crown failed to obtain the agreement of all owners to sale. Pouakani B6A was vested in the Crown when the Crown applied to the Native Land Court to award it a defined portion of B6 equal to the proportion of interests it had acquired.[1] Pouakani B6A encompassed the northern half of B6, and took in the entire river frontage of B6 with the exception of B6E in

[1] Statement of Agreed Facts.

the extreme east of the block, which was vested in Werohia Te Hiko of Ngati Wairangi, with a restriction on alienation.[2]

[2] At the time of the purchases in 1892 the Crown was effectively a monopsony purchaser.[3] At the time of the purchases in 1899 a statutory monopsony was in place.[4]

[3] The appellants asserted in the High Court that the vesting of Pouakani No 1 and the Crown acquisitions of the other riparian blocks gave the Crown ownership of the bed of the river to the middle of the flow ("*usque ad medium filum aquae*"), by operation of a conveyancing presumption of English common law. They claimed that, in taking advantage of this common law presumption which could not have been understood by the Maori vendors and which was not explained to them, the Crown breached fiduciary or equitable duties of disclosure and fair dealing to the Maori vendors. They said that the owners would not have agreed to transfer of the riverbed land with the riparian lands conveyed to the Crown because the Waikato River was essential to their identity and was an important tribal property valued for its spiritual qualities as well as for the sustenance provided by the food resources obtained from it. The appellants sought in the High Court a declaration that, "to the extent the Crown has claimed ownership of the riverbed of the Waikato River adjacent to the Blocks" under the presumption that a conveyance of riparian land carries the land to the middle of the stream, "the Crown holds such riverbed of the Waikato River as constructive trustee" for the descendants of the original owners.

[4] For its part, the Crown asserts its ownership of the riverbed. Its pleadings claim that, "to the extent that the [river] … is navigable", it was vested in the Crown by s 14 of the Coal-mines Act Amendment Act 1903 (a provision re-enacted in the Coal Mines Act 1979 and now found in s 354(1)(c) of the Resource Management Act 1991). Counsel for the Crown in this Court acknowledged that the Coal-mines

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2 Pouakani B6E remained in Maori ownership until 1952, when most of it was taken by the Crown, in exchange for adjacent Crown land, for hydroelectric power developments: Statement of Agreed Facts and evidence of Crown historian, Dr Loveridge.

3 Whether it was a legal monopsony is a matter of some debate, turning on the application of the North Island Main Trunk Railway Loan Application Act Amendment Act 1889 and the North Island Main Trunk Railway Loan Application Amendment Act 1891.

4 Native Land Court Act 1894, s 117.

Act Amendment Act vesting was the basis upon which the Crown has relied for its ownership in recent times, as is confirmed by the two land transfer titles which have been issued in relation to discrete parts of the riverbed. They refer to the land as Crown land pursuant to s 261 of the Coal Mines Act 1979 (the successor to s 14 of the Coal-mines Act Amendment Act 1903). It was accepted by the appellants that if the Crown was correct in its contention that the land was vested in it by statute, the claim based on breach of fiduciary duty could not succeed because it was overtaken by the legislation, which provides that the beds of all navigable rivers "shall remain and shall be deemed to have always been vested in the Crown". (Whether this vesting applied to Maori customary land was doubted by Cooke P in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*[5] but is not in issue in this appeal.)

[5] The Crown also pleaded by way of defence to the claim of breach of fiduciary and equitable duties that, "to the extent that the Waikato River between Atiamuri and the Waipapa River is non-navigable", the Crown acquired title to the bed "by the principle of *ad medium filum*". It denied that it owed any fiduciary duty to the vendors in acquiring the riverbed in accordance with the presumption that it was obtained with acquisition of the riparian land and in any event denied that it was in breach of any fiduciary or equitable duties. It also pleaded that the claim is barred by lapse of time under the Limitation Act 1950 and under the equitable doctrine of laches and acquiescence.

[6] The Crown was successful in its contention that the Waikato River was navigable and that the riverbed had vested in the Crown by virtue of the Coal-mines Act Amendment Act in both the High Court[6] and the Court of Appeal.[7] It was unnecessary in those circumstances for the Courts below to resolve finally whether any duties owed by the Crown in the transaction were breached. Nor was it necessary to decide questions of remedy, including whether the claim was barred by the lapse of time. Despite this, Harrison J in the High Court went on to consider the

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5 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 26. FM Brookfield has expressed the opinion that the Coal-mines Act Amendment Act 1903 was insufficiently specific to extinguish Maori customary rights: "The Waitangi Tribunal and the Whanganui River-Bed" [2000] NZ Law Rev 1 at 6.

6 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC).

7 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 (Hammond, Robertson and Arnold JJ).

claim to breach of fiduciary duty in case on appeal his decision on application of the statutory vesting was not upheld.

[7] Harrison J expressed the view that the claim based on breach of duties said to be owed to the vendors by the Crown could not succeed because it depended on a right to the riverbed that was severable from the riparian lands, a conclusion he considered to be excluded by the decision of the Court of Appeal in 1962 in *Re the Bed of the Wanganui River*[8] as a matter of Maori custom.[9] Even if Maori enjoyed a discrete customary right to the riverbed, he considered that right was extinguished by order of the Native Land Court when giving title and not by the subsequent act of acquisition.[10] Beyond this, he did not further consider whether the Crown owed the Pouakani vendors duties of good faith or in the nature of fiduciary obligations and whether, if so, they were breached. He did however go on to indicate the view that the relief of a remedial constructive trust would be barred by lapse of time both under the Limitation Act 1950 and by the equitable doctrine of laches.[11]

[8] The Court of Appeal, while not coming to a concluded view, indicated some doubts about the nature of the claim for breach of fiduciary duty and raised whether the claim might be better expressed as based on a "relational duty of good faith".[12] It expressed the view that the relief of a remedial constructive trust, sought by the appellants, would not be available, however, because of the overlapping interests that had arisen in relation to the river over the past century.[13] It did not find it necessary to deal with the question of limitation or laches.[14]

[9] On application by the appellants for leave to appeal to this Court, it was decided that we should first hear the appeal against the determinations in the Courts below that the river was navigable and that the lands had vested in the Crown by

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8 *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA).
9 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [148].
10 At [149]. Although Harrison J cited as authority *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [40] per Elias CJ, and at [99] per Gault P, those paragraphs deal only with land in respect of which title has issued and customary title extinguished, not with riverbed or seabed land contiguous to investigated land.
11 At [167]–[177].
12 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [104]–[118].
13 At [119].
14 At [120].

operation of statute.[15] Leave was granted in relation to four additional points identified in the Court's leave judgment, but their hearing was deferred until the judgment of the Court on the navigability question was delivered.[16]

[10] The majority decision of the Court that the river was not navigable in these reaches and that the riverbed land did not vest under the Coal-mines Act Amendment Act[17] made it necessary to hear argument on the additional appeal points, upon which leave to appeal had first been granted by judgment of 21 July 2010. They are:

> (iii) … [D]id the Crown acquire title to the claimed part of the riverbed through application of the presumption of riparian ownership *ad medium filum aquae* by reason of its acquisition of the riparian lands?
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> (iv) If so, in the circumstances in which the Crown acquired the claimed part of the riverbed, was it in breach of legally enforceable obligations owed to the owners from whom title was acquired?
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> (v) If so, have the [appellants] lost their right to enforce such obligations by reason of defences available to the Crown through lapse of time?
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> (vi) If not, what relief is appropriate?

Why the appeal should be dismissed

[11] It is necessary for me to explain in some detail why I take the view that the outcome of the claim is not determined by application of the decision of the Court of Appeal in 1962 in *Re the Bed of the Wanganui River*. Because that explanation requires lengthy discussion of the case and its background, I start with the reasons why I consider the appellants have not established the necessary threshold for their claims based on breach of fiduciary and other equitable duties.

(i) The contingency of the claim

[12] The claim depends on the assumption that the Crown obtained ownership of the riverbed when it acquired the riparian land by reason of a presumption of

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15 A question of standing, the subject of appeal by the Crown, was not pursued at the first hearing: *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [12] per Elias CJ, Blanchard and Tipping JJ.

16 *Paki v Attorney-General* [2010] NZSC 88 (leave).

17 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [89] per Elias CJ, Blanchard and Tipping JJ, and at [118] per McGrath J.

conveyancing law. What may not perhaps have been sufficiently appreciated in the identification of issues for the appeal and in the sequencing of the hearing is that neither party was in a position to argue against application of the presumption. Following the determination in this Court that the bed of the river did not vest in the Crown under the Coal-mines Act Amendment Act, the Crown has now no other basis for asserting ownership, although counsel for the Crown acknowledged that application of the conveyancing presumption to Maori land is controversial. And the foundation of the case for breach of fiduciary duty being pursued by the appellants in the proceedings depends on the same presumption both as the foundation for the title of their predecessors to the riverbed when they obtained title through the Native Land Court and as the foundation of the subsequent Crown acquisition claimed to be in breach of equitable duties.

[13] Senior counsel for the appellants accepted quite readily at the hearing that an outcome available to the Court is a determination that the presumption is not shown to have applied and, in that event, the case could not succeed. Nor did he seek to argue *for* application of the presumption, being content to rely on the assumption that it applied. He accepted that it is only *if* the Crown "claim" to ownership by reason of the presumption is accepted by the Court that the claim for breach of fiduciary duty or duty of good faith in the acquisition can be made. The reason for this approach is likely to be explained at least in part by an earlier abandoned attempt to obtain investigation of the title to the riverbed as Maori customary land, described at paragraphs [47] to [48]. It seems to have been abandoned because of concern that, on the authority of the 1962 Court of Appeal decision in *Re the Bed of the Wanganui River,*[18] the Maori Land Court lacked jurisdiction on the basis that the riparian land had been investigated and took with it the bed to the mid-point and that the subsequent alienation of the riparian land similarly included the riverbed to the mid-point.

[14] The third question on which leave to appeal was granted – whether the Crown acquired title to the riverbed through application of the presumption *ad medium filum aquae* – arises because of the oddly tentative basis of the claim. As already indicated, the appellants seek a declaration that, "*to the extent the Crown has*

[18] *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA).

claimed ownership … the Crown holds such river bed … as constructive trustee".[19] The essentially hypothetical nature of the claim was also shown in the application for leave to appeal filed in this Court by the appellants in which they indicated their wish to argue on appeal that "it was a breach of [its fiduciary duty and duty of good faith] for the Crown to *claim* that the acquisition of the visible land carried with it the invisible land under a taonga such as the Waikato River".[20] Because the pleadings of the appellants rest on Crown ownership and seek relief by way of constructive trust "to the extent" of such "claim", the leave judgment (rightly, as I continue to think) posed the distinct question for determination whether the Crown had indeed acquired the riverbed by application of the riparian presumption. The contingent expression of the declaration sought by the appellants ("*to the extent* the Crown has *claimed* ownership … under the principle of ad medium filum"[21]) glides around significant controversy – the effect and the application of the common law presumption when title to riparian land is investigated and granted by the Native Land Court.

(ii) Pouakani custom

[15] The application of the mid-point presumption on investigation of Maori customary land and its conversion into Maori freehold land was not the subject of direct judicial consideration until the decision of the Court of Appeal in 1962 in *Re the Bed of the Wanganui River*.[22] The Court of Appeal there held, after obtaining answers from the Maori Appellate Court to questions of fact about the applicable native custom, that ownership of the bed of the Whanganui River by the riparian owners was broadly consistent with Whanganui custom and that any tribal interest in the river had been superseded by the individual titles sought and granted to the riparian owners. If *Re the Bed of the Wanganui River* is good authority in relation to the Pouakani lands, so that the presumption of ownership to the middle of the flow by the riparian owners accords with the custom and usage of the Pouakani people also, the appellants' claim for breach of duties owed by the Crown to the vendors faces an apparently insurmountable hurdle because transfer with that effect, if in

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19 (Emphasis added.)
20 (Emphasis added.)
21 (Emphasis added.)
22 *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA).

accordance with their own custom, can hardly be said to be in breach of any equitable duty of candour or fair dealing that may apply. But that depends on relevant custom and usage, a question of fact for determination.

[16] Under the Native Rights Act 1865 and subsequent Maori land statutes, title to or interest in land in which native title has not been extinguished is "determined according to the Ancient Custom and Usage of the Maori people so far as the same can be ascertained".[23] As is explained in what follows, I consider that the appellants have not shown that the Pouakani riparian individual vendors had the bed of the river to the mid-point according to the custom and usage of the tribe or hapu affected. Maori custom and usage are questions of fact to be ascertained on inquiry, as was accepted by the Court of Appeal at both stages of the litigation concerning ownership of the bed of the Whanganui River.[24] That is why questions relating to custom were directed for answer to the Maori Appellate Court in 1958, despite the fact that exceptional jurisdiction to determine whether the Whanganui tribes owned the bed of the river at the date of enactment of the Coal-mines Act Amendment Act in 1903 had been conferred on the Court of Appeal itself.[25]

[17] The ascertainment of native custom, on which ownership to the mid-point depends, was emphasised by the Privy Council to entail "the study of the history of the particular community and its usages in each case".[26] Such custom may be proved by evidence.[27] This approach conforms with the view of Edwards J in *Tamihana Korokai v Solicitor-General* that the existence and content of customary property is determined as a matter of custom and usage by the particular Maori community.[28] In similar vein, FB Adams J, dissenting in the 1954 *Wanganui River*

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23 Native Rights Act 1865, s 4; Native Land Act 1909, s 91; Native Land Act 1931, s 119. The wording of s 161(2) of the Maori Affairs Act 1953 is practically identical. Section 132(2) of Te Ture Whenua Maori Act 1993 provides that "[e]very title to and interest in Maori customary land shall be determined according to tikanga Maori".

24 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 426–428 per Hutchison J, at 438 per Cooke J, and at 467–470 per North J. Compare FB Adams J, dissenting, at 454–455. *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) at 609 per Gresson P, at 618–619 per Cleary J, and at 624–626 per Turner J.

25 Maori Purposes Act 1951, s 36(1).

26 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 404 per Viscount Haldane.

27 *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577.

28 *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA) at 351.

decision, expressed the view that it seemed "clear that Maori customs and usages varied greatly from place to place and from tribe to tribe":[29]

> Even if a more or less general custom were proved, it would still be necessary to show that it applied to this tribe, and to this river.

[18] In the present case, the High Court treated the 1962 decision in *Re the Bed of the Wanganui River* as expressing universal Maori custom.[30] I do not think that conclusion can properly be taken from the judgments of the Court of Appeal or the opinions of the Maori Appellate Court, which are specific to the Whanganui River and the investigations of title through the Court in relation to the riparian lands on that River. The discussion of the course of the litigation concerning the Whanganui River is set out in some detail at paragraphs [73] to [145] to substantiate that view. It follows that the High Court was wrong to apply it without further inquiry into the custom and usage of the Pouakani people.

[19] Investigation of custom may be undertaken on reference by the High Court under s 61 of Te Ture Whenua Maori Act 1993 by the Maori Appellate Court if the question of custom is relevant to a matter properly within the jurisdiction of the High Court. In the present case, however, the custom for inquiry also determines whether the land has or has not the status of customary land. The Maori Land Court has jurisdiction to determine the status of any parcel of land,[31] and has had exclusive jurisdiction since 1909 to investigate the title to Maori customary land.[32] On that basis, it is consistent with the statute and with authorities such as *Tamihana Korokai v Solicitor-General* (discussed at paragraphs [79] to [82]) that the question of the status of the land be considered on application for investigation of title in the Maori Land Court. That option was not available in the *Wanganui River*, an undoubtedly navigable river, case because the jurisdiction to decide whether the riparian lands included the riverbed to the mid-point was jurisdiction specifically conferred on the Court of Appeal for the purpose of ascertaining compensation for loss, including as a result of gravel extraction, as if the Coal-mines Act Amendment Act had not been passed.

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29 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 444.
30 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [148].
31 Te Ture Whenua Maori Act 1993, s 131(1). The High Court also has jurisdiction: s 131(3).
32 See today Te Ture Whenua Maori Act, s 132(1).

[20] In *Ngati Apa v Attorney-General*, Tipping J considered that "the Maori Land Court's investigation into the facts must be allowed to proceed unless it can be shown beyond doubt that the land cannot, as a matter of law, have the status asserted for it".[33] *Ngati Apa* concerned seabed, but the correctness of the Court of Appeal's determination in *Re the Ninety Mile Beach*[34] that the investigation of title in the riparian lands extinguished any customary interest in land on the foreshore was a live issue and raised comparable issues to those in the present case. Tipping J thought that inquiry into custom in relation to the foreshore lands was "both general and specific to the site in question" and, as a matter of tikanga, was within the "exclusive jurisdiction" of the Maori Land Court under s 132(1) of Te Ture Whenua Maori Act.[35] I consider it is the appropriate course in the present case also.

(iii) Presumption of law as to riparian ownership

[21] In the High Court, Harrison J also concluded, in the alternative and irrespective of whether it accorded with custom, that a presumption that riparian land carried the bed of the river to the mid-point arose as a matter of New Zealand law when the titles to the riparian lands were settled by the Native Land Court.[36] The Court of Appeal referred to the presumption of ownership only by way of background, although it seems to have been of the same view. I conclude at paragraphs [136] to [145] that no such presumption of ownership arose as a matter of New Zealand law on investigation of titles and that such a presumption of law would be inconsistent with New Zealand law and traditions, for reasons explained in *Ngati Apa.*

[22] The conveyancing presumption on subsequent sales of riparian land could arise only where owners disposing of their interests had the bed to convey, as is explained in discussing the effect of the mid-point presumption at paragraphs [60] to [61]. Because of the circumstances of New Zealand land ownership pre-Treaty of Waitangi (in which all land was held by Maori under their customs and usages), that assumption was not available unless the riverbed land had been investigated and any

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33 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [186].
34 *Re the Ninety-Mile Beach* [1963] NZLR 461 (CA).
35 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [186].
36 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [149].

customary interest extinguished, either by sale to the Crown or, after the establishment of the Native Land Court, by investigation of title and conversion to Maori freehold land. While in the case of small watercourses such inference of exclusion of separate customary interest might be irresistible or not contested, no such assumption applied in the case of significant bodies of water of importance to Maori, as the cases discussed at paragraphs [128] to [135] indicate. Separate claims to the bed required investigation and determination before the conveyancing presumption could apply.

[23] As is further explained in relation to the common law presumption, it operates on the commonsense basis that someone conveying riparian land has no interest in retaining a strip of riverbed when parting with the frontage land.[37] Rebuttal of the mid-point presumption in the case of sale by Maori riparian owners would depend on whether that consideration held true. Just as in *Mueller v The Taupiri Coal-Mines (Ltd)* the interests of the Crown in ensuring public ownership of the bed of the Waikato River at Mercer were held to rebut any application of the presumption to the Crown grants there made,[38] continuing interest by Maori riparian owners in fisheries or other resources or attributes might readily rebut the presumption, as North and Cooke JJ accepted in the 1954 *Wanganui River* case.[39] The presumption was inaccurately described by the Court of Appeal in the present case as "rebuttable by evidence of ownership".[40] It is, rather, rebuttable by circumstances which show that the transferor who owns the riverbed does not intend to part with it. Whether the presumption was rebutted in the circumstances is likely itself to turn on matters of custom and usage.

[24] The decisions in the Courts below treat the effect of the presumption as if it were a substantive rule of the incidents of title, rather than a conveyancing presumption based on commonsense and usage which operates when riparian land

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37 See below at [60]–[66].

38 *Mueller v The Taupiri Coal-Mines (Ltd)* (1900) 20 NZLR 89 (CA) at 109 and 113 per Williams J (Conolly J concurring), at 114–115 per Edwards J, and at 126–127 per Martin J. Stout CJ dissented at 101–102.

39 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 438 per Cooke J, and at 467 per North J. See also *The King v Joyce* (1904) 25 NZLR 78 (CA) where Williams J indicated that the presumption would not arise where Maori had not ceded rights of fishing even in the case of a cession to the Crown of land on both banks.

40 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [29].

which undoubtedly includes riverbed is transferred. Rebuttal of the presumption is not the first question. The prior question is whether it is shown that the riparian owners whose titles were investigated by the Native Land Court had themselves the property in the riverbed upon which the presumption depends.

[25] For the reasons explained below, I do not consider that the 1962 decision in *Re the Bed of the Wanganui River* is authority for the proposition that a legal presumption of ownership to the middle of the flow attached to all Maori freehold riparian land for which title was issued on investigation in the Native Land Court, ousting any separate customary interest in the bed if the riparian land has been investigated. If ownership to the middle of the flow does not accord with the custom and usage of the Pouakani riparian owners, I consider that no presumption that the riverbed was conveyed with the riparian lands applies as a matter of New Zealand law. On that basis, the status of the riverbed is undetermined and may be investigated by the Maori Land Court to establish whether it continues as unextinguished customary land.

[26] If, contrary to the view I take, the 1962 decision in *Re the Bed of the Wanganui River* does purport to express a rule of law of general application as to ownership of riverbed land adjoining riparian Maori freehold land, I would not follow it, for reasons explained at paragraphs [142] to [145]. They include the nature of land ownership in New Zealand and the institutional protections for Maori property which have always been a feature of New Zealand law. They also include the inapplicability of the justifications given by the authorities for what is a limited rule of English conveyancing practice, predicated on undoubted ownership of riverbed by riparian owners, which justifications are unconvincing in the circumstances of conversion of Maori customary land into Maori freehold land.

[27] The 1962 decision, as is explained in paragraph [141], is difficult to reconcile with earlier decisions, such as the 1912 decision of the Court of Appeal concerning the bed of Lake Rotorua in *Tamihana Korokai v Solicitor-General*,[41] and with decisions of the Native Land Court vesting the beds of lakes, such as Lake

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41 *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA).

Omapere.[42] The decision has been much criticised (including by the Waitangi Tribunal in 1999 in its report on the Whanganui River[43]) and rests in part on reasoning which was not followed by the Court of Appeal in 2003 in *Ngati Apa v Attorney-General*.[44] I consider that the continued authority of the 1962 Court of Appeal decision in *Re the Bed of the Wanganui River* is inconsistent with the decision of the Court in *Ngati Apa,* as is explained at paragraph [142].

(iv) No impediment to investigation by reason of effluxion of time

[28] It should be noted that if the 1962 *Wanganui River* case does not preclude investigation of title to determine whether the land remains customary land, there are no statutory or equitable time limits for such application. An investigation of the status of land is not a claim for recovery of land brought against the Crown (raising limitation legislation impediments). And because the Crown can assert no independent proprietary interest in land until Maori customary property has been extinguished according to law, there is no impediment in equity to an investigation by reason of the doctrine of laches.

(v) Further matters should not be resolved

[29] In some cases there may be no great harm in proceeding on an hypothesis the parties are content to invoke. But the assumption that the Crown obtained the riverbed with its purchase of the riparian lands is highly contentious and the single authority relied on for it is questionable. It would not be responsible for this Court to accept the assumption because the parties, for their own reasons, do not choose to dispute it. As importantly, the further arguments put forward (and which must be determined if the presumption of ownership to the mid-point is assumed) raise points of real difficulty which are themselves significant for the New Zealand legal order. They are not topics to be embarked upon without real need. I identify some of the issues which would need to be addressed in a case in which these consequential matters squarely arise to indicate reservations about the approach adopted in the Courts below and to reserve my position on them.

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42 *Lake Omapere* (1929) 11 Bay of Islands MB 253.
43 Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999).
44 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

[30] So I would decline to enter into speculation as to the circumstances in which the Crown may owe special duties of fair dealing to Maori (which may well be appropriately described as "fiduciary" in nature, as is discussed at paragraphs [148] to [162]) and the remedies that may be available for breach of such duties. They are big questions. The Court of Appeal was not prepared to hold that fiduciary duties cannot in any circumstances be owed by the Crown in relation to its dealings with the Pouakani claimants. Nor would I. I do not think it appropriate to determine questions of limitation or laches in a case where they arise only hypothetically. Again, these seem to me to be matters of some considerable difficulty which are not appropriately resolved in the present case on assumptions not shown to be valid and which in themselves require investigation of Maori custom on which the opinion of the Maori Land Court should be sought before final conclusions are reached.

[31] If not of the view that the claim must fail because it is advanced on a hypothesis not shown to be correct, I would in any event have remitted the case for further hearing on questions of duty and breach. Although the Court of Appeal left open the question whether remittal to the High Court was necessary,[45] I consider that this Court is not in a position on the material before it to decide the questions of duty and breach raised and that it would not be appropriate for it to undertake further inquiry without further findings of fact in the Courts below. Ascertaining the facts as to Maori custom is necessary for determination of the existence of any fiduciary duty and its breach and is relevant to questions of remedy. Questions of relief too require consideration of the interests of third parties and the dealings with the riverbed in the interim. Although in the Court of Appeal it was assumed that the imposition of a constructive trust would not be possible because of the "accretion of interests which have occurred on the river over the course of a century" and because of "difficult and perhaps insurmountable problems of demarcation" because of the creation of dams on the river, it is not clear these impediments are determinative of the availability of relief.[46] Such conclusions require further substantiation on evidence. Mighty River Power Ltd obtained leave to intervene in the appeal and sought to be heard on matters of remedy which affect it. Had it been necessary to determine the questions of breach of fiduciary duty and remedy, the case would have been returned to the

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45 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [95].
46 At [119].

High Court for further consideration and findings of fact, as indeed Mighty River Power argued.

(vi) Conclusion as to approach

[32] In conclusion, I do not consider the plaintiffs have established an essential plank in their case – that the Crown became the owner of the riparian lands by the 19th century acquisitions on which they rely. I would decline to accept the assertion of ownership by the Crown and its adoption for reasons of convenience by the appellants. I would dismiss the appeal on that basis, without prejudice to any application that the appellants or others who qualify may bring to the Maori Land Court for investigation of any customary title to the riverbed and without prejudice to any application the Crown may make in properly constituted proceedings in the High Court to establish its title.

Background

[33] It is necessary to set out some matters of background. These matters of background concern the land itself (both the history of the Native Land Court investigations in the 19th century and some recent changes of interest in relation to the riverbed), the history of the Pouakani claims to the riverbed, and the decisions in the High Court and Court of Appeal.

(i) The Native Land Court investigations and recent interests

[34] The riparian land in issue lies along the left bank of the Waikato River between Atiamuri and the Waipapa River. The five blocks had earlier been subdivided from the large Pouakani Block,[47] itself a subdivision of the huge Tauponuiatia Block and its own earlier subdivision into Tauponuiatia West (the last being a subdivision that did not itself entail separate investigation).[48]

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47 When first surveyed the block was given the name Horaaruhe Pouakani.

48 See Richard Boast *The Native Land Court 1862–1887: A Historical Study, Cases and Commentary* (Brookers Ltd, Wellington, 2013) at 1117–1118.

[35] Tauponuiatia was investigated by the Court from 1886 on the application of Te Heuheu Tukino Horonuku of Tuwharetoa.[49] The boundaries of the vast territory included in Tauponuiatia had been identified at the outset by Horonuku, who set up the Tuwharetoa ancestors Tia and Tuwharetoa for the Block.[50] The hapu of Pouakani descend from these ancestors but also from ancestors of the Waikato tribes of Raukawa and Maniapoto.[51] The naming of the Tuwharetoa ancestors meant that they were admitted to the blocks only on the basis of their Tuwharetoa connections.[52]

[36] The fact that the boundaries were identified by the application instead of following investigation also caused controversy because the Pouakani lands had been within the Rohe Potae and part of the political league against passing land through the Court. In June 1883 Maniapoto, Raukawa, Tuwharetoa and Whanganui chiefs, invoking arts 2 and 3 of the Treaty of Waitangi, petitioned the House of Representatives for a better system for land ownership than was provided through the Native Land Court.[53] They asked to be allowed to fix the tribal boundaries and the hapu boundaries within each tribe as well as to settle the claim of individuals. Under their proposals the land would be inalienable.

[37] In December 1883, however, Maniapoto consented to survey of the external boundaries of the huge Aotea Block,[54] causing a rift with Tawhiao,[55] and this perhaps was the catalyst which caused Te Heuheu Horonuku to seek investigation of the Tauponuiatia Block through the Court.[56] The decision to go to the Court rather than to leave determination of the outward boundaries of the territory to be settled by the tribes themselves caused a serious breach with Maniapoto. The naming of the ancestors Tia and Tuwharetoa for the entire block offended Maniapoto and Raukawa.[57] In addition, the Waikato River boundary set up by Horonuku did not

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49 At 1117.
50 At 1096.
51 Waitangi Tribunal *The Pouakani Report* (Wai 33, 1993) at 1.
52 Boast *The Native Land Court 1862–1887*, above n 48, at 1119–1120.
53 Richard Boast *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) at 174.
54 Waitangi Tribunal *The Pouakani Report*, above n 51, at 104–106. Also known as the Rohe Potae block or the King Country block. For discussion see Boast *The Native Land Court 1862–1887*, above n 48, at 1168–1190.
55 Waitangi Tribunal *The Pouakani Report*, above n 51, at 99.
56 See at 118.
57 At 124.

accord with the interests of the Pouakani hapu, which were settled on both banks of the River. (The right bank of the river was separately investigated by the Native Land Court by 1886[58] but details of that investigation are not before the Court.)

[38] Although the Native Land Court was effectively established in 1865, land leagues had resisted recourse to the courts in the Central North Island, particularly in areas influenced by the Kingitanga, as Pouakani was.[59] The land leagues had held up land sales for a decade after the wars had ended.[60] The Pouakani lands, which had been much disputed in the recent past, became subject to political and tribal pressures and shifts in the years before Tauponuiatia was brought to the Court. In the 1880s a potential rail route to Taupo lay across the Pouakani block and the prospect is said by the Waitangi Tribunal to have been "an important factor in Crown transactions on this block through the 1890s".[61] The agreement of Maniapoto to allow the railway through the King Country led to great pressure to purchase land, open up the country for settlement, and sell land to finance the construction of the railway.

[39] Crown land agents, some of whom were connected to others involved in the partitions (as conductors, purchasers and sellers[62]), were busy organising sales before the blocks went through the Court. Williams[63] and Ward[64] have described how partition orders were used to get around the requirements of s 48 of the Native Land Act 1873 which required all owners to consent to sale: "it became the practice for private or Crown agents to acquire a majority of signatures and then have some vendors apply for the land to be partitioned".[65] In Tauponuiatia, in addition to lands taken for survey costs, subdivisions were made to separate out Crown purchases.

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58 See *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [3].

59 Waitangi Tribunal *The Pouakani Report*, above n 51, at 49.

60 At 65, quoting MPK Sorrenson "Land Purchase Methods and their Effect on the Maori Population, 1865–1901" (1956) Journal of the Polynesian Society at 189–190.

61 Waitangi Tribunal *The Pouakani Report*, above n 51, at 93.

62 William Moon, for example, with James Grice (himself associated with the Thames Valley Land Company) purchased from the Crown the Tatua West Block and was married to Karawhira Kapu, who was awarded Pouakani C3 of 12,000 acres in August 1891, subsequently transferred to the Crown on 12 March 1892: Waitangi Tribunal *The Pouakani Report*, above n 51, at 71.

63 David V Williams *'Te Kooti Tango Whenua': The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999) at 168.

64 Alan Ward *An Unsettled History: Treaty claims in New Zealand today* (Bridget Williams Books, Wellington, 1999) at 138.

65 At 138. This appears to have been the approach taken in relation to Pouakani B6, as described above at [1].

The behind the scenes management of the process meant that "many blocks were hardly inquired into at all, and little is recorded in the Minutes apart from noting the various applications and recording the lists of owners".[66] The subdivision of Pouakani is described as having been particularly contentious.

[40] Following a Royal Commission investigation, the orders made by the Native Land Court were set aside by the Native Land Court Acts Amendment Act 1889,[67] apart from that relating to Pouakani No 1 which had been awarded to the Crown in payment of survey fees and which was not disturbed.[68] The remainder of the original Pouakani Block was the subject of further investigation in 1891.[69] Further partitions and the identification of owners proceeded rapidly thereafter and the early sales to the Crown (effectively a monopsony purchaser[70]) indicated that sales had already been agreed before the Land Court investigation was complete.[71] An order of the Native Land Court in 1899 resulted in further subdivision of Pouakani B6, with the Crown then purchasing what became Pouakani B6A by order of the Court in 1899 and the remaining part of the block abutting the river, Pouakani B6E being vested in Werohia Te Hiko of Ngati Wairangi.[72] Unlike, for example, the transformation through the Court of the Whanganui River lands, which occurred from 1866 to the end of the century,[73] the sale of most of the riparian lands at Pouakani happened effectively all at once.

[41] Although the Court which reinvestigated the Pouakani lands in 1891 heard lengthy evidence over many days in Cambridge, these were largely claims by counterclaimants, particularly hapu which tried to claim through Raukawa and Maniapoto rather than their Tuwharetoa ancestry. When these attempts were rebuffed by the Court, the individuals admitted to the block were provided by agreement. Perhaps for this reason evidence was principally directed to the capacity

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66 Boast *The Native Land Court 1862–1887*, above n 48, at 1093.
67 Section 29.
68 Waitangi Tribunal *The Pouakani Report*, above n 51, at 131.
69 At 131.
70 See above at [2].
71 See Waitangi Tribunal *The Pouakani Report*, above n 51, at 191–193.
72 Evidence of Crown historian, Dr Loveridge.
73 *Memorandum of the Maori Appellate Court on the matter of a case stated by the Court of Appeal relating to the bed or portions of the Wanganui River* (Judges Prichard, Smith, O'Malley, Jeune and Brook, 6 June 1958) at 4. This passage was subsequently cited by the Court of Appeal in *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) at 615.

in which the claim was made rather than the facts of occupation and use to support the *take*. There was however some evidence of the use of the river for fowling and food gathering (particularly for koura). The settlements along the river bank were permanent but were occupied only seasonally for particular food gathering.[74] (An objective of some of the agents of the Crown in passing land through the Court seems to have been to settle Maori in permanent villages rather than leaving them to move around according to the seasons for traditional food gathering.[75])

[42] The advent of the Native Land Court was against the background of the "political trust" view of Maori property, referred to below.[76] Passing land through the Court established title which was recognisable in the courts and which (subject to periods of re-imposition of the Crown pre-emption) could be sold to enable Maori to develop their remaining lands and participate in the European economy. The operation of the Court itself set up pressures to sell to pay for survey costs and the expenses of court proceedings (often conducted at a distance, as in the Cambridge hearings in respect of the Pouakani lands), as is well documented by Boast,[77] Williams[78] and others.[79] The vesting of Pouakani No 1 for payment of survey fees is consistent with the pattern described. Such circumstances set up the conditions in which equity has displayed heightened concern in analogous cases, such as those of

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74 Waitangi Tribunal *The Pouakani Report*, above n 51, at 40.

75 Waitangi Tribunal *The Pouakani Report*, above n 51, at 115, quoting letter from Lawrence Grace (Member of Parliament) to the Hon John Ballance (Native Minister) regarding the settlement of the Taupo Country (6 January 1886).

76 See below at [160]. Political trust theory denied remedies at law to native people for protection of their property following assumption of sovereignty by a colonial power and made their observance a matter for the sovereign power. A late and controversial application of this theory was *Tito v Waddell (No 2)* [1977] Ch 106 (Ch). In New Zealand, its most famous application was in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 at 78, in which it was held that the executive government "must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice" because "there exist no known principles whereon a regular adjudication can be based". Although repudiated by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577, the idea that the Crown owned all land in New Zealand with the acquisition of sovereignty and that Maori interests were not legally enforceable unless recognised by the Executive as a matter of "grace and favour" continued to be supported in decisions of the New Zealand courts, including in *Re the Ninety Mile Beach* 1963] NZLR 461 (CA); and by Turner J in *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) until the decision of the Court of Appeal in *Ngati Apa* [2003] 3 NZLR 643 (CA). At the time of the Pouakani purchases, *Wi Parata* was authoritative. It was not overruled until the decision of the Privy Council in *Nireaha Tamaki v Baker* held that the ordinary courts were required to give effect to Maori property in land. The reaction of the local legislature to *Nireaha Tamaki v Baker* was to constitute the Native Land Court the exclusive jurisdiction for investigation and recognition of Maori customary land.

77 Boast *The Native Land Court 1862–1887*, above n 48, at 180–181.

78 Williams, above n 63, at 85.

79 See, for example, Waitangi Tribunal *The Pouakani Report*, above n 51, at 238.

bargains with expectant heirs.[80] This is part of the background which is relevant to suggestions made in argument in the present case that transactions for sale of land were at arm's length and excluded any fiduciary responsibilities. It is also background against which it is dangerous to assume that the statutory processes under the successive Native Land Acts were a discharge of any duty of fair dealing the Crown may have been under.[81] As is indicated below, it is arguable that the method by which the Crown acted to fulfil what was then regarded as a political trust set up risks from which it could not conscientiously benefit to the detriment of Maori.

[43] It should be noted that in 1909 the major overhaul of the Native Land Acts undertaken by Sir John Salmond removed the ability to go to the general courts for enforcement of Maori customary property[82] which had been asserted by the Privy Council in *Nireaha Tamaki v Baker*[83] (in rejection of the political trust theory). The legislation instead provided that the exclusive jurisdiction for investigating and determining Maori customary property was vested in the Native Land Court.[84] All subsequent Maori Land Acts have continued that exclusive jurisdiction.[85]

[44] Until 2002, the riverbed land was not described in any certificate of title. By then some of the riparian land had passed into private hands and then been taken under the public works legislation for the purposes of the electricity generation developments on the River. Some of the riparian land remained Crown land and was set aside under the public works legislation for the same purposes.

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80 See GE Dal Pont *Equity and Trusts in Australia* (5th ed, Thomson Reuters, Sydney, 2011) at [9.05] n 1.

81 Compare William Young J at [277].

82 Native Land Act 1909, s 84 provided that Maori customary title to land would not be available or enforceable against the Crown in any court proceedings or in any other manner. Under s 85, a proclamation that any Crown land was free from Maori customary title would be conclusive in all courts. Section 86 provided that courts could not question or invalidate any alienation of land by the Crown on the ground that Maori customary title had not been extinguished. Section 87 provided that Maori customary title was deemed to have been lawfully extinguished in respect of all land which had been in the previous ten years continuously in the occupation of the Crown whether by tenants or otherwise. Under s 88(1), for the purpose of recovering possession of customary land or preventing trespass or other injury to customary land, the land would be deemed Crown lands. Section 88(2) provided that no action or other proceeding other than a proceeding by or on behalf of the Crown under s 88(1) could be brought in any Court by any person for recovery of the possession of customary land, or for damages or an injunction in respect of any trespass or injury to such land.

83 *Nireaha Tamaki v Baker* [1901] AC 561 (PC).

84 Section 90.

85 Maori Affairs Act 1953, s 161(1); Te Ture Whenua Maori Act 1993, s 132(1).

[45] In 2002 and 2003, at its request, the Crown was granted certificates of title for 6.5500 hectares beneath the Maraetai dam and 3.1250 hectares beneath the Whakamaru dam. In both certificates of title the legal description on the Survey Office Plans shows the riverbed as Crown land by reason of s 261 of the Coal Mines Act. (The effect of this misdescription on the face of the titles was not addressed on the appeal.) The Maraetai riverbed land transfer title has since been included in a 2005 certificate of title in the name of Mighty River Power which includes also the riparian lands earlier set aside under the Public Works Act for the purposes of the dam. This certificate of title is subject to the memorial that it is available for resumption if required by the Waitangi Tribunal under s 27B of the State-Owned Enterprises Act 1986. The Whakamaru riverbed land (including the 3.1250 hectares contained in the certificate of title) is still held by the Crown but is subject to an agreement for its transfer to Mighty River Power, which has been delayed by the Crown pending the outcome of this litigation. In the event of transfer, it is acknowledged by the Crown that the title obtained by Mighty River Power will be subject to a s 27B State-Owned Enterprises Act memorial.

[46] A recreational riparian reserve set aside out of Pouakani B10 has been vested in trust in the Taupo County. The Crown has also granted Mighty River Power easements in relation to the beds of Lakes Whakamaru, Maraetai and Waipapa which include former riverbed land. A further easement over a portion of the river bank has been granted to Transpower Limited. These interests were created in 1969 (the recreational reserve vested in the Taupo County) and 2011 (the easements in relation to the beds of the three lakes).

(ii) The Pouakani claim to the riverbed land

[47] In 2000 Mr Paki applied to the Maori Land Court for investigation of title to the bed of the Waikato River adjoining the Pouakani Blocks on the basis that it remained land held by the hapu of Pouakani under their customs and usages.[86] Mr Paki's contention that the riverbed was customary land of the Pouakani hapu had

[86] Mr Paki's application on behalf of the Pouakani hapu followed an application made in 1998 by Whititera Kaihau of behalf of Ngati Whaita that the bed of the River from Reporoa to Horahora was customary land of Ngati Whaiti. Mr Paki's claim was filed to protect the position of the hapu of Pouakani, some of whom are also connected to Ngati Whaita.

already been foreshadowed in 1989 in his claim to the Waitangi Tribunal in relation to the land sales.[87] The Tribunal had decided not to include the river in the hearing then underway, and it is not dealt with in its 1993 Report.[88] Discussions about the river were however initially part of the negotiations that then took place with the Crown. It was only when the Crown in 2000 declined to deal with the Pouakani hapu in relation to the river (preferring to deal with the larger iwi groupings of Tuwharetoa and Maniapoto) that the application for investigation was pursued.

[48] In July 2001 the Maori Land Court queried whether it had jurisdiction to hear the application for investigation of title to the riverbed land, since the adjoining riverbanks were no longer in Maori ownership. Following advice from senior counsel, the application for investigation of title was withdrawn in 2002. It seems clear that the perceived impediment to the Maori Land Court claim that the land was uninvestigated customary land (in respect of which the Maori Land Court would have jurisdiction to conduct an investigation of title) was the decision of the Court of Appeal in 1962 in *Re the Bed of the Wanganui River*.[89] That case treated the bed of the Whanganui River as having been included in the riparian titles already investigated and awarded to individuals, thus extinguishing any Maori customary and tribal interest and leaving no uninvestigated land within the exclusive jurisdiction of the Maori Land Court.

[49] Although proceedings in the High Court were not filed until 2004 (because of delays explained as having been caused by the appointment of successive senior counsel for the Pouakani plaintiffs to the bench), it seems clear that the form of the claim brought was shaped on the basis that *Re the Bed of the Wanganui River* was authoritative and precluded separate investigation of the riverbed by the Maori Land Court once riparian lands had been investigated and titles granted. On this basis, the claim alleges breach of fiduciary duty by the Crown in its purchases because, it is said, without the knowledge of the Pouakani hapu and without explanation to them, its purchases carried ownership of the bed of the river to the mid-point.

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87 The original claim was lodged with the Waitangi Tribunal on 27 March 1987. On 27 April 1989 an "Addendum" was lodged which raised, inter alia, the issue of ownership of the Waikato River.

88 Waitangi Tribunal *The Pouakani Report*, above n 51, at 9.

89 *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA).

[50] The appellants therefore proceeded on the basis set out in their pleadings that "[t]he Pouakani People lost their ownership of the bed of the Waikato River by virtue of the Crown acquisition of the Pouakani Lands". It is necessary for their case that the Crown obtained the riverbed through application of the English common law presumption so that the riparian land investigated by the Native Land Court included the riverbed to the middle of the flow and was transferred to the Crown with sale of the riparian land. This deprivation of the interest of the Maori owners in the river by a presumption of English law of which it is said they could have no knowledge is the foundation of the claimed breach of fiduciary duty. It is also essential to the constructive trust relief the appellants seek that the Crown continues to own the riverbed as riparian owner (although in the case of some of the blocks the Crown's current ownership of the riparian lands is on reacquisition, including by public works takings, following further dealings in the period since the 1890s, a circumstance that adds another complication to the claim).

(iii) The High Court and Court of Appeal decisions

[51] The appellants were unsuccessful in the High Court[90] and on appeal to the Court of Appeal.[91] In both Courts, the Crown defence that the Waikato River was navigable and that the riverbed was accordingly vested in it by statute was accepted. Despite their conclusions that the river was navigable and that the bed of the river was statutorily vested in the Crown, the High Court and Court of Appeal went on to deal with the arguments addressed to them on the claimed breach of fiduciary duty.

[52] In the High Court, Harrison J was conscious that a different view of the question of navigability might be taken on appeal and that an indication of his views, though "strictly obiter" on the view of navigability he had taken, could be helpful to an appellate court.[92] He held that the Crown did not owe fiduciary duties to the Pouakani people in making the purchases of their lands because the Crown was free to act in its own interests and owed no "absolute or single-minded loyalty" to the vendors, the essential requirement of fiduciary obligation.[93] In this, the Judge

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90 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC).
91 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125.
92 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [107].
93 At [92].

followed suggestions made by the Court of Appeal in the 2007 case of *New Zealand Maori Council v Attorney-General* disagreeing with the proposition that the Crown could owe "a fiduciary duty in a private law sense" to the Maori vendors.[94] (These suggestions were explicitly acknowledged to be obiter by the parties when withdrawing the appeal to this Court, leave having been granted but the proceedings having been subsequently settled.[95])

[53] In any event, Harrison J considered that the substantive claim of breach of fiduciary duty could arise only if the Pouakani plaintiffs could establish:[96]

> (1) the existence of a discrete customary right to the riverbed severable from similar rights relating to the adjoining land and vested in the Pouakani people at the time of the Crown's acquisition; and (2) the Crown's extinguishment of that right by the acts of acquisition.

[54] While Harrison J acknowledged the first matter to be a question of fact, he held that the findings of fact made in the 1962 determination in *Re the Bed of the Wanganui River,* were "of general application to Maori custom" and established that there was no such customary right severable from the riparian ownership.[97] "Additionally", he considered that, even if Maori had a "discrete customary right" to the riverbed, "that right was extinguished by order of the Native Land Court when issuing title, and not by the subsequent act of acquisition".[98]

[55] Harrison J also considered that the claim was barred because of the lapse of time: a remedial constructive trust (such as he considered was the correct categorisation of the relief sought in the claim) was not protected by s 21(1)(b) of the Limitation Act 1950.[99] Even if not barred by the Limitation Act, he considered that the claim was barred by the equitable doctrine of laches because it would be unreasonable or unconscionable to permit enforcement after such delay.[100]

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94 *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA) at [81].
95 *New Zealand Maori Council v Attorney-General* SC 49/07, 4 November 2008 at [2(b)].
96 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [143].
97 At [148].
98 At [149].
99 At [170]–[174]. The effect of s 21(1)(b) is that no period of limitation applies to action by a beneficiary under a trust to recover from the trustee trust property in possession of the trustee.
100 At [176]–[177].

[56] The Court of Appeal, although acknowledging that its affirmation of the view of navigability taken in the High Court made it unnecessary to do so, thought it appropriate "to make some observations" on breach of fiduciary duty because the matter had been fully argued and because "[t]here has been a good deal of professional and academic concern as to whether a fiduciary cause of action can be maintained in this context".[101] It considered that Harrison J had not found there to be a breach of fiduciary duty and that, if a duty were indeed accepted, it might be necessary to consider further whether the matter should be returned to the High Court or whether there was sufficient material before the Court to enable it to decide whether there had been breach.

[57] The Court of Appeal pointed out that most authorities in New Zealand which have referred to a possible fiduciary duty being owed by Crown to Maori in some circumstances described the duty as "analogous" to a fiduciary duty.[102] It floated the question whether a "better vehicle"[103] for claim might be found in a "relational duty of good faith",[104] which would allow the controversial language of "fiduciaries" to "drop out of the legal lexicon".[105] It remained an open question whether such development would be "wise",[106] but the Court thought that it might meet the need to ensure that those who "resort to the law" are able to "be satisfied that at least a measure of justice has been achieved".[107] A duty along these lines had not been greatly developed in argument, and the Court considered that it could not be taken further without further argument and better factual material on the question of breach, a course that was unnecessary because of the decision it had come to on the question of navigability.[108]

[58] Even on the assumption that breach either of fiduciary duty or of a "relational duty" was established, the Court considered that a constructive trust could not be imposed in respect of the riverbed land: there had been an "accretion of interests which [had] occurred on the river over the course of a century"; there were "difficult

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101 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [86].
102 At [99] and [104].
103 At [104].
104 At [112].
105 At [111].
106 At [112] (emphasis removed).
107 At [116].
108 At [117]–[118].

and perhaps insurmountable problems of demarcation" such as how the riverbed, now covered by dams and lakes, could be "the subject matter of a constructive trusteeship" and how such an obligation could be enforced.[109] (As is indicated at paragraph [31], I consider that the problems assumed by the Court of Appeal should have been the subject of inquiry and would require the question to be remitted to the High Court.) Because it was unnecessary to do so, the Court of Appeal did not deal with questions of limitation or laches.[110]

[59] In the Court of Appeal, consideration of the mid-point presumption was largely background for the discussion of the purpose and effect of the statutory vesting under the Coal-mines Act Amendment Act in respect of the bed of navigable rivers. There was no distinct consideration of whether investigation and grant of riparian Maori freehold land extinguished any customary property in the river itself. The Court treated *Re the Bed of the Wanganui River* as having established as a matter of New Zealand law that "in the case of non-navigable and non-tidal rivers, the registered proprietor of the adjacent land owns the bed of the river to the middle line".[111] The principle was described as "a presumption, rebuttable by evidence of ownership to the contrary, that the boundaries of land on either side of a non-tidal river extend to its midpoint".[112]

Presumption of riparian ownership *ad medium filum aquae*

[60] The English conveyancing presumption that a riparian owner intends to convey the bed of a stream bounding his property with the riparian land is not a rule of law that the beds of land covered by water are owned by the proprietors of the riparian lands "*usque ad medium filum*".[113] The effect of the presumption is more modest. It has less to do with the perquisites of ownership than with the incongruity

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109 At [119].
110 At [120].
111 At [33].
112 At [29].
113 Whether or not the presumption applies in a particular case, a riparian owner has other rights at common law in relation to the river, including to take water and to use the river for access: *Miner v Gilmour* (1859) 12 Moo PCC 131 at 156, 14 ER 861 at 870; and *Lord v Commissioners for the City of Sydney* (1859) 7 Moore 473 at 484–485, 14 ER 991 (PC) at 995–996, citing James Kent *Commentaries on American Law* (4th ed, printed for the author, New York, 1840) Part 6, Lecture 52 at 439.

of retention of strips of land of no use once riparian lands are transferred. As described in *Tilbury v Silva*:[114]

> It is a law of conveyancing that, *prima facie*, where a man grants land on the bank of a river, having himself the soil *ad medium filum*, without any words describing the boundary to be the *medium filum*, the soil *ad medium filum* passes by the grant. … It is a law by which you ascertain the parcel of a grant. It does not matter whether the land is copyhold, freehold, or leasehold. If it be bounded by a river, and the grantor has the soil *ad medium filum* of the river, you presume, in the absence of evidence to the contrary, that the soil *ad medium filum* of the river passes by the grant.

[61] This statement of principle has been often repeated with approval.[115] The presumption arises when the person conveying an interest in riparian land has himself the soil to the middle of the stream. And it is a presumption which applies "in the absence of evidence to the contrary" as to what is included in the conveyance. It is founded in commonsense and usage.

[62] In *Micklethwait v Newlay Bridge Co*, Cotton LJ considered it "very likely" that the origin of the rule was that it was generally "useless to a vendor, when parting with his property, to retain an adjoining strip of land forming half the bed of a river or half the soil of a road".[116] When in *Lord v The Commissioners for the City of Sydney*, the presumption was applied to a Crown grant of land in the colony of New South Wales, the Privy Council, similarly, stressed that the presumption was simply the application of "common sense and justice" to construction of the words used in the conveyance.[117] It held that, "whether the subject-matter of construction be a grant from the Crown, or from a subject: it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances":[118]

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114 *Tilbury v Silva* (1890) 45 ChD 98 (Ch) at 108–109. The point of principle was not in issue in the case and Kay J's decision on the construction of the effect of the deed in issue was affirmed by the Court of Appeal without reference to the conveyancing presumption: *Tilbury v Silva* (1890) 45 ChD 111 (CA).

115 *Commissioners for Land Tax for the City of London v Central London Railway Co* [1913] AC 364 (HL) at 379 per Lord Shaw; *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 (PC) at 715; and *Attorney-General v Leighton* [1955] NZLR 750 (CA) at 790.

116 *Micklethwait v Newlay Bridge Co* (1886) 33 Ch D 133 (CA) at 146.

117 *Lord v Commissioners for the City of Sydney* (1859) 7 Moore 473 at 497, 14 ER 991 (PC) at 1000.

118 At 497–498.

> The learned Counsel for the Respondents contended that, according to the plain and literal meaning of the words, which must alone be looked to, that which was described as bounding the subject-matter of a grant, must be something beyond the limits, and excluded from it. But this will not be found to be a test which can be practically applied. Words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found. If lands granted were described as bounded by a house, no one could suppose the house was included in the grant; but if land granted were described as bounded by a highway, it would be equally absurd to suppose that the grantor had reserved to himself the right to the soil *ad medium filum*, in the far greater majority of cases wholly unprofitable.
>
> This consideration shows that it never can be a question to be determined by the literal meaning of the words, without reference to the circumstances in which they are used. The same learned author [James Kent] who has already been cited, and who may be safely relied on in any question of general principle, lays it down … that "it may be considered as the general rule, that a grant of land bounded upon a highway or river, carries the fee on the highway or the river to the centre of it, provided the grantor at the time owned to the centre, and there be no words or specific description to show a contrary intent". Tried according to these principles, it appears clear to their Lordships that the description of the boundaries in this grant does not exclude from it that portion of the creek which, by the general presumption of law, would go along with the ownership of the land on the bank of it. The Crown had the power of granting it; no reason can be assigned why it should have reserved what might be directly and immediately useful to the grantee, and could scarcely have been contemplated as of any probable use to the Crown, and this too in an infant Colony, where it was the manifest and avowed policy to encourage settlement and the cultivation of land by grants on the easiest and most favourable terms.

[63] In *Lord* in New South Wales and in *Mueller* in New Zealand the riverbed land transferred was undoubtedly Crown land it had the legal capacity to transfer. In New South Wales that was because the land had been assumed to be terra nullius and was in the ownership of the Crown from the acquisition of sovereignty.[119] In *Mueller*, the Waikato River at Mercer was within the confiscations that followed the Land Wars and the riverbed land was also undoubtedly land of the Crown which it had the capacity to grant.[120] The presumption that the grant of riparian lands extended to the mid-point of the river arose because the Crown, as owner of the riparian lands, "had the power of granting it".[121] In *Lord,* retention of the riverbed made no sense on alienation of the riparian land and so the application of the presumption was not

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119 At 490.

120 See *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [20].

121 *The King v Joyce* (1904) 25 NZLR 78 (CA) at 109.

rebutted.[122] In *Mueller*, by majority, it was held that the surrounding circumstances negated any inferred intention on the part of the Crown to transfer the riverbed with the riparian lands.[123]

[64] Application of a presumption of conveyance to the mid-point of the river when land owned by the Crown or by Europeans was transferred was applicable to New Zealand circumstances because the justifications for the presumption were ones of "commonsense"[124] and usage equally applicable to conveyances of European riparian land in New Zealand. Early invocation of the presumption was therefore confined to the interpretation of European land granted by the Crown and the interpretation of subsequent conveyances of such land.[125]

[65] In the case of Maori land, the importation of this rule of the common law is not self-evidently dictated by similar considerations of "common sense", even in circumstances where the riparian owners undoubtedly have the bed of the river or lake. Retention of an interest in a river or lake, as a valuable source of food even if on a seasonal basis (as appears to have been the case in respect of this stretch of the Waikato River)[126] and as a focus of tribal identity, cannot be dismissed as "wholly unprofitable" (the rationale for the presumption given in *Lord*[127]). The Pouakani people may have been sellers of part of their lands, but they retained other land and were not leaving the area. It may not have been the case that interests in the river according to Maori custom were confined to those whose occupation of the riparian lands entitled them to title to those lands in the Native Land Court.

[66] Since it has been important in the reasoning of the Courts below that the intentions of the individual vendors is now unknowable, it should be noted that

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122 *Lord v Commissioners for the City of Sydney* (1859) 7 Moore 473 at 498, 14 ER 991 (PC) at 1000.

123 *Mueller v The Taupiri Coal-Mines (Ltd)* (1900) 20 NZLR 89 (CA) at 109 and 113 per Williams J (Conolly J concurring), at 114–115 per Edwards J, and at 126–127 per Martin J. Stout CJ dissented at 111–112.

124 *Lord v The Commissioners for the City of Sydney* (1859) 7 Moore 473 at 497, 14 ER 991 (PC) at 1000.

125 See the cases cited in *Mueller* by Stout CJ at 103: *Borton v Howe* (1875) 2 NZ Jur 97, (1875) 3 NZCAR 5; *Costello v O'Donnell* (1882) 1 NZLR (CA) 105; and *The Jutland Flat (Waipori) Gold-Mining Company (Ltd) v McIndoe* (1895) 14 NZLR 99 (CA).

126 Waitangi Tribunal *The Pouakani Report*, above n 51, at 40. See above at [41].

127 *Lord v The Commissioners for the City of Sydney* (1859) 7 Moore 473 at 497, 14 ER 991 (PC) at 1000.

application and rebuttal of the presumption does not turn in all cases on close inquiry as to the thinking of the individuals concerned at the time. In *Mueller* no close inquiry was made of what the agents of the Crown had in mind when the land grants there in issue were made. Instead, the presumption was rebutted on objective assessment by the Court of the externalities of the grant: the importance of the Waikato River for communication, the Crown's purpose in opening up the settlements, and so on.[128] Similar assessment may be available in relation to the vendors of the Pouakani blocks and in relation to those who agreed to the partitions arrived at, depending on custom in relation to the river and its continued importance to the vendors. They remained on land in the District and may well have had no thought that their connection with the river would be affected.

English conveyancing practice and New Zealand law

[67] As is described in *Ngati Apa*[129] and need not be enlarged upon here, the English common law applied in New Zealand from 1840 only "so far as applicable to the circumstances of the … Colony of New Zealand".[130] English common law rules affecting property (such as the presumption of Crown ownership of tidal lands considered by the Court of Appeal in *Ngati Apa*) could not apply to lands held by Maori according to custom unless consistent with those customs. The Court held unanimously in *Ngati Apa* that native property continues until lawfully extinguished and that the onus of proof of extinguishment lay on the Crown in contending that it owned all land below high tide in New Zealand.

[68] The cession of sovereignty to the Queen of England in 1840 did not affect the property of Maori. The "full exclusive and undisturbed possession" of "their Lands and Estates Forests Fisheries and other properties" was guaranteed by art 2 of the Treaty of Waitangi for so long as the chiefs, tribes, families, and individual Maori should "wish and desire to retain the same in their possession". Stout CJ in *Tamihana Korokai* in 1912 described how from the beginning of the Colony "it has

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128 *Mueller v The Taupiri Coal-Mines (Ltd)* (1900) 20 NZLR 89 (CA) at 109–113 per Williams J (Conolly J concurring), at 115, 117 and 120–122 per Edwards J, and at 125–126 per Martin J.

129 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [14]–[49] per Elias CJ and [143]–[150] per Keith and Anderson JJ.

130 As was later confirmed by the English Laws Act 1858 for the avoidance of doubt. This provision was continued, in relation to New Zealand, by the English Laws Act 1908 and is confirmed today by the Imperial Laws Application Act 1988, s 5.

been recognized that the lands in the Islands not sold by the Natives belonged to the Natives" and that "[a]ll the old authorities are agreed that for every part of land there was a Native owner".[131] Until acquired by the Crown by purchase or until otherwise lawfully extinguished under statutory authority, all land remained the property of Maori held under their customs and usages. It was held communally but was allocated among hapu and individuals according to tribal custom, for cultivations and other use.

[69] If established by custom and usage, Maori proprietary interests included land covered by water such as the beds of rivers and lakes, as was recognised in cases such as *Tamihana Korokai* (in relation to the bed of Lake Rotorua),[132] *Mueller* (in relation to the bed of the Waikato River),[133] and in the 1954 decision of the Court of Appeal in *Re the Bed of the Wanganui River* (in relation to the bed of the Whanganui River at 1840).[134] In the *Wanganui River* litigation, FB Adams J thought it was "not to be lightly assumed … that the rules of the common law are *prima facie* applicable to Maori customary rights".[135] Caution was also required before assuming that the common law concept of ownership of land covered by water was not "so obviously necessary and universal" that it must be attributed to Maori and indeed it was "not one that is readily grasped or accepted even by Europeans".[136] The view that Maori could have had no understanding of the common law relating to rivers is similar to that expressed by Judge Whitehead in the Native Appellate Court in 1944: "though the Maoris are an intelligent race it is hard to conceive that they could possibly understand the [English common] law as to beds of rivers".[137]

[70] Whether Maori customary interests in features such as rivers and lakes is adequately rendered by concepts more familiar to English property law was doubted by Judge Acheson in his decision in *Lake Omapere*[138] and has been the subject of more recent reassessment. This reassessment was prompted by critical Waitangi

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131 *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA) at 340.
132 At 345 per Stout CJ, and at 351 per Edwards J.
133 *Mueller v The Taupiri Coal-Mines Ltd* (1900) 20 NZLR 89 (CA) at 122–123 per Edwards J.
134 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 437 per Cooke J and at 461–462 per North J.
135 At 444.
136 At 444.
137 *Wanganui River* (1944) 11 Whanganui Appellate MB 111 at 122–123.
138 *Lake Omapere* (1929) 2 Bay of Islands MB 253.

Tribunal reports and is now reflected in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010[139] and the deed of settlement between Whanganui iwi and the Crown in respect of the Whanganui River.[140] As Cooke P observed in *Te Runanganui o Te Ika Whenua Inc Society*,[141] care in the translation of customary interests into European notions is necessary for the reasons given by the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*.[142]

[71] The limitation of the jurisdiction of the Native Land Court to interests in land and the Court's adoption of occupation as the principal basis on which title could be obtained by individual Maori may both have contributed to the emphasis in the 20th century on ownership of the beds of important rivers and lakes and to the neglect of wider tribal interests or more limited individual use rights in these important properties.[143] Such background may be of particular importance in determining whether investigation and grant of title to individual Maori owners, which had the effect of extinguishing customary interests through their conversion into deemed Crown grants, included ownership of the adjoining river or lake bed. This was itself first a question of custom, as indeed it was treated by the Court of Appeal in the litigation about the bed of the Whanganui River.[144]

[72] The presumption that riparian land on conveyance takes the bed of the river to the middle of the flow arises only where the person conveying property has himself the interest in the lakebed or riverbed to convey.[145] I do not consider that it is established that the fact of conversion of riparian ownership according to custom into Maori freehold title itself raised a presumption of ownership to the mid-point. The question was reserved by the Court of Appeal in 1954 in *Re the Bed of the Wanganui River* to enable the opinion of the Maori Appellate Court to be obtained on

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139 See s 8(3).

140 Hon Christopher Finlayson "Whanganui River Deed of Settlement Signed" (press release, 5 August 2014).

141 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 26.

142 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 403.

143 See *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 468 per North J, quoting Norman Smith *Native Custom and Law Affecting Native Land* (Maori Purposes Fund Board, Wellington, 1942) at 75, and at 434–435 per Cooke J.

144 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA).

145 See *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 467 per North J, citing *Halsbury's Laws of England* (2nd ed, 1932) vol 33 Trusts and Trustees at 561–562.

whether such ownership accorded with custom and usage.[146] And the 1962 decision in *Re the Bed of the Wanganui River* concluded, on the opinion of custom obtained, that the presumption of riparian ownership to the middle of the Whanganui River had not been excluded.[147] As a consequence it held that riverbed land on the Whanganui was owned by the riparian owners. That is a conclusion which has been much criticised. It is controlling in the present case only if it expresses either universal custom or a rule of law. For the reasons given at paragraphs [126] to [135] (in relation to custom) and at paragraphs [136] to [145] (in relation to a rule of law), I do not think either proposition is correct and I do not consider that *Re the Bed of the Wanganui River* excludes the jurisdiction of the Maori Land Court to determine the status of the riverbed land.

The litigation over the bed of the Whanganui River

(i) Previous application of the presumption

[73] Before the litigation concerning the bed of the Whanganui River, the mid-point presumption had received very little attention in New Zealand case-law. Three cases are cited by Stout CJ in *Mueller* in support of his minority view that it had been "tacitly assumed" that *Lord v The Commissioners for the City of Sydney*[148] applied in New Zealand law, "that the beds of streams and rivers in New Zealand belonged to private owners" and that no distinction was to be drawn in respect of navigable and non-navigable streams in relation to such private ownership.[149] They are also cited by William Young J at paragraph [251] as authority for the view that "long before the *Mueller* case, New Zealand courts had assumed that the mid-point presumption applied in New Zealand". The cases relied on are *Borton v Howe*,[150] *Costello v O'Donnell*[151], and *The Jutland Flat (Waipori) Gold-Mining Co (Ltd) v McIndoe.*[152]

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146 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 426 per Hutchison J, at 437 per Cooke J, and at 466–467 per North J. Compare, however, at 454 per FB Adams J; and *Tua Hotene v Morrinsville Town Board* [1917] NZLR 936 (SC) at 945.

147 *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) at 610 per Gresson J, at 620 per Cleary J, and at 627 per Turner J.

148 *Lord v The Commissioners for the City of Sydney* (1859) 7 Moore 473, 14 ER 991 (PC)

149 *Mueller v The Taupiri Coal-Mines Ltd* (1900) 20 NZLR 89 (CA) at 103.

150 *Borton v Howe* (1875) 2 NZ Jur 97, (1875) 3 NZCAR 5.

151 *Costello v O'Donnell* (1882) 1 NZLR (CA) 105.

152 *The Jutland Flat (Waipori) Gold-Mining Co (Ltd) v McIndoe* (1895) 14 NZLR 99 (CA).

[74] *Borton v Howe* was concerned with entitlement to clean water, not ownership of the bed of streams. The land through which the stream in issue ran was within the Crown's enormous early purchases in the South Island and had been allocated to settlers under the provisions of the Otago Waste Lands Act 1866. The Court of Appeal considered that there was "no real distinction, as regards the right to pure water, between cases where the land on both sides of the stream belongs to, or is lawfully occupied by, the same person, and those in which the land on the opposite sides is occupied by different persons".[153] It expressed a tentative view as to ownership of the bed of the stream, unnecessary for the decision:[154]

> It *would appear* that the freehold in the soil of a running stream within the colony is vested, *ad medium filum aquae*, in the riparian proprietor. *At all events*, he has the right to the water unpolluted, except in so far as it may have been taken away by statute.

[75] *Costello v O'Donnell* was similarly a decision concerning pollution and damage caused by mining licensed under the Goldfields Act 1866. The case was not concerned with ownership of the bed of the streams and did not refer to the application of the presumption of ownership *ad medium filum aquae.*

[76] *The Jutland Flat (Waipori) Gold-Mining Co (Ltd)* case also concerned a claim by the proprietor of lands with a frontage to the Waipori River that gold mining upstream had polluted the water of the river, making it unfit for stock and household purposes, and had caused siltation which had damaged the landholder's land. Again, this decision of the Court of Appeal did not involve issues of the ownership of the bed of the watercourse or the mid-point presumption.

[77] *Mueller* seems to have been the first reported New Zealand case in which the application of the English common law presumption was directly raised.[155] The case has been discussed in the first *Paki* judgment in this Court.[156] For present purposes, it is sufficient to say that it concerned confiscated lands freed from Maori customary ownership under the New Zealand Settlements Act 1863 and granted by the Crown

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153 *Borton v Howe* (1875) 2 NZ Jur 97 at 117, (1875) 3 NZCAR 5 at 18.
154 At 117 (emphasis added).
155 That is the view of Professor Brookfield: see Brookfield, above n 5, at 12.
156 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18]–[25] per Elias, Blanchard and Tipping JJ.

as general land. The case was not concerned with the application of the presumption on investigation of title by the Native Land Court. Edwards J in the Court of Appeal treated the riverbed as having been native land before the confiscations.[157]

[78] When Titi Tihu applied to the Native Land Court in 1938 for an investigation of customary title to "the bed of the Wanganui River from the tidal limit at Raorikia to its junction with the Whakapapa River",[158] the application of the common law conveyancing presumption to riverbed adjoining riparian land formerly customary land that had passed through the Native Land Court had not been directly addressed by the courts.[159]

[79] The presumption had been considered in respect of the bed of Lake Rotorua in *Tamihana Korokai* where an application was made to the Court for declaration that the Native Land Court could investigate title to the lake bed. The Crown argued that its assertion of its own title ousted the jurisdiction of the Court (an argument the Court of Appeal rejected as inconsistent with the Treaty of Waitangi guarantees of native property).[160] The Solicitor-General, Sir John Salmond, also argued that the presumption did not arise in relation to Maori customary land or, if it did, it was rebutted because there was no Maori custom or usage that ownership of riparian land carried the soil to the middle.[161]

[80] By 1912, when *Tamihana Korokai* was heard, the riparian land on Lake Rotorua still comprised some blocks of uninvestigated land.[162] But most of the riparian land had passed through the Native Land Court and much of it had been sold to the Crown and to European purchasers. Despite this, it is notable that there was no suggestion in the case that the Crown and European titles extended to the middle of the lake and prevented the Native Land Court investigating customary title (although the argument would not have advanced the Crown position that it was the proprietor of the lake bed).

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157 *Mueller v The Taupiri Coal-Mines Ltd* (1900) 20 NZLR 89 (CA) at 122.

158 *Wanganui River, Investigation of Title to its Bed* (Judge Browne, 20 September 1939) at 1.

159 It had been assumed by Cooper J in *Tua Hotene v Morrinsville Town Board* [1917] NZLR 936 (SC): see at 945.

160 *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA) at 345 per Stout CJ, at 346 per Williams J, at 351–352 per Edwards J, at 353 per Cooper J, and at 358 per Chapman J.

161 See at 335.

162 At 322.

[81] The Court of Appeal in *Tamihana Korokai* was unanimous in the decision that the Native Land Court had jurisdiction to investigate the claim. So, Stout CJ made it clear that *Mueller* was authority only on the effect of a Crown grant under the Native Land Acts:[163]

> What the customary title to the bed of Lake Rotorua may be must be considered and determined by the only Court in New Zealand that has jurisdiction to deal with Native titles – the Native Land Court. At common law there may be an ownership of the bed of navigable rivers or lakes that are non-tidal. The case of *Mueller v Taupiri Coal-mines (Limited)* turned on the effect of a grant under the Land Acts.

[82] Edwards J thought that, although it was quite possible that native custom and usage did not recognise property in the bed of navigable waters, "[t]hat is a question which neither the Supreme Court nor this Court can determine":[164]

> If there never was any such custom or usage prior to the Treaty of Waitangi, then the Crown will get the advantage of that when that question has been determined by the Native Land Court, or in the last resort by the Judicial Committee of the Privy Council. But if there was such a custom or usage the treaty, so far as it is effective, is sufficient to preserve it. … Whatever rights were conserved to the Maoris by the Treaty of Waitangi were fully recognized by the Native Lands Act, 1862, which recited the treaty, and was enacted with the declared object of giving effect to it. All the subsequent Native Land Acts have in turn given to the Maoris the right to invoke the jurisdiction of the Native Land Court for the purpose of investigating their claims to lands alleged by them to be owned under Native customs and usages.

[83] In the Native Land Court a number of orders were made vesting the beds of lakes, to which as a matter of common law the mid-point presumption applies equally.[165] In the 1929 case of Lake Omapere, the Court considered the effect of sales of riparian land to the Crown.[166] It was argued (although "not seriously pressed") on behalf of the Crown on an application for investigation of the title to the

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163 At 345 (citation omitted).

164 At 351.

165 The Native Land Court awarded title to the beds of the Wairarapa lakes to Maori in 1883: see Waitangi Tribunal *The Pouakani Report*, above n 51, at 299. (A land exchange was subsequently effected with the lakes being passed to the Crown: see at 299–302.) The Court awarded title to the bed of Lake Omapere to Maori owners in 1929: *Lake Omapere* (1929) 11 Bay of Islands MB 253. The Maori Land Court awarded title to the bed of Lake Rotoaira to Maori owners in 1956: see Waitangi Tribunal *Te Kahui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013) at [14.7.3(1)].

166 *Lake Omapere* (1929) 2 Bay of Islands MB 253. Extracts from this decision are set out in Waitangi Tribunal *Te Whanganui-a-Orotu Report* (Wai 55, 1995) at [12.3.4] and Waitangi Tribunal *The Whanganui River Report*, above n 43, at [9.2.15].

bed of the lake that the sales gave the Crown riparian rights in the lake bed adjoining the blocks sold. Of this Judge Acheson said:[167]

> This contention had no merit whatever. The sales to the Crown were of particular areas of land well defined as to area and boundaries, and could not possibly have been intended to include portions of the lake bed adjoining. See also Judgement of Court of Appeal in *Re Mueller v Taupiri Coal Mines*.
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> Also, the mere fact that Lake Omapere was "customary land" was an absolute bar to sales of any portions of it to the Crown. Section 89 of "The Native Land Act, 1909" forbids sales of "customary land" to the Crown, and earlier statutory provisions were to the same effect.
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> Moreover, Lake Omapere was tribal territory, and therefore, according to established Maori custom and usage, no individual or group of individuals had the right to alienate any portion of its bed. To hold otherwise would be to give support to that lamentable doctrine which led, in the celebrated Waitara Case, to tragic and unnecessary wars between Pakeha and Maori.
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> There can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them rights to portions of the lake or of its bed.

(ii) Previous claims to the Whanganui River

[84] Although the Whanganui River claim was not advanced in the Native Land Court until the application for investigation of title made by Titi Tihu in 1938, petitions and actions to assert Maori authority over the river had been made from the 1860s by direct action[168] and by petitions to Parliament. They are described in the 1999 Report of the Waitangi Tribunal.[169]

(iii) The application to the Native Land Court in 1938

[85] When the Whanganui River title investigation came before the Native Land Court, it undertook first as a "preliminary step towards the ascertainment of the individual ownership," a determination of whether, "at the time of the Treaty of Waitangi, the bed of the River was owned by Natives according to Native custom".[170] The case came before Judge Browne, who proceeded on the basis that the bed of a lake or river is "merely land covered by water" and that all of New

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167 (Citation omitted.)

168 Such as blocking access to the River, obstructing works on the River, and seeking to impose tolls: see Waitangi Tribunal *The Whanganui River Report*, above n 43, at 179, 182–183 and 285–286.

169 Waitangi Tribunal *The Whanganui River Report*, above n 43.

170 *Wanganui River, Investigation of Title to its Bed* (Judge Browne, 20 September 1939) at 1.

Zealand (apart from some land which had been alienated), at the time of the Treaty of Waitangi, belonged to some Maori tribe or hapu:[171]

> The boundaries of the land of each tribe or hapu were well defined and the members of that tribe or hapu had the exclusive right in common to everything within those boundaries including rivers and lakes.

[86] Native custom was held to recognise the exclusive ownership of the beds of rivers such as the Whanganui: "The bed of the Wanganui River belonged to the Natives through whose territory it ran just as much as the land forming its banks did".[172] Judge Browne pointed out that "[e]ven hapuka and wharehou fishing grounds miles out at sea off the East Coast and off the Bay of Plenty Coast were, in ancient times and up to very recent years, admitted to be the exclusive property of certain of the hapus residing on the main land".[173] Although in "recent years" general use had been made of the River, such encroachment was largely due to "want of unity" by the hapu and the lack of "a powerful and influential leader" to offer resistance and also to the "mistaken assumption" of the Crown and the European settlers that the river was a "main Highway accessible to everyone".[174] The rights possessed by the Maori were ownership, not simply rights of fishing, navigation, and to access water.[175]

[87] In a passage much relied on in the subsequent cases relating to the Whanganui River, Judge Browne said:[176]

> This Court, in all its experience of Native land and the investigation of the titles thereto, never once heard it asserted by any Maori claimant that the ownership of the bed of a stream or river, running through or along the boundaries of the land the subject of investigation, whether that Stream or River was navigable or not, was in any way different from the ownership of the land on its banks. Nor has it ever heard it denied that the tribes or hapus that owned the land on the banks of a stream or river had not the exclusive right to construct eel weirs or fish traps in its bed or exercise rights of ownership over it. The river bed being a source of food in ancient times would be looked upon as [a] highly important asset to any tribe and the right to it would be very jealously guarded by the members of that tribe.

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171 At 1.
172 At 2.
173 At 2.
174 At 2.
175 At 2.
176 At 2.

> … at the time of the Treaty of Waitangi, land, to the Maori mind, meant the whole of the territory within the tribal boundaries, over which the tribe had complete control whether covered with water or not.

[88] Judge Browne considered there was no reason why freehold orders should not issue for the bed of a river "in the same manner as they have already been issued for the bed of a lake".[177] The rights of sovereignty acquired under the Treaty of Waitangi gave the Crown no "rights of ownership [or] access over the country and its navigable waters".[178] Any such general access would have been strenuously objected to by those invited to sign the Treaty and might in the end have "wrecked the Treaty".[179]

[89] Because of the use made of this decision in the subsequent litigation, relying on the authority of Judge Browne in matters of Maori custom, it should be noted that, as is discussed below at paragraphs [127] to [128], it is necessary to be careful to read these statements in context.

(iv) Appeal to the Native Appellate Court (1944)

[90] The decision of Judge Browne was appealed to the Native Appellate Court.[180] The appeal was dismissed. Separate reasons were given by the six Judges.

[91] The Chief Judge, Judge Shepherd, referred to the "many rivers and streams included in Titles to Native lands".[181] He considered that the decision in the Native Land Court was not shown to be wrong.[182]

[92] Judge Carr too affirmed that all land within the boundaries of a tribe belonged to the members of that tribe as a "recognised feature of the ancient customs of the Maori".[183]

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177 At 2.
178 At 3.
179 At 3.
180 *Wanganui River* (1944) 11 Whanganui Appellate MB 111.
181 At 113.
182 At 113.
183 At 114.

[93] Judge Harvey agreed that the evidence proved that the claimed area of the Whanganui River was wholly within the tribal boundaries and was the property of the tribe at the time of the Treaty of Waitangi. He pointed out that the decision:[184]

> … carries with grave implications for the reason that unless it can be shown that such Customary title has been lawfully extinguished a body of Natives later to be ascertained may be entitled to a freehold order which will give them rights against the Crown and a title against the world[.]

[94] Judge Dykes accepted that if separate property in the bed of a river or lake was established by custom and usage, "the jurisdiction of the Native Land Court with respect to Native Lands extends as much to the land covered with water as it does to lands covered with forest".[185]

[95] Judge Beechey emphasised that the question with which the Court was concerned was confined to the position in 1840: "[t]he effect of the introduction of the English law to New Zealand, on cession in 1840, as to the ownership of the River Bed, is a matter for future consideration when the investigation of title is continued".[186] Alone of the Judges in the Appellate Court who heard the case, Judge Beechey commented that the *take* put forward for the riverbed was different from that supporting the claim for land on the river banks. He remarked that he did not understand why different *take* would be advanced, but thought the matter was not relevant.[187]

[96] Judge Whitehead pointed out that English law as it affects rivers is "the result of a long process of development" but "[i]n my view the Native Land Court is in no way bound by any such considerations":[188]

> On the contrary it must free its mind from all such matters. I agree with the opinion expressed by Counsel that though the Maoris are an intelligent race it is hard to conceive that they could possibly understand the law as to beds of rivers. However, is this a matter which the Court should have taken into account in arriving at a determination of a simple question of fact? I think not.

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184 At 117.
185 At 118.
186 At 121.
187 At 121.
188 At 122–123.

> It is well established that by Native custom all the land within the tribal boundaries of each tribe belonged exclusively to that tribe, and this applies to land which is covered by water. This was in no way limited by considerations as to whether or not such water was navigable or otherwise. Mr Prendeville [for the Crown] quoted authorities to show that riparian ownership extended to the centre of rivers and mentioned that in America there is a general conclusion that beds of rivers belonged to the State. It is well to repeat that the Native Land Court was not concerned with such matters. The definition of English and American law, and rights of ownership based thereon have no application whatsoever to Native custom. The plain fact is that in New Zealand the Native tribes asserted their rights over everything within their respective tribal boundaries, and were prepared at all times to defend these rights with all the force available. This custom was established to the satisfaction of the Native Land Court in relation to the Wanganui River, and the right to make a freehold order in favour of the Natives is complete. The New Zealand legislature has taken no steps to limit this right by removing rivers of any kind from this general application. In my view this ends the matter and the Appeal must fail.

(v) The King v Morison (1949)

[97] The Native Land Court was then asked to determine the next stage of the litigation: whether the investigation of titles to riparian lands through the Court had covered investigation of the parts of the bed adjoining such lands and whether, on conveyance of riparian land to the Crown on sale, the title to the bed passed with the riparian lands. Before the case could be heard, however, the Crown sought certiorari and prohibition to stop the Court proceeding, on the basis that it did not have jurisdiction to investigate the title to the bed of the River.

[98] In *The King v Morison*[189] the Crown's application for certiorari and prohibition proceeded on the basis that all riparian lands had been investigated and had ceased to be customary land. The Crown argued first that the doctrine *ad medium filum aquae* applied and that, in consequence, the Maori Land Court had already investigated the title to the bed and that any customary interests had been extinguished. The Crown fallback position was that, in any event, the river had vested in the Crown under s 14 of the Coal-mines Act Amendment Act 1903.

[99] In his judgment, Hay J agreed with the Maori Land Court that at the time of the Treaty, the bed of the river was land held under the customs and usages of

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189 *The King v Morison* [1950] NZLR 247 (SC).

Maori.[190] While Hay J thought that the application of the presumption of ownership to the middle of the river on investigation of titles would require "much fuller information as to the surrounding circumstances to be placed before the Court",[191] he considered that the presumption was "settled law" in New Zealand and thought the inference "irresistible" that it applied on vesting orders of the Native Land Court.[192] Certainly, no intention to exclude the presumption could be "read into the orders made by the Maori Land Court".[193]

[100] It was unnecessary for Hay J to take the matter further because he was of the view that s 14 of the Coal-mines Act Amendment Act vested the bed of the river in the Crown so that the Maori Land Court no longer had jurisdiction to proceed with the application for investigation of the title to the riverbed.[194] He made an order prohibiting the Maori Land Court from proceeding with its investigation of title to the bed of the River.[195]

(vi) The Royal Commission (1950)

[101] While Maori were considering whether to appeal, the government announced a Royal Commission to determine whether Maori would have been the owners of the bed but for the passing of s 14 of the Coal-mines Act Amendment Act.[196] If so, the Royal Commission was asked to determine whether any Maori had suffered loss, including as a result of gravel extraction, such as would entitle them to compensation in equity and good conscience.[197]

[102] Sir Harold Johnston, a former Judge of the High Court, was appointed as Commissioner and heard further evidence. He determined that "but for the Coal-mines Act, the bed of the river would be owned by the Wanganui Maoris, as it

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190 See 254–256.
191 At 265.
192 At 256.
193 At 265.
194 See at 265 and 267–268.
195 At 269.
196 Waitangi Tribunal *The Whanganui River Report*, above n 43, at 212. The background to the Whanganui River litigation is also set out by North J in *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 457–459.
197 At 212.

was at the time of the signing of the Treaty of Waitangi".[198] Sir Harold was of the opinion that there should be no presumption that the riverbed vested in riparian owners, considering that the circumstances (particularly the fisheries not contiguous to land interests) displaced it even if the English rule was applicable in New Zealand.[199]

[103] The Royal Commission reported that there was insufficient evidence to determine who the Maori owners were at 1903 or their successors, for the purposes of payment of compensation, and he recommended that these matters should be referred to the Maori Land Court for determination, with compensation for gravel extraction then entrusted to an arbitral panel.[200] Sir Harold pointed out that the Maori Land Court was at that stage prohibited by an undischarged order of the Supreme Court from entering upon the investigation and that legislation might be required to enable it to proceed.[201]

(vii) The decision of the Court of Appeal of 1954

[104] The Crown did not accept the recommendation in full. Parliament enacted s 36 of the Maori Purposes Act 1951. It conferred jurisdiction upon the Court of Appeal to determine:

> (a) Whether immediately prior to the passing of section 14 of the Coal Mines Act Amendment Act 1903, the soil of the bed of the Wanganui River between the tidal limit at Raorikia and the junction of the Wanganui and Whakapapa Rivers above Taumarunui was held by Maoris under their customs and usages, or what (if any) other rights in the said river bed were then possessed by Maoris:
>
> (b) To what Maori or Maoris, hapu, tribe, or other group or classes of Maoris (if any) did the said river bed or the said rights then belong.

Under s 36(2) the proceedings before Hay J were deemed "to have been removed into the Court of Appeal as if no judgment had been given". The Court was empowered to receive in evidence the record of the evidence in the Native Land Court and the evidence before the Royal Commission, as well as such other evidence

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198 Harold Johnston "Report of the Royal Commission on Claims Made in Respect of the Wanganui River" [1950] 27 AJHR G2 at 13.

199 At 11–12.

200 At 20.

201 At 20. That order being the one made in *The King v Morison* [1950] NZLR 247 (SC).

as it thought fit.[202]

[105] Before hearing argument on the two issues referred to it by s 36(2), the Court of Appeal sought clarification of the questions on which relief was sought. The Crown asked the Court to declare that the bed of the river between the tidal limit at Raorikia and the junction of the Whanganui and Whakapapa Rivers above Taumarunui had, ever since the Treaty, been a navigable public highway and not land held by Maori under their customs and usages and that, on the acquisition of sovereignty, the riverbed became the property of the Crown, subject only to Maori rights to fish and take water and to navigate the river in common with members of the public. Alternatively, the Crown asked the Court to declare that, where title to the riparian blocks had been investigated, the bed adjoining the block went with the riparian land, and that the bed of the river was confirmed as being Crown land by passage of the Wanganui River Trust Act 1891.[203]

[106] Separate judgments were delivered by Hutchison, Cooke, Adams, and North JJ (Northcroft J having died before judgment was delivered). Three Judges held that ownership of the bed of the river was not affected by the acquisition of sovereignty and that it remained at 1840 land held by Maori under their customs and usages. (FB Adams J dissented on the basis that there was insufficient proof before the Native Land Court judges on which they could conclude that the river was held by Maori under their customs and usages.[204]) The Court reached no conclusion on the argument of the Crown that investigation of title to the riparian lands passed the interest in the bed to the riparian owners. All Judges considered that further evidence and the opinion of the Maori Appellate Court should be sought on the point.[205]

[107] Hutchison J considered that if a separate *take tupuna* was set up for the river and the riparian land, that would be a strong point in rebuttal of the mid-point presumption and might even be decisive.[206] He pointed however to Judge Browne's

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202 Subsections (3)–(5).

203 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 420 and 460; and Waitangi Tribunal *The Whanganui River Report*, above n 43, at 220–221.

204 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 440.

205 Although see below at [111] for the position of FB Adams J on the point.

206 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 427.

evident surprise at the idea of separate bases of claim to the land and the river (although acknowledging that it was expressed in connection with a more general point) and referred also to the reservations of Judge Beechey as to their being separate *take*.[207] He acknowledged the lateness of the claim but did not think this was a strong argument against rebuttal of the presumption, although it might impact upon the measure of compensation.[208]

[108] Cooke J expressed agreement with the conclusions reached by North J that the ownership of Maori was established as at 1840 and was protected by the Treaty of Waitangi.[209] He thought that the importance of the river to the tribe pointed strongly to the inference that it was held under their customs and usages and that, if a tribal certificate of title had been applied for, there was no doubt that the river would have been included.[210] Cooke J considered that the question whether the presumption of riparian ownership was capable of application to titles granted after investigation was "a question of great importance and one upon which I should be disposed to think that the settled practice and understanding of conveyancers would be of no little weight".[211] Because however the question had not been fully argued, he declined to decide it, pointing out that further information should be obtained on matters such as whether the customary rights in the river were held by Maori who were "not identical with those who were able to establish title to the land".[212] If so, the presumption might well be rebutted. Indeed, Cooke J allowed that the presumption might also be rebutted in other circumstances discussed by North J, which included fishing interests not attached to riparian ownership and rights of navigation.[213]

[109] FB Adams J dissented on the basis that it was not proved that the riverbed was owned by Maori at the time of the Treaty of Waitangi.[214] He took the view that until conversion of customary interests into freehold, Maori had customary rights

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207 At 427.
208 At 424.
209 At 432.
210 At 433.
211 At 437.
212 At 438.
213 At 438.
214 At 440.

only "on the sufferance of the Crown", in an application of political trust theory.[215] To the extent that Maori customary interests were not convertible into freehold interests through the courts, they remained exercisable only on such sufferance.

[110] FB Adams J expressed scepticism about the suggestion that Maori custom in 1840 conferred a customary interest in land covered by water able to be recognised by fee simple title on investigation:[216]

> There is nothing in *Tamihana Korokai* which asserts that common-law conceptions as to the ownership of the beds of rivers, or lakes have any application to such claims by Maoris. It is not to be lightly assumed – as I suspect has been done in the judgments herein in the Maori Land Court, and perhaps even in those now delivered in this Court – that the rules of the common law are *prima facie* applicable to Maori customary rights, or that the common law conception as to the ownership of land covered by water is so obviously necessary and universal that it must be attributed to the mind of the aboriginal Maori. In my experience, this particular conception is not one that is readily grasped or accepted even by Europeans. Here, the question is whether, or how far, such an idea was in fact entertained by Maoris before 1840; and in my opinion, the burden rests heavily on those who assert it, their task being to establish by sufficiently convincing evidence that Maori customs and usages at that date did in fact recognize something equivalent to ownership of an underlying bed, and to do so with reference to this particular river. It seems clear that Maori customs and usages varied greatly from place to place and from tribe to tribe. Even if a more or less general custom were proved, it would still be necessary to show that it applied to this tribe, and to this river. So far as appears from the material available to us, the question whether Maori customs recognized ownership of the beds of rivers and lakes has never previously been litigated – let alone taken to judgment – though apparently on some occasions, in comparatively recent years, it seems to have been taken for granted in the Maori Land Courts, or allowed to go by default.

[111] As his was a minority view on this point, FB Adams J went on to consider the issue of the application of the mid-point presumption to titles issued by the Maori Land Court.[217] FB Adams J considered that there was no reason why the convenient mid-point presumption should not apply.[218] That result followed from the application of the common law, which treated the bed "as an annexure to the riparian lands"; if this were not so, the riverbed could be dealt with in "absurd and inconvenient ways".[219] FB Adams J accordingly would have determined this issue

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215 At 441.
216 At 444 (citation omitted).
217 At 454.
218 At 454.
219 At 455.

on the evidence before the Court, and was only reluctantly "content" that there should be further investigation on the facts.[220]

[112] North J considered that the entire territory of the Whanganui tribe was tribal property and that there was no basis to distinguish between "dry land and land covered by water".[221] Proprietary rights of the tribe had not been lost between 1840 and the enactment of the first Native Lands Act in 1862 and the fact that no tribal certificate had been obtained was "immaterial so long as the legal right to make such an application existed".[222] The argument advanced by the Crown seemed to him to be "in danger of being merely a refinement of the argument [rejected in *Tamihana Korokai*]".[223]

[113] He considered that the presumption could only apply if the person making the grant "is in a position to part with the soil of the bed", and was rebutted if "there is a several fishery not belonging to the grantor", if at the time of the grant there was no intention to part with the bed, or if the grantor "had not the bed of the river to convey".[224] North J pointed to the problems confronting the Native Land Court in the early days of its operation. They included the fact that "the Maoris did not recognize individual titles to tribal land", so that the Court was obliged to "fall back on occupational rights".[225] It was a difficulty too, as Sir John Salmond had argued in *Tamihana Korokai*, that there was "no provision in the Native Land Act, 1909, for the grant of incorporeal hereditaments".[226]

[114] Since the Whanganui River was pre-existing tribal property, North J considered that an automatic conferral of an interest to the middle of the stream on creation of individual riparian titles was too simplistic. He pointed to the suggestion made by Williams J in *The King v Joyce* that reservation of an interest in fishing

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220 At 455–456.
221 At 461.
222 At 463.
223 At 465.
224 At 467.
225 At 468.
226 At 469.

could prevent application of the mid-point presumption even if land on both sides of the river had vested.[227] North J commented:[228]

> Surely, then, if the presumption might be excluded even where land on both sides of a non-navigable river was ceded by Maoris to the Crown, there is more to be said for recognizing the possibility that the presumption might be excluded in cases where individual Maoris occupying only one bank of the Wanganui River approached the Maori Land Court and invited it to carve out of the tribal territory a block of land, the freehold title of which was to be vested in them exclusively.
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> …
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> [B]efore the first order of the Maori Land Court which resulted in the tribe's parting with a block of riparian land, the members of the tribe were entitled freely to use the river, not as members of the public but because the tribe itself owned the river and the soil beneath the river; and I would think that, if the river was still being used to any substantial extent as a passageway for canoes and boats at the time the orders were made, it might be difficult to contend that it could have been the intention, either of the Maori Land Court itself, or of the Crown, when it issued the grant to confer a title on individual Maoris *usque ad medium filum aquae.*

As a result, there was "no simple approach" and a thorough examination of "all the circumstances surrounding each separate application for the investigation of the title to riparian blocks" was necessary "for there can, of course, be no justification for any broad submission that the presumption applied, irrespective of the surrounding circumstances".[229]

[115] The Judges in the majority had not felt able to resolve the questions referred to the Court of Appeal without further inquiry into the facts. An amendment to s 36 was obtained which permitted the Court to obtain the opinion of the Maori Appellate Court on a number of stated questions.[230]

(viii) The opinion of the Maori Appellate Court (1958)

[116] The questions for determination by the Maori Appellate Court were settled by the Court of Appeal in December 1956. Perhaps following the suggestion of Hutchison J that separate *take* to the river and the land might be decisive, the first

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227 At 469.
228 At 469–70.
229 At 468.
230 Section 6 of the Maori Purposes Act 1954, which added s 36(5)(A)–(H) to the Maori Purposes Act 1951.

question asked was "whether the ancestral right – take tupuna – (if any) to the Wanganui River was separate or different from that to the riparian lands; and if so, what (if any) is the significance of that distinction".[231] Since this question, which received the lengthiest answer, ultimately proved to be determinative of the litigation, it is necessary only to touch on the answers to the other questions, most of which related to ownership of eel weirs on the river but some of which helped explain the approach of the Native Land Court.

[117] Five Judges of the Court answered the questions – Judges Prichard, Smith, O'Malley, Jeune, and Brook. They did not dismiss the evidence that the "symbolic" ancestors for the river could be more remote ancestors but thought they were invoked to provide "at most, a background to an understanding of the general and cosmogonic conceptions which the ancient Maori had towards his property".[232] They accepted that proper consideration should be given to the "mana" of the river and its "significance to the Wanganui tribe".[233] But they considered that the Maori Land Court required claims for inclusion in a title "to be tied more to the foundations of practical realism rather than to those of mere symbolism".[234] It was treated as significant too that although use of eel weirs had featured in claims of occupation, no tribal interest had been asserted in them.[235]

[118] The Maori Appellate Court could find nothing in the evidence to suggest that it was ever put to the Maori Land Court before the hearing before Judge Browne in 1939 that there was a separate *take* to the river and the land on its banks.[236] Since the Judges were of the view that such an assertion would have been made "long since" and recorded in the minute books relating to the title investigations, they concluded that "such recent testimony has insufficient value, standing alone, upon which this Court can express an opinion in favour of the Maori claimants".[237] The Judges expressed scepticism about a *take* based on the three children of the remote

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231 *Memorandum of the Maori Appellate Court on the matter of a case stated by the Court of Appeal relating to the bed or portions of the Wanganui River* (Judges Prichard, Smith, O'Malley, Jeune and Brook, 6 June 1958) at 1.
232 At 2.
233 At 2.
234 At 2.
235 At 3.
236 At 2.
237 At 2.

ancestor Tamakehu (suggested to represent the upper, middle, and lower reaches of the River), when none was set up as an ancestor to any block bordering on the river (although Tamakehu himself was named in relation to one non-riparian block). Instead, the claimants in the investigations of the blocks had traced their claims to more recent ancestors.[238]

[119] The Court placed great weight on the observation of Judge Browne that the Court had never heard a suggestion that rivers were severable from the lands through which they passed.[239] In supplement, it expressed the view that the tribe was "an aggregation of separate, though to some extent, independent sub-tribes each of which exercised immediate rights of ownership and control over the section of the river that lay within its boundaries":[240]

> We say this upon the footing that if the whole tribal territory even though most extensive had been investigated as one block, the Maori Land Court might well have been disposed to issue a freehold order, or series of such orders, or other form of orders for title according to the relevant form prescribed by statute at the time of investigation. Such order or orders would have been founded upon the claims made by the tribe according to its ancestral and other rights under Maori custom, leaving the claims of the hapus to their respective territories to be determined later by partition or other appropriate proceedings as they made applications to the Court for that purpose.
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> But this procedure was not followed, either by the Maoris themselves or by the Court. On the contrary, the sub-tribes or smaller groups themselves made separate applications to the Court to be awarded the respective areas of the tribal lands that were in their occupation according to the internal rules of the tribe, whatever they may have been, not being inconsistent with Maori custom as found by the Court. All this took place, not at the one time, but over a period of years extending from the year 1866 to the end of that century. In the practical result, therefore, the original or tribal right, not being insisted upon by the tribe, was being converted by these processes into the recognised rights of the sub-tribes or smaller groups as they obtained freeholds in fee simple from the Court.

The Maori Appellate Court therefore answered the first question in the negative.

[120] In answer to the other questions stated for its opinion, the Court acknowledged that an application by the whole tribe to the Maori Land Court would have required proof of occupation according to custom and exclusion of others as

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238 At 3.
239 At 4.
240 At 4.

at 1840.[241] The Court would not in the case of such a claim have required the claimants to take their claims beyond 1840, unless the claim was disputed.[242]

[121] In the case of separate applications by hapu or groups the scope of the hearing would be "considerably extended", although it would not be necessary to go further than to establish the claim as at 1840 and, generally, continuous occupation since, unless there were conflicting claims.[243] More generally, the Court commented on the nature of tribal entitlements:[244]

> Generally speaking, the lands of a tribe did not form an unbroken district over which all members of the tribe might exercise rights of ownership at will. The tribal lands were parcelled out among the hapus or sub-tribes with a demarcation of boundaries. Within the hapu a further division might take place among the various family groups. Each group would have its cultivations, and its hunting, fishing and bird-snaring places, and would not trespass upon such places in the possession of another group without its consent, otherwise serious trouble might be caused between them.
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> Upon investigation of title, these occupationary rights, if supported by an antecedent ancestral or other right, were sufficient, if proved, to found the issue of a title to the land on which such rights were exercised, in favour of the hapu or groups who had established them to the satisfaction of the Court; and in due course of time, the separate rights of an individual or family, whatever they might be, could be awarded to them by the process of partition.
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> It was partly upon the right of the individual or family in respect of the use of small cultivations, that the present Maori custom of succession to interests in lands, now forming the subject of English titles, came into being.

[122] The opinion of the Maori Appellate Court was decisive. It has however been criticised more recently by the Waitangi Tribunal.[245] The Tribunal has pointed out that the difficulties encountered by the claim were not with separate ancestors but with a difference between local rights based on occupation which named more recent ancestors and tribal rights, more inclusive and therefore naming more remote ancestors.[246] The Land Court processes had not responded to this difference. The Waitangi Tribunal has also pointed out that the assumption of the Maori Appellate

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241 At 8.
242 At 9.
243 At 9.
244 At 10–11.
245 Waitangi Tribunal *The Whanganui River Report*, above n 43, at 276–280.
246 At 276.

Court that tribal interests in the river had not been pressed in the past was inaccurate if account is taken of the petitions and other actions of the Whanganui people.[247]

(ix) The decision of the Court of Appeal (1962)

[123] The resumed Court of Appeal hearing was before Gresson P, Cleary and Turner JJ. Gresson P considered that the opinion of the Maori Appellate Court and the views of Judge Browne were "well nigh conclusive".[248] The application of the mid-point presumption was "too well settled to require any extended reference to authorities to establish the rule".[249] The only circumstance put forward to rebut the presumption was the contention that the ownership of the bed was different in character from ownership of the banks. This, Gresson P said, was "an assertion first made in 1938 which has been judicially examined on several occasions and found lacking in substance".[250] He concluded that none of the information put forward rebutted the principle that the riverbed to the mid-point was included when titles were issued "and common ownership was transmuted to ownership in severalty".[251] At that point, "there attached to each grant by virtue of the presumption title to the bed of the river *ad medium filum*".[252]

[124] Cleary J considered that the "substratum" to any separate tribal claim to the ownership of the riverbed was removed with the conclusion that there was "no ancestral right to the riverbed in the tribe separate from the ancestral right to the riparian lands in the *hapus* of the tribe".[253] He was of the view that the statements of the tribal interest in earlier cases "did not mean, and could not have been intended to mean, that the bed of the river was owned by the Wanganui tribe as an entity separate from the *hapus* or families of that tribe".[254] No grounds were made out for excluding the mid-point presumption from the freehold titles issued after investigation by the Maori Land Court. Indeed, Cleary J considered that it was

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247 At 278.
248 *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) at 608.
249 At 609.
250 At 609.
251 At 609–610.
252 At 610.
253 At 616.
254 At 615.

"more consistent with the Maori customary rights described by the Appellate Court that the rule should be applied than that it should be excluded".[255]

[125] Turner J repeated the view he had taken in *Re the Ninety-Mile Beach* at first instance that all title to land in New Zealand passed to the Crown under the Treaty of Waitangi, with the Crown having an unenforceable obligation to recognise and guarantee possession of customary lands to those entitled by custom.[256] The Native Land statutes were, he thought, the means by which the Crown discharged that obligation. Turner J took the view that "whatever was originally the nature of the customary title to lands which have come before the Maori Land Court for investigation, the incidents of the titles which the same Court has issued and certified are and always have been the incidents of English freehold title".[257] Since it was an incident of English freehold riparian title to land that the title extended to the middle of the stream, it became applicable to titles granted in New Zealand and applied to the riparian titles on the Whanganui River.[258] If the ownership of the bed of the river had been shown to be different from ownership of the riparian land, the application of the mid-point presumption might have been rebutted, allowing separate investigation of the bed of the river.[259]

No general custom of riparian ownership of riverbed

[126] The authorities cited at paragraph [17] indicate that native custom was recognised to be specific to the tribe or hapu concerned. Even a generally observed custom in relation to rivers required, as FB Adams J put it, proof of application to "this tribe, and to this river".[260]

[127] Much reliance was placed in the Maori Appellate Court in 1958 on the opinion of Judge Browne that he had never heard it asserted that the ownership of beds of streams or rivers were "in any way different from the ownership of the land on its banks".[261] The context of Judge Browne's comment is set out at

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255 At 619.
256 At 623.
257 At 624.
258 At 624.
259 At 625.
260 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 444.
261 *Wanganui River, Investigation of Title to its Bed* (Judge Browne, 20 September 1939) at 2.

paragraphs [87] to [88]. He was dealing with the position at the time of the signing of the Treaty of Waitangi. It is clear from his reasons that his focus was the entire territories of tribes and hapu and the ownership by those tribes and hapu of the rivers and lakes within their tribal territories. He was not concerned with intra-tribal rules about individual use or entitlement. Self-evidently he was not concerned with individual ownership, because there was no such ownership at the time of the Treaty.[262] He was not dealing with common law precepts. In particular, he was not dealing with presumptions of English conveyancing law concerning riparian ownership. The reference to fishing spots well offshore suggests property which was not joined to the shore in the manner the mid-point presumption joins the riparian land of the banks with the riverbed.

[128] Since decisions of the Maori Land Court vesting the beds of lakes had recognised tribal interests rather than riparian interests (as in the case of Lake Omapere), Judge Browne's reference to the decisions of the Native Land Court in which beds of lakes had been vested does not suggest his remarks should be taken to support any custom in riparian ownership. What was said about the ownership of the beds of rivers or lakes running with the ownership of their banks must be seen in the context in which he spoke. His statements acknowledge that at 1840 every piece of land within the tribal boundaries was part of the property of the tribe or hapu, subject to the Treaty property protection and in respect of which freehold orders could be made. He did not deal with the question of how individual title based by the Native Land Court on occupation affected the former tribal property of a lake or river.

[129] The decision of Judge Acheson in relation to Lake Omapere[263] is direct recognition of customary interests which supported tribal title on investigation even though the riparian lands had been investigated and in some cases sold. His preparedness to accept that an important feature, such as a lake, was a tribal property, not susceptible to the individual titles appropriate for the riparian lands, is indicative of custom which does not simply follow riparian occupation rights.

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[262] See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 653–654.
[263] *Lake Omapere* (1929) 11 Bay of Islands MB 253.

[130] The separate judgments given by the judges of the Maori Appellate Court in 1944 in relation to the Whanganui River similarly contain indications that there was no inevitable linkage with riparian rights according to custom.[264] So, Judge Harvey seems to have considered that where customary title to a river had not been lawfully extinguished, those entitled would have to be "ascertained",[265] which hardly suggests automatic application of a presumption of riparian ownership. Similarly, Judge Dykes was prepared to accept that custom and usage might establish "separate property" in the bed of a river or lake, in respect of which "the jurisdiction of the Native Land Court with respect to Native Lands extends as much to the land covered with water as it does to lands covered with forest".[266] Judge Beechey expressed some surprise that different ancestors would be put forward for the river and the land, but did not indicate that was impossible.[267] Judge Whitehead said quite forthrightly that it was "hard to conceive" that Maori would understand the mid-point presumption, a view that hardly seems to suggest universal custom to that effect.[268] He said of the mid-point presumption (and the doctrine of State ownership of water bodies in the United States) that "the Native Land Court was not concerned with such matters" and that they had "no application whatsoever to Native custom".[269] As in the case of Judge Browne, the judges of the Appellate Court were dealing with the position as at 1840. Even so, their statements do not suggest a well-known general customary principle of riparian ownership to the mid-point of the stream.

[131] The questions posed for the Maori Appellate Court in 1958 are specific to the circumstances in respect of the investigations of title on the banks of the Whanganui River. No general proposition of custom applicable to all Maori was in issue. And in my view the judgments of the majority members of the Court of Appeal in 1962, tied as they were to the answers received in relation to the Whanganui River from the Maori Appellate Court, provide no authority for a finding of general custom.

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264 *Wanganui River* (1944) 11 Whanganui Appellate MB 111.
265 At 116.
266 At 118.
267 At 121.
268 At 122–123.
269 At 123.

[132] The Maori Appellate Court in 1958 acknowledged that a tribal interest in the whole territory, including the Whanganui River, might have been asserted to obtain title, leaving the hapu to make further applications for partition.[270] Although it thought the opportunity had passed because individual applications had been made and riparian interests had vested[271] (a legal assessment it seems to me rather than a question of custom), it is interesting that conceivably such process might well have left tribal interests unaffected by subsequent partition orders. The suggestion of subsequent partition out of the tribal property of the riparian lands (leaving the river in separate tribal ownership), makes it clear that the Court saw nothing inherently implausible as a matter of custom about tribal property in a feature such as a river.

[133] In the Court of Appeal in the 1954 *Wanganui River* case, North J, with whom Cooke J expressed agreement, reached the same end which was allowed by the Maori Appellate Court to be a result that accords with custom. They agreed that different titles for riparian lands and riverbed may accord with custom, depending on the circumstances.

[134] The difference is that the Maori Appellate Court (and the Court of Appeal in the 1962 case after it) thought that result could only have been achieved by the tribe first taking title to the wider territory and then partitioning out the individual interests based on occupation. The conclusion that separate title for riparian lands and tribal lands was only possible in the sequence of tribal title followed by partition is not itself based on custom, but arises because of what is conceived to be the effect of the riparian titles granted through the Native Land Court. It is only on the assumption that the titles included a presumption of ownership to the middle of the river (a presumption derived from English common law which has nothing to do with custom[272]) that the possibility of separate title is treated as too late because not raised in the right sequence. (As an aside, it may also be noted that there is real irony in this result in the case of the Pouakani people because of their association with the 1883 petition which had tried to prevent the Native Land Court

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270 *Memorandum of the Maori Appellate Court on the matter of a case stated by the Court of Appeal relating to the bed or portions of the Wanganui River* (Judges Prichard, Smith, O'Malley, Jeune and Brook, 6 June 1958) at 4.

271 At 4–5.

272 As Judge Whitehead, Judge Acheson, FB Adams J and others, including Sir Harold Johnston, were agreed.

investigations, enabling the tribes themselves to identify their interests.[273]) As is discussed at paragraphs [138] to [145] below, I consider that no such presumption arises as a matter of law.

[135] For these reasons, I consider that the Courts below were wrong to conclude, without evidence of Pouakani custom, that riparian ownership to the middle of the river is established as a matter of general custom.

Re the Bed of the Wanganui River is not authority for a rule of riparian ownership *ad medium filum aquae*

[136] The 1962 majority decision of the Court of Appeal is based entirely on the opinion of the Maori Appellate Court with respect to native custom in relation to the Whanganui River. No general proposition of law that the common law conveyancing presumption applies to exclude separate customary interests can be derived from the reasons given by Gresson P and Cleary J. They accepted the opinion of the Maori Appellate Court to mean that there was no such separate property according to custom.

[137] The only judge in the 1962 case to advance the view that the presumption excluded customary interest on investigation and grant of title by the Native Land Court was Turner J. He took the stance that all land in New Zealand had passed to the Crown with the Treaty of Waitangi and that all incidents of English freehold title, including the presumption of ownership to the middle line, applied after Maori property was recognised by the Crown through investigation and the granting of titles through the Court.[274] This view is inconsistent with *Ngati Apa*.[275]

There is no rule of law that riparian ownership extends *ad medium filum aquae*

[138] In the 1954 Court of Appeal case[276] North J, with whom Cooke J expressed general agreement,[277] emphasised that the mid-point presumption could not apply if

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273 See above at [36].
274 *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) at 623–624.
275 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).
276 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA).
277 At 432.

the riparian owner did not have the riverbed.[278] He accepted that there could be no basis for a general rule that the presumption was applicable without examination of the "surrounding circumstances" of each application for investigation of title to a riparian block.[279] And, in the passage set out at paragraph [114] he indicated why the mid-point presumption might well not arise where a tribal interest, still exercised at the time of investigation of riparian lands, was not appropriately subsumed into individual title over the riparian lands based on occupation.

[139] The approach taken in 1962 in respect of the Whanganui River, as has been described at paragraphs [123] to [125], did not in fact turn on the mid-point presumption being in accordance with custom. The acknowledgement of the Maori Appellate Court that a tribal property could have been obtained, with the riparian lands then partitioned out to leave the river as tribal property, shows that there is nothing incongruous as a matter of custom in separate ownership. The conclusion by the Court of Appeal in the 1962 case[280] turns in effect on application of a legal presumption of ownership to the middle of the stream on the grant of titles.

[140] The approach suggested by North J in 1954 did not assume any such legal rule. It treated application of the mid-point presumption as depending on the circumstances of the original investigation. Consideration of the circumstances to decide whether the riverbed was implicated in the title to riparian lands is consistent with the approach of Chief Judge Shepherd in the Maori Land Court in relation to the Manawatu River in 1941. He took the view that the application of the presumption depends on the "circumstances surrounding the investigations of Title".[281] Such circumstances included:[282]

> … any express or implied claims to the ownership or possession of the land covered by the river and its bed, either as constituting a highway for themselves and/or others, or as a source of eels or for the purpose of taking fish therefrom.

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278 At 467.
279 At 468.
280 *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA).
281 Quoted in *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 469.
282 Quoted at 469.

[141] The very different approach taken in respect of Lakes Omapere and Rotorua, the criticisms made of the 1958 Appellate Court opinions, the indications in the earlier Appellate Court opinions that there might be separate interests in respect of property in the riparian and riverbed lands, and the general approach that the incidents of title follow custom, make it inappropriate for the question of ownership of riverbeds and lakebeds to be treated as joined to riparian ownership as a matter of law.

[142] Treating application of the mid-point presumption as a rule of law is also inconsistent with the approach taken by the Court of Appeal in *Ngati Apa*.[283] That case established that an investigation and grant through the Native Land Court of title to land did not extinguish any property held under Maori custom in lands below high water mark, any more than investigation and grant could extinguish any customary property in adjacent land onshore. Whether there is such customary property beyond the boundaries of investigated land was a matter for the Maori Land Court. I consider the identical position applies in respect of non-tidal land covered by water. The mid-point presumption arises on conveyance of riparian land only if there is no such uninvestigated customary land in the river.

[143] It may be that the terms of application for investigation and the evidence given at the time allow an inference to be drawn that the customary interest in the riverbed or lakebed is exhausted. But, as is illustrated by the discussion of North J in the 1962 case and the discussion of Stout CJ in *Mueller*, the translation of customary communal interests in New Zealand into individual title was not straightforward. In *Ngati Apa,* I questioned whether in cases of great value to the tribe (such as the toheroa fishery of the Ninety-Mile Beach) there was less susceptibility to individual ownership than in the case of land on which were located habitations and cultivations.[284] Such overlapping interests may indicate different and wider interests in rivers and lakes from the interests of those entitled to riparian titles. Today, under Te Ture Whenua Maori Act, investigation of title does not require conversion of interests into fee simple title, which may cut across the complexities of overlapping customary interests. That is a matter for the Maori Land Court on investigation of

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283 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).
284 At [89].

title. But I do not think such inquiry is precluded by a presumption of ownership beyond the boundaries established in investigation and title already granted.

[144] As described at paragraphs [60] to [66], the conveyancing presumption arises as a matter of commonsense and usage when a riparian owner has the ownership of riverbed. Then, any conveyance of the riparian land is presumed to carry the riverbed also, because it is of no utility to the vendor to retain it (a presumption readily rebuttable in cases of several fisheries or other features of value). The presumption does not arise as a necessary incident of the title obtained in the Maori Land Court unless the circumstances of the investigation indicate that the riparian owner has the riverbed. In the case of major tribal resources and natural features of value to the tribe whether the riparian owner takes title to the riverbed or lakebed requires investigation of the status of the land beyond the boundaries of the title.

[145] For these reasons, I consider the High Court was wrong to conclude without evidence of Pouakani custom and without investigation of the status of the riverbed land by the Maori Land Court that riparian ownership to the middle of the river is established as a matter of general custom or as a matter of law.

The claims that the Crown breached duties of good faith and fair dealing

[146] I would dismiss the appeal on the basis that the assumption on which it rests – that the Pouakani riparian owners owned the river to the middle of the flow before acquisition of the riparian lands by the Crown and transferred it with the riparian lands – is not one the Court can properly infer. It is therefore not necessary or appropriate to express concluded views on the further questions whether the Crown breached duties of good faith and fair dealing owed to the Pouakani vendors. Nor is it appropriate to speculate upon the form of relief that might be available in such a case. It is necessary however to indicate that I have considerable reservations about the approaches taken in the High Court and Court of Appeal. I refer briefly to four topics which merit some comment, principally because they are relevant to the decisions in the courts below or feature in the reasons of other members of this Court. They are: the knowledge possessed by the Crown at the time of the transactions; the basis on which the Crown arguably may owe duties in the nature of

fiduciary obligations; the remedies which may be available in a case where breach of duty is made out; and the different roles of the Waitangi Tribunal and the courts.

(i) The Crown's understanding of the presumption at the time of its acquisition

[147] In their statement of claim, the plaintiffs plead that at the time of the transfers of the land to the Crown the Pouakani people had "no knowledge of the principle of common law that the land adjoining a non-navigable river took the ownership of and rights up to the middle of the river known as the 'ad medium filum' principle" but that the Crown "was aware of the operation of the ad medium filum principle". In its statement of defence the Crown said, in response, that while it had insufficient knowledge of the understanding of the Pouakani owners (and therefore put the plaintiffs to proof of their understanding), "the Crown was aware that the *ad medium filum* presumption was a principle of New Zealand law that applied at the relevant times". This admission answers any doubt that the Crown may not itself have understood the consequences, an element in the claim of unconscionable or unfair dealing. In relation to the understanding of the Pouakani riparian owners, it is not clear than an inference would not be objectively available on inquiry into the circumstances, in particular the custom and usage in relation to the River. As indicated at paragraph [23], that was the approach taken in *Mueller*, which did not rely on evidence of subjective intention.

(ii) Crown duties to the Pouakani vendors

[148] The duties here have been pleaded as arising out of the specific context of the purchase transactions and also because the Crown is said to owe general duties of a fiduciary nature to Maori both by reason of the Treaty of Waitangi and by reason of the relationship between the sovereign authority and a pre-existing indigenous population. Although it does not use the term "fiduciary", the preamble to Te Ture Whenua Maori Act expresses the link between Crown and Maori. It refers to the "special relationship between the Maori people and the Crown" arising out of the Treaty and "reaffirm[s]" the "spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi".

[149] The gravamen of the claim is that the effect of the presumption that the conveyance of riparian land would carry ownership to the mid-point of the river was not explained to the riparian owners. They therefore conveyed the riparian lands without understanding that, by the conveyance and through operation of the presumption, they would lose the riverbed unless they reserved it from the transfer. The failure to ensure that they were fully informed is the unconscientious conduct of the Crown which the appellants say is contrary to the duties it owed them.

[150] Although where duties arise out of the relationship between the sovereign and indigenous populations they may readily be seen to be in a category of their own,[285] I am not convinced it is inappropriate to apply principles developed in connection with duties of a fiduciary nature recognised in equity, as seems to have been suggested in the controversial 2007 decision of the Court of Appeal in *New Zealand Maori Council v Attorney-General*,[286] cited by William Young J at paragraph [273]. The paragraphs in the *New Zealand Maori Council* case referred to by William Young J were among those the parties specifically asked this Court to record as having been obiter dicta when the appeal to this Court was abandoned.[287]

[151] The principles on which courts intervene in cases of undue influence, unconscionability, and breach of fiduciary duty overlap. They are not closed categories. I have already referred to my impression that the circumstances of 19th century purchases, described for example by Richard Boast,[288] have parallels with the cases dealing with transactions with expectant heirs.[289] It is not inconceivable that circumstances from which a presumption of undue influence may be inferred (shifting the onus of proof) may arise in cases of land transactions between the sovereign power and indigenous peoples.

[152] In particular, duties may arise in relation to Maori in New Zealand because of the obligations taken on by the Crown in the Treaty of Waitangi in the exchange of

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285 Canadian cases which recognise such duties generally describe them as "sui generis". The term was first adopted in *Guerin v R* 2001 SCC 85, [1984] 2 SCR 335 at 385 per Dickson J. See also *Osoyoos Indian Band v Oliver (Town)* [2001] 3 SCR 746 at [53]–[54]; and *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [96].

286 *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA) at [81].

287 *New Zealand Maori Council v Attorney-General* SC 49/2007 (minute) at [2(b)].

288 See Boast *The Native Land Court 1862–1887*, above n 48.

289 See *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125, (1751) 28 ER 82.

sovereignty for the protection of property. As Cooke P suggested in *Te Runanga o Muriwhenua Inc v Attorney-General* the idea that the Crown in New Zealand has lesser obligations to its indigenous people than are owed to the indigenous peoples of other jurisdictions, is unattractive.[290] It is difficult to reconcile with the terms of the Treaty of Waitangi. Cooke P said of the Treaty that it created "an enduring relationship of a fiduciary nature" in which each party accepted a "positive duty to act in good faith, fairly, reasonably and honourably towards the other".[291] Extinguishment of Maori property rights "by less than fair conduct or on less than fair terms" was, he thought:[292]

> … likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power.

[153] Nor is this a modern insight. Before the "political trust" notion[293] took hold in New Zealand, Arney CJ in *Re the Lundon and Whitaker Claims Act 1871* had expressed similar views of the obligations on the Crown in relation to Maori property interests:[294]

> The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it.

[154] As *Re the Lundon and Whitaker Claims Act* indicates, whether the Crown is in breach of obligations derived from the common law as well as from the Treaty of Waitangi would require inquiry into the extent of the proprietary interest as a matter of custom. That inquiry was not undertaken in the Courts below. It would I think be necessary to refer the matter for inquiry to the Maori Appellate Court before the question of breach of any obligation by the Crown in the acquisition could be finally determined.[295] Such deferral to the opinion of the Maori Appellate Court on matters of custom has been a long-standing feature of New Zealand statutory law, since the Native Rights Act 1865 required the Supreme Court to give judgment according to

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290 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655.
291 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304.
292 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24.
293 Discussed above at n 76.
294 *Re the Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41 (CA) at 49.
295 Under s 61 of Te Ture Whenua Maori Act 1993.

the opinion of the Native Land Court on matters of custom or usage "in any action in which the title to or any interest in [customary land] is involved".[296]

[155] Whether it matters greatly whether duties of good faith and fair dealing a court of equity will recognise in cases where the conscience of the court requires it are rightly described as "fiduciary" is a matter for consideration in a case where such claims arise for determination. The language of "fiduciary" obligations is now familiar in connection with the dealings between the sovereign and indigenous peoples, including in decisions of the courts in New Zealand.[297] Although a usual characteristic of a fiduciary is loyalty, a fiduciary duty in the sense in which it has been recognised in respect of indigenous people in New Zealand and in Canada does not seem to depend on a relationship characterised by loyalty. It follows that, without further development in a case in which the point arises, it remains an open question whether the principles of equity relied on by the appellants are "a function of the duty of loyalty owed by fiduciaries"[298] which cannot apply to the relationship between the Crown and the Pouakani vendors.

[156] A pointer to the standard expected in dealings with Maori over land is provided by s 5(1) of the Native Lands Frauds Prevention Act 1881 which provided that alienations of Native Land or the transactions relating to them were invalid if "contrary to equity and good conscience". An amendment in 1888 required explanation of the effect of deeds of conveyance or lease by provision of a statement in the Maori language certified by a licensed interpreter, the effect of which was to be explained to each Maori signing the conveyance.[299] Although the 1888 provision did not apply to the Crown, that may well have been on the basis that the Crown was expected always to fulfil the requirements of equity and good conscience in its dealings, as indeed the express terms of art 2 of the Treaty of Waitangi require and as

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296 Section 4.

297 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664 per Cooke P; *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655 per Cooke P; *Te Runanga o Wharekauri Rehoho Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304 and 306 per Cooke P; *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 21(CA) at 24 per Cooke P; *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA) at [81].

298 Per William Young J at [113]; and *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA) at [81].

299 Native Lands Frauds Prevention Act 1881 Amendment Act 1888, s 3.

may also be inherent in the circumstances of the Crown's monopsony on purchases and the explicit instructions given to successive governors.[300]

[157] The obligations here sought to be recognised in equity are not comparable to those deprecated by Binnie J in *Wewaykum Indian Band v Canada*[301] and recited by William Young J at paragraph [275]. Rather they arise out of the specific proprietary interests in land, recognised at common law and guaranteed to the individuals and hapu of Pouakani by the Treaty of Waitangi.

[158] The United Nations Declaration on the Rights of Indigenous Peoples,[302] to which New Zealand is a signatory,[303] provides that indigenous peoples:[304]

> … have the right to redress, by means that can include restitution or, when this is not possible, just fair and equitable compensation, for lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Absence of "free, prior, and informed consent" underlies the present claim. It is said that the Crown's own dealings with the vendors without their "free, prior, and informed consent" was in breach of its obligations, for which it is liable in equity to make redress by restitution if possible.

[159] Quite apart from the general obligations that may be owed by the Crown in its dealings with Maori, a duty may arise in the particular context. It is not to adopt

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300 Normanby's Instructions to Hobson stated that land was to be purchased "by fair and equal contracts" between Maori and the Crown: Marquess of Normanby (Secretary of State for the Colonies) to Captain William Hobson (14 August 1839) in John Ward *Information Relative to New-Zealand* (2nd ed, John W Parler, London, 1839; reprinted Capper Press, Christchurch, 1975) Appendix No XI at 165. The Instructions also stated that "All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands": at 168. Instructions given by Lord Stanley directed Grey as Lieutenant Governor to "honourably and scrupulously fulfil the conditions of the Treaty of Waitangi": Lord Stanley (Secretary of State for the Colonies) to Captain George Grey (13 June 1845) British Parliamentary Papers/Colonies New Zealand (Irish University Press, Shannon, 1970) vol 5 at 230.

301 *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 at [82].

302 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).

303 (20 April 2010) 662 NZPD 10229–10240.

304 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007), art 28.

an "unfortunate and erroneous affirmation … as to the inferior position of Maori"[305] to accept that it is well arguable that in the late 19th century in the dealings with the Pouakani blocks (which occurred much at the same time and which may be contrasted with the lengthier process noted by the Court of Appeal in relation to the Whanganui River[306]) the Maori owners were unlikely to have known of the application of the common law mid-point presumption. The presumption and its effect on the ownership of the river is not referred to in the record of the transactions through the Native Land Court, as the Crown historian, Dr Loveridge, made clear in his evidence. The river boundary to the land had been set not in the investigation of the Pouakani titles but in the earlier identification of the Tauponuiatia Block, without reference to the Pouakani people.

[160] In summary, the relevant context here is likely to include the recognition of Maori property according to their own custom both at common law and under the Treaty guarantee. It includes the fact that the Crown at the relevant times had a monopsony on purchases of land from the Pouakani vendors and the fact that these were early transactions put through the Native Land Court, in circumstances of some controversy and dispute. The context may also include the fact that the purchases occurred during a period in which "political trust theory" held sway (preventing vindication of property interests through the courts except through titles obtained through the Native Land Court by which customary interests were extinguished)[307] and its replacement, after correction of the local courts by the Privy Council,[308] by statutory impediments to direct protection of customary land by Maori. From 1909, legislation prevented recourse by Maori to the ordinary courts not only for recognition of customary property[309] but also for vindication of such property interests through actions for trespass to customary land or recovery of its possession.[310] Such vindication of property could be obtained only in actions brought by the Crown itself.[311] This background is potentially relevant both to the

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305 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [103].
306 *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 446 per FB Adams J.
307 See above n 76.
308 *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577.
309 Native Land Act 1909, ss 84–87.
310 Section 88.
311 Section 88(2).

existence of any equitable duty on the Crown, particularly in relation to its own dealings for property, and to the question whether lapse of time is a bar to the claims.

[161] As the Court of Appeal indicated, questions of breach were not reached in the High Court, because of the view taken by Harrison J that *Re the Bed of the Wanganui River* precluded a claim to the riverbed distinct from a claim to the riparian land. If of the view that the questions of duty and breach required determination, I would have returned the matter for further inquiry into the facts. Since duty and breach are inextricably linked with the nature of Maori customary interests in the riverbed land, the opinion of the Maori Appellate Court on the custom of the Pouakani people may well have been required.

[162] It is unnecessary to do more than advert to these matters. They indicate why I do not think it can be accepted without closer inquiry in a case where the question arises unmistakeably that a claim for breach of fiduciary duty cannot be maintained against the Crown. It is enough to say that I consider it arguable, in a case like the present one, that dealings which resulted in the Crown acquiring by operation of a presumption of law interests in the river which were of value to the affected hapu, if without explanation of the effect of the presumption, could breach duties owed by the Crown in the circumstances to deal fairly and in good faith with the vendors. The facts on investigation might also justify relief on the principle discussed by Toohey J in *Mabo v Queensland (No 2)*,[312] adapting the approach of Mason J in *Hospital Products Ltd v United States Surgical Corp*,[313] if they demonstrate vulnerability of the vendors. While difficult questions may arise concerning defences based on lapse of time (not least whether the courts in New Zealand should follow the reasoning of Millett LJ in *Paragon Finance Plc v DB Thakerar & Co*,[314] as William Young J would do,[315] and as Harrison J in the High Court did),[316] I do not think they can properly or usefully be addressed, even in a preliminary and provisional way, without establishment of the facts giving rise to liability.

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312 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 200.
313 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96–97.
314 *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 ALL ER 400 (CA).
315 See at [297]–[299].
316 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [173].

(iii) Remedies

[163] It is not at all clear that remedies are "largely dictated" by the label of "fiduciary" breach.[317] It has been said that courts in New Zealand have available the full range of remedies at common law and equity, according to what is appropriate.[318] It is not appropriate in the present proceedings to foreclose the availability of relief by recognition of a constructive trust over property acquired in breach of equitable duties, when the retention of the property would be unconscionable. Whether the classification of any such constructive trust as "institutional" or "remedial" is truly useful is a topic that can be left for another day.[319]

[164] In the case of established breaches of equitable duties owed to Maori, the United Nations Declaration on the Rights of Indigenous Peoples may be of some importance. As indicated, at paragraph [158], it is supportive of restitutionary remedies where possible. Third party interests may affect the availability of such relief. So too may the problems of restoration of the Crown's position in the present case referred to by William Young J.[320] Although it should be noted that there was no claim to set aside the land transactions themselves so that the exclusion of land not separately bargained for and subject to independent proprietary rights does not seem to entail any rewriting of the bargains entered into.[321] There seems to be no indication in the contemporary record that the riverbed was important to the Crown transaction. The general circumstances known to the Court do not support any such inference since the river was not navigable in these reaches and the riparian owners had common law rights in relation to water in any event.

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317 As the Court of Appeal held: *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [102].

318 *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA) at 301.

319 Compare the approach taken at present in the United Kingdom and most recently explained in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [47] per Lord Neuberger with that taken in Australia and Canada in cases such as *Muschinski v Dodds* (1985) 160 CLR 583 and *Pettkus v Becker* [1980] 2 SCR 834.

320 Per William Young J at [278].

321 Compare William Young J at [278].

(iv) Courts and the Waitangi Tribunal

[165] A claim of this nature does not confuse the role of the Courts with the role of the Waitangi Tribunal. The Tribunal is the body to which claims that the Crown has failed to meet its political obligations under the Treaty must be addressed. Loss of customary interest because the legislative mechanism for recognising title was inadequate or too simplistic (in the manner suggested by Sir John Salmond in argument in *Tamihana Korokai* because there was "no provision in the Native Land Act 1909, for the grant of incorporeal hereditaments")[322] would be such a claim, properly addressed to the Waitangi Tribunal. And the recommendations of the Waitangi Tribunal are not legally enforceable.[323] But claims of legal right in respect of property are properly brought to the courts, as the Privy Council made clear in *Nireaha Tamaki v Baker*. Whether the claims of unconscionable dealing are properly characterised as legal claims or Treaty of Waitangi claims depends on whether the duties claimed were owed and breached as a matter of law. While there may be issues that will need to be confronted in other cases about whether relief in equity is excluded by statute, including by the terms of the Treaty of Waitangi Act, their resolution will turn on the terms of the legislation.

Conclusion

[166] Whether the Crown became the owner of the riverbed adjacent to the Pouakani lands on purchase of the interests of the Pouakani riparian owners depends upon whether any customary property in the riverbed was extinguished upon investigation of the riparian lands. It is not established that ownership of the riverbed was vested in the owners to whom the riparian lands were awarded and subsequently passed to the Crown with its purchases. Such ownership to the middle of the flow does not arise by operation of law and could only be established if consistent with Maori custom and usage (a question of fact for investigation). The necessary foundation for the claim of breach of fiduciary duty in the Crown acquisition of the riparian lands has not been established and cannot be assumed. As a result, the claims fail.

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322 See [113] above.

323 Except in the circumstances of resumption under s 27B of the State-Owned Enterprises Act 1986.

[167] The appeal must be dismissed, but for reasons that differ from those given by the Court of Appeal. Although the Crown has formally succeeded on the appeal that was not on the basis of the cases put forward by either party. In these unusual circumstances, I would make no order for costs.

McGRATH J

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Introduction

[168] This case is a continuation of the proceeding brought by the appellants against the Crown which was the subject of this Court's judgment of 27 June 2012 in *Paki v Attorney-General*.[324] The appellants claim that the Crown obtained title to part of the bed of the Waikato River by operation of the presumption of *usque ad medium filum aquae* and in breach of fiduciary duties owed to the Maori vendors, so that the Crown holds the riverbed on trust for the descendants of the original owners. The approved grounds of the appeal in the proceeding are:[325]

> (i) Did the applicants have standing to bring the proceeding in a representative capacity?
>
> (ii) Did s 14 of the [Coal-mines Act Amendment Act 1903] vest title in the riverbed adjoining the Pouakani lands in the Crown?
>
> (iii) If not, did the Crown acquire title to the claimed part of the riverbed through application of the presumption of riparian ownership *ad medium filum aquae* by reason of its acquisition of the riparian lands?
>
> (iv) If so, in the circumstances in which the Crown acquired the claimed part of the riverbed, was it in breach of legally enforceable obligations owed to the owners from whom title was acquired?
>
> (v) If so, have the applicants lost their right to enforce such obligations by reason of defences available to the Crown through lapse of time?
>
> (vi) If not, what relief is appropriate?

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[324] *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 [*Paki (No 1)*].
[325] *Paki v Attorney-General* [2010] NZSC 88.

[169] In its first judgment, the Court answered the question set out in the first ground "Yes"[326] and that in the second ground "No".[327] The Court then heard argument on the remaining grounds, on which the Court now delivers judgment. The factual background to these issues is fully set out in the judgments of Elias CJ and William Young J.

Did the Crown acquire title to the claimed part of the riverbed?

[170] The *usque ad medium filum aquae* (mid-point) principle operates so that a transfer of riparian land is presumed also to transfer the adjacent riverbed to the mid-point of the river. In the first judgment, the Court did not address whether the mid-point presumption applied to the beds of rivers adjacent to the riparian lands sold by Maori to the Crown. It was not necessary to consider that question in determining the first two grounds of appeal. The issue is, however, directly raised by the third ground of appeal.

[171] Fundamental to the appellants' case is their contention that the titles to the riparian land issued by the Native Land Court, between 1887 and 1899, included title to the riverbed up to the mid-point of the river. Transfer of the riparian blocks to the Crown accordingly included transfer of the riverbed. The appellants claim that the Maori owners were unaware at the time that the transfer of riparian land would also convey the riverbed. They say that the Crown's failure to warn them of this consequence was in breach of its fiduciary duties.

[172] The Crown's defence of the proceeding has likewise proceeded on the basis that title to the riverbed was included in the Native Land Court title and transferred to the Crown when the riparian owners sold their land. There is accordingly no contest on the third ground of the appeal, which both parties contend shall be answered "Yes".

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[326] The Solicitor-General withdrew the Crown objection to the appellants' standing to bring the claim: see *Paki (No 1)*, above n 324, at [12].

[327] *Paki (No 1)*, above n 324.

[173] It is well established that the mid-point principle is a presumption that can be rebutted, whether by the terms of the grant or attendant circumstances.[328] In the leading New Zealand decision of *Mueller v The Taupiri Coal-Mines (Ltd)*, a majority of the Court of Appeal held that the presumption had been displaced by circumstances relating to the grants and the fact that the stretch of river in issue was a highway to the settlements.[329] The circumstances to be considered may extend to relevant customs and practices of Maori.[330]

[174] I acknowledge that the decision of the Court of Appeal in *Re the Bed of the Wanganui River* supports the view that application of the mid-point presumption may, in a case involving grant of title by the Native Land Court, be consistent with the understanding and custom of Maori owners at the time of grant.[331] This may be so even where the Maori owners may not have fully understood the principle at the time the titles were issued and transfer to the Crown took place.

[175] But whether the *Wanganui River* case provides a sound basis for acceptance of the parties' common reliance on the application of the mid-point presumption in this case is a matter on which there is scope for argument. One view is that the *Wanganui River* decision established a generally applicable rule of law, based on a finding of universal Maori custom, that the investigation of riparian land by the Native Land Court also included the riverbed to the mid-point, constituting an "effective barrier" to other claims of customary title to the bed of a river.[332] But another view is that the outcome of the *Wanganui River* case was determined not by the existence of any general rule of law or finding of universal Maori custom, but rather by the particular facts, which the Court of Appeal saw as establishing that the application of the mid-point presumption was consistent with local Maori custom. On this approach, the mid-point presumption may not apply if its operation is

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328 See *Re the Bed of the Wanganui River* [1962] 1 NZLR 600 (CA) at 609 per Gresson P.

329 *Mueller v The Taupiri Coal-Mines (Ltd)* 91900) 20 NZLR 89 (CA) at 109 per Williams and Conolly JJ, and at 125 per Martin J.

330 As seems to have been assumed in *Re the Bed of the Wanganui River*, above n 328. See the judgment of Elias CJ above at [23].

331 *Re the Bed of the Wanganui River*, above n 328.

332 See, for example, EJ Haughey "Maori Claims to Lakes, River Beds and the Foreshore" (1966) 2 NZULR 32 at 39. See also the explanation of how the assumption that this view was correct may have influenced the course of proceedings in this appeal in Elias CJ's judgment above at [13].

inconsistent with Maori custom and usage in relation to the relevant river or stretch of river.[333]

[176] My concern in this case is that, because of the common position reached by the parties, there has been no contest on the facts, in particular issues of local Maori custom and usage, nor as to the law on the central question of whether title to the mid-point was held by the Maori owners of the riparian land, or transferred to the Crown. I have reached the conclusion that the absence of argument on this issue is an impediment to this Court proceeding to decide the remaining issues in the appeal.

Flawed basis for the appellants' claim

[177] If the Court were to accept the common position of the parties as to the application of the mid-point presumption to the riparian lands sold to the Crown, the remaining substantive issues to be determined would be whether the Crown owed legally enforceable fiduciary duties to the Maori vendors and whether the transfer and receipt of that part of the riverbed was in breach of those duties. In respect of these grounds, too, the appellants' case faces difficulties.

[178] The appellants' case essentially rests on two propositions:

(a) the mid-point presumption applied to the grant of titles by the Native Land Court and the subsequent transfer of title to the Crown by the Maori owners of the riparian land; and

(b) this operation of the mid-point presumption was inconsistent with the Maori owners' understanding of ownership of the riparian land and the riverbed, so that acquisition of title by the Crown was in breach of fiduciary duties owed to the vendors.

[179] These propositions are, however, inconsistent. As I have indicated, the argument for application of the mid-point presumption depends on its consistency with the understanding and intentions of Maori; only if the attendant facts and

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[333] See the judgment of Elias CJ at [15], [18], [25] and [126]–[144]; the judgment of William Young J at [236]; and the judgment of Glazebrook J at [317]–[318].

custom are consistent with its application can it apply. If the mid-point presumption was consistent with Maori custom, that is, in my view, inconsistent with the Crown acquiring title in breach of a fiduciary duty, even if it were established that one was owed. In other words, if there were a fiduciary duty, it could not be breached by the absence of a warning in a situation where the Crown acted in a way consistent with the vendor's understanding.[334]

[180] On the other hand, if the mid-point presumption was inconsistent with the custom of the Maori vendors, then the Crown could not have acquired title by operation of the presumption and, again, there cannot have been any breach of a fiduciary duty. The principle would not have applied to the Native Land Court titles granted to the riparian owners, so that the vendors would not have had title to the mid-point that could be transferred to the Crown, and customary title to the river may be unextinguished.[335]

[181] In short, the theory of the appellants' case is an illogical one. I do not consider it is open to the Court in constitutional litigation of this kind to deal with a case founded on such internal contradiction, particularly without proper argument on the legal and factual issues surrounding the application of the mid-point presumption. The proper course is to find that the parties have not persuaded the Court that their case rests on a secure footing and to dismiss the appeal.

Fiduciary duties

[182] These reasons are sufficient to dispose of the appeal without attempting to resolve the issue of whether the Crown owed in the circumstances of this case, or may owe in those of other cases, enforceable fiduciary or relational duties to Maori. I prefer not to express a view on this question, but identify some of the considerations which, in my view, should inform the courts' approach if and when the issue falls to be decided.

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334 See the judgment of Elias CJ at [15], the judgment of William Young J at [236], and the judgment of Glazebrook J at [320].

335 See the judgment of Elias CJ at [25], the judgment of William Young J at [236], and the judgment of Glazebrook J at [321].

[183] The first consideration is the characterisation by the Court of Appeal of the Treaty of Waitangi as giving rise to a relationship in the nature of a fiduciary relationship. In his judgment in *New Zealand Maori Council v Attorney-General* (the *SOE case*), Cooke P said that the Treaty signified a "partnership between races".[336] The relationship between the Treaty partners created "responsibilities analogous to fiduciary duties",[337] including a reciprocal duty to act "reasonably and with the utmost good faith".[338] Richardson J, in the fullest discussion of the point, identified reciprocal obligations of good faith as the "paramount principle" of the Treaty.[339] Somers J said that "each party to the Treaty owed to the other a duty of good faith" of the kind that civil law partners owe to each other.[340] Casey J saw "the expectation of good faith … in the way that the Crown exercises the rights of government ceded to it" as implicit in the "ongoing partnership" formed by the Treaty.[341] Bisson J saw the Treaty as involving an assurance by the Crown of "utmost good faith" in the manner in which Maori rights should be guaranteed.[342]

[184] Accordingly, as Cooke P subsequently put it, all members of the Court of Appeal held that:[343]

> … the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.

[185] These descriptions of the Treaty relationship arose out of the Court of Appeal's identification of the principles of the Treaty to be applied, as required by s 9 of the State-Owned Enterprises Act 1986, in assessing whether foreshadowed action by the Crown would be inconsistent with the Treaty principles. The analogy to a partnership, in particular, was drawn for the purpose of characterising the nature of the relationship between the Crown and Maori. The Judges of the Court of Appeal were not concerned with the enforceability of the Treaty nor with the obligation of good faith identified, other than through application of the statutory

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336 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [the *SOE case*] at 664.
337 At 664.
338 At 667.
339 At 680–681.
340 At 693.
341 At 703.
342 At 715.
343 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304.

provision before the Court.[344] This context is relevant in considering the significance of the *SOE case* and its references to fiduciary duties to the broader question of whether the Crown has enforceable fiduciary obligations to Maori.

[186] The next consideration is that the unique nature of the relationship between the Crown and Maori may mean it is appropriate to recognise the existence of a sui generis fiduciary duty even though the application of general equitable principles developed in relation to private commercial transactions or relationships may not give rise to such a duty. There are obiter references in judgments of the Court of Appeal delivered by Cooke P subsequent to the *SOE case* to the possibility that the Crown may owe Maori a fiduciary duty under New Zealand law.[345] These dicta indicate that while the Treaty of Waitangi provides "major support" for the existence of such obligations in New Zealand,[346] recognition of a duty would not mean that the Treaty is being directly enforced in the domestic courts. Rather, a sui generis fiduciary duty would arise between the Crown and certain Maori, in the circumstances of particular situations, and against the background of the relationship constituted by the Treaty of Waitangi.

[187] What is said in these judgments, which have been the subject of further discussion in subsequent cases,[347] can be expected in the future to be the basis of further consideration, in a case which requires it, of whether the Crown may owe Maori an enforceable fiduciary or relational duty, and its scope.

[188] It can also be expected that regard will be had to recognition in Canada of the existence of specific and enforceable fiduciary duties owed by the Crown to

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344 See the *SOE case*, above n 336, at 655-656 per Cooke P, at 672 per Richardson J and at 691–692 per Somers J.

345 *Wharekauri Rekohu*, above n 343, at 304. See also *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655; and *Te Runanganui o Te Ika Whenua Inc v Attorney-General* [1994] 2 NZLR 20 (CA) at 24.

346 *Wharekauri Rekohu*, above n 343 at 306.

347 Including the sharply contrasting views expressed by the Court of Appeal in both the Te Arawa case, *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA) at [65]–[66] and [81]; and in the present case: *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [105]–[118].

indigenous peoples.[348] The Supreme Court of Canada has said that the existence and content of the duty will depend on the circumstances and the interests at stake.[349]

[189] The third matter that is likely to require consideration is the limit on the constitutional capacity of courts to develop the common law in fields that have been addressed by the legislature. The role of the Supreme Court includes the development of the common law of New Zealand. Furthermore, one of the purposes of the Supreme Court Act 2003 in establishing this Court was:[350]

> to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions.

[190] It is Parliament, however, that has full power to make laws under our constitutional arrangements.[351] The Supreme Court Act itself recognises New Zealand's commitment to the sovereignty of Parliament, as well as to the rule of law.[352] An Act of Parliament is the superior law that prevails over any inconsistent laws made by the executive or judicial branches of government. The constitutional position of the courts is different. As Kirby J once said: [353]

> At whatever level they may be in the hierarchy, judges of the common law tradition, are aware of the superior right of the legislature and its special legitimacy to make laws within its constitutional competence, particularly involving major changes to the law.

[191] It follows that the courts should not develop the common law in a manner inconsistent with legislation. Furthermore, where Parliament has legislated in a certain area, the courts must consider whether development of the law may be more appropriately left to Parliament.

[192] When, in the future, a case that involves circumstances giving rise to an arguable case of fiduciary duty comes before the New Zealand courts, one issue that

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348 See, for example, *Guerin v R* [1984] 2 SCR 335, particularly at 383–388; *Blueberry River Indian Band v R* [1995] 4 SCR 344; and *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [73]–[74].

349 See *Wewaykum Indian Band v Canada*, above n 348, at [83].

350 Supreme Court Act 2003, s 3(1)(a)(ii).

351 As recognised in s 15 of the Constitution Act 1986.

352 Supreme Court Act, s 3(2).

353 Michael Kirby *Judicial Activism: Authority, Principle and Policy in Judicial Method* (Sweet and Maxwell, London, 2004) at 69–70.

the courts will have to address is whether the development of New Zealand's common law to recognise a directly enforceable duty of good faith in the context of the relationship of the Crown and Maori would cut across the statutory scheme established in the Treaty of Waitangi Act 1975 for recognising and providing remedies for breaches of the Treaty of Waitangi.

[193] The Treaty of Waitangi Act establishes the Waitangi Tribunal to receive and inquire into both historic and contemporary claims of Treaty breach.[354] Where breach of the Treaty principles is established, the Tribunal may make recommendations to the government as to the appropriate redress and remedies.[355] In general, because the Tribunal process is a recommendatory one, whether and what redress ultimately will be provided to Maori claimants is a decision for the government, with outcomes usually being the result of settlements between the Crown and Maori claimants.

[194] Importantly, the Tribunal process provided for in statute overcomes limitation problems and evidential difficulties inherent in historic claims and apparent in the present appeal. The Tribunal is better placed than the courts to overcome these difficulties and to fashion appropriate remedies for the modern age.

[195] As well, since the inclusion of s 9 in the State-Owned Enterprises Act, Parliament has regularly included in legislation provisions that give recognition in varying ways to the Treaty and its principles. In cases concerning such provisions, as Cooke P once said, "[i]f the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity".[356]

[196] In this field, as in all others, it is necessary that the courts do not frustrate legislative mechanisms or render statutory remedies redundant by developing alternative laws that go beyond the scope of what is available under statute. This is not to say that the courts should not, where circumstances require, consider the need

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354 Treaty of Waitangi Act 1975, s 5. The scope of its jurisdiction to receive historical and contemporary claims is set out in ss 6–6AA.

355 There have been refinements of the statutory scheme, including conferring on the Tribunal a power in some situations to order resumption of land that has been transferred to a state enterprise: see ss 8A–8C and 8HB–8HC.

356 The *SOE case*, above n 336, at 668.

for development of the common law of New Zealand in relation to the reciprocal fiduciary obligations that the Crown and Maori owe to each other. Rather it means that, in cases where they are required to do so, the courts should ensure that the law is not developed in a way that frustrates applicable statutory schemes.

Conclusion

[197] For the reasons given, it is not necessary in the present case to resolve the question of whether or not a fiduciary relationship can exist between the Crown and Maori, giving rise to duties, including of good faith, enforceable in the courts. I would hold that the appellants do not have a tenable argument for the relief that they seek. I would dismiss the appeal. I agree with what the Chief Justice says as to costs.[357]

[357] Above at [167].

WILLIAM YOUNG J

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Ownership of the Waikato River

[198] This case concerns a large block of land at Pouakani, near Mangakino and adjacent to the Waikato River. In the 1880s, the then Maori owners of Pouakani applied to the Native Land Court to have titles created. The land in issue in the case became vested in, or was transferred to, the Crown at various dates between 1887 and 1899.

[199] The appellants, suing as descendants of the owners recognised by the Court, say that, unbeknownst to those owners, this process resulted in the Crown acquiring the riverbed adjacent to the land it purchased; this by operation of a rule of the English common law whereby a conveyance of riparian land is presumed also to transfer title to the adjacent riverbed up to its mid-point. This rule has a Latin tag, *usque ad medium filum aquae*, but I will refer to it as "the mid-point presumption".

[200] The appellants say "the Crown" (that is, the Crown officials involved in the purchases) should have warned the Maori owners about this presumption and failed to do so. Their case is that the obligation to warn arose by reason of the nature of the relationship between the Crown and the Maori owners. The appellants assert that the Crown now holds the land on a constructive trust (or perhaps on a resulting trust) in favour of the appellants. The appellants seek a declaration to that effect, but their counsel, Mr Millard QC, confirmed that the remedies they would ultimately seek, if successful, were proprietary and monetary remedies.

[201] The specific declaration sought by the appellants is:

> … that, to the extent the Crown has claimed ownership of the river bed of the Waikato River adjacent to the [relevant] Blocks … under the principle of ad medium filum, the Crown holds such river bed of the Waikato River as constructive trustee for the Pouakani People (being all the persons accepted by the Maori Land Court as being a [descendant] of the original owners of the Pouakani Block).

[202] The terms of the constructive trust argued for are that the Pouakani people should (among other things):

> (a) Have access to and use of the bed of the Waikato River adjoining the River Land;

(b) Be consulted on all uses of the Waikato River adjoining the River Land;

(c) Receive any benefit whether by way of payments, or otherwise, that the Crown or anyone claiming through it directly or indirectly obtains or has obtained from the use and/or rights to the bed of the Waikato River adjoining the River Land; and

(d) Be entitled to call for the return of such land.

[203] In the High Court, the appellants' claim failed on a number of grounds.[358] Harrison J found that the claim was barred by the terms of the Pouakani Claims Settlement Act 2000 (Settlement Act).[359] He also found that the Waikato River as a whole was a navigable river,[360] with the consequence that the bed of it was "deemed to have always been vested in the Crown" by virtue of s 14 of the Coal-mines Act Amendment Act 1903 (the 1903 Act). He further held that the Crown did not owe a fiduciary (or similar) duty at large to indigenous people or a group of them.[361] Any claim would, in any event, be barred by reason of the effluxion of time.[362]

[204] The appellants' appeal to the Court of Appeal failed.[363] The Court of Appeal disagreed with Harrison J as to his finding that the claim was barred by the Settlement Act.[364] But it agreed with him that the Waikato River was navigable for the purposes of the 1903 Act[365] and it further considered that even if it could be established that the Crown owed a fiduciary duty, it was far from clear that there was a breach of it.[366] However, the Court of Appeal did explore the possibility of recognising a relational duty of good faith with respect to Crown-Maori relations,[367] though it concluded there was a lack of factual material to allow the Court to determine whether there was a sustainable breach in this case.[368] But even assuming a breach of fiduciary or relational duty in respect of Crown-Maori relations, the Court of Appeal did not consider it possible to impose a constructive trusteeship on

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358 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [178].
359 At [36], [41], [48] and [178].
360 At [104]–[106].
361 At [122] and [141].
362 At [167]–[177].
363 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 [*Paki* (CA)] at [121].
364 At [19]–[20].
365 At [85].
366 At [95].
367 At [106]–[112].
368 At [118].

the Crown given the accretion of interests in the river over the course of a century and the problems of demarcation.[369]

[205] The appellants sought leave to appeal to this Court. This Court granted leave on six grounds.[370] The Court ordered that the first two leave grounds should be argued first. If the appellants lost on one or other of those, the claim would fail. The first phase of the appeal was heard in 2011, judgment being delivered in 2012.[371] As to standing, the Solicitor-General made clear "that the Crown concern [was] not properly with standing to bring the representative claim but with identification of those who would succeed to the original owners for the purposes of any remedy by way of constructive trust".[372] The second ground questioned the lower Courts' concurrent findings that the Waikato River was navigable for the purposes of the 1903 Act. On this point, the appellants won, this Court holding that the particular stretch of the Waikato River with which this case is concerned was not navigable within the meaning of the 1903 Act.[373]

[206] The second phase of the hearing of this appeal was concerned with the remaining four leave grounds. These were:

> (iii) [If s 14 of the Coal-mines Act Amendment Act did not vest title in the riverbed adjoining the Pouakani lands in the Crown], did the Crown acquire title to the claimed part of the riverbed through application of the presumption of riparian ownership *ad medium filum aquae* by reason of its acquisition of the riparian lands?
>
> (iv) If so, in the circumstances in which the Crown acquired the claimed part of the riverbed, was it in breach of legally enforceable obligations owed to the owners from whom title was acquired?
>
> (v) If so, have the [appellants] lost their right to enforce such obligations by reason of defences available to the Crown through lapse of time?
>
> (vi) If not, what relief is appropriate?

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369 At [119].
370 *Paki v Attorney-General* [2010] NZSC 88.
371 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 [*Paki (No 1)*].
372 At [12].
373 At [89] per Elias CJ, Blanchard and Tipping JJ, and at [118] per McGrath J.

An assumption at the heart of the appellants' case

[207] It is important to recognise that the appellants do not claim as descendants of the customary owners of the relevant portion of the Waikato River. Rather they say that their ancestors obtained title to the riverbed when they acquired title to the adjoining land; this by operation of the mid-point presumption. It is the loss of the title so obtained which is at the heart of their case.

[208] The appellants had little choice as to the way in which their case has been framed. In the first place it would be difficult and perhaps impossible now to identify customary owners in relation to the river other than the owners of the riparian land recognised by the Native Land Court. As well, such claims would run up against the restrictions on claims against the Crown in relation to land in customary ownership which were introduced by ss 84 to 87 of the Native Land Act 1909 and which in a sense are reflected in the current stringent limitation rules which are specific to such claims.[374] As the Chief Justice has explained in her reasons, the results of the litigation over the ownership of the bed of the Whanganui River which we both discuss in detail had a significantly constraining effect on the forensic options of the appellants. In particular it appears that it was because of this case that the appellant's did not persist with proceedings in the Maori Land Court for investigation of title to the riverbed.

[209] I note in passing that, under Te Ture Whenua Maori Act 1991, the appellants may seek a determination from either the Maori Land Court[375] or the High Court[376] that the riverbed is Maori customary land and, if it is held to be Maori customary land, an investigation by the Maori Land Court as to title.[377] A determination that the riverbed is Maori customary land would involve a reassessment by the Maori Land Court or High Court of the questions whether mid-point presumption applied and, if so, whether it was rebutted in respect of the transactions in issue in the present case. Beyond that, I have no view as to the ability of the appellants to obtain such a determination including as to the relevance (or otherwise) of their continuing

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374 See ss 360 and 361 of the Te Ture Whenua Maori Act 1993, now replaced by s 28 of the Limitation Act 2010.

375 Te Ture Whenua Maori Act, s 13(1).

376 Section 131(3).

377 Section 131(1).

association with the river and the significance (or otherwise) of adverse possession and the effluxion of time.

[210] The Crown, in its submissions, noted that the appellants' case depends on: (a) the application in favour of their ancestors of the mid-point presumption, but (b) a deprecation of its application in relation to the later transfers by their ancestors. But, apart from noting this apparent incongruity, the Crown did not challenge the underlying premise of this part of the appellants' case, namely that the creation of titles by the Native Land Court processes were subject to the mid-point presumption which was not displaced and that, accordingly, the original grantees obtained title to the mid-point of the river.

[211] I see this aspect of the case as raising rather more complexity than was recognised in the course of argument.

[212] In the first place, for reasons I will shortly give, it is at least uncertain whether the mid-point presumption generally applied to the titles created by the Native Land Court and, if so, whether it applied in relation to the Pouakani blocks and was not displaced.

[213] Secondly, there is a distinct element of the artificial in the formulation of the claim. It is not very likely that the appellants' ancestors thought that their rights in relation to the river were based on the application (and non-displacement) of the mid-point presumption. A far more plausible view of the facts is that they assumed that customary rights to the river were unaffected by the creation of titles. On this basis, the appellants' case proceeds along these lines:

(a) Contrary to the understanding of the original grantees of the Pouakani blocks, the titles created by the Native Land Court extinguished customary rights in relation to the river and they obtained title to the riverbed under the mid-point presumption.

(b) On the later alienation of the Pouakani blocks, the Crown obtained title to the riverbed under the mid-point presumption with the

appellants' ancestors assuming that customary rights to the river still persisted.

Viewed in this way, the appellants' complaint is that their ancestors were deprived of rights which they never realised they had. Underlying this formulation of the claim might be thought to be a different grievance, namely that the processes by which titles were created and the blocks were later sold resulted in the inadvertent loss of customary rights. Such a grievance, however, is not before this Court. And given my reservations as to the operation of the mid-point presumption in relation to these blocks, it is not clear to me that these processes did result in the loss of customary rights.

[214] As noted, the Crown did not make much of this point. Indeed, it contends that the mid-point presumption applied to its Pouakani purchases and thus applied also to the creation of titles by the Native Land Court. Given the absence of a contest on the point, it would not be right for this Court to seek to determine the question. On the other hand, the lack of clarity as to the application of the mid-point presumption and its non-displacement adds more uncertainty to the factual issues as to the understanding of the parties at the time of the Crown purchases, a point to which I will return later in these reasons.

[215] Finally, as will become apparent, there is also something of an anomaly associated with this assumption which may not be able to be resolved logically in favour of the appellants. My explanation for this is deferred[378] because it depends on an understanding of the New Zealand authorities on the application of the mid-point presumption which I discuss later in these reasons.

A class action?

[216] The appellants are running what is in essence a class action. The members of the class can be taken to be the original vendors. All are now dead. There is virtually no evidence as to their individual personal circumstances, for instance their understanding of English, their literacy or where they lived. There is no evidence as

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[378] See at [235]–[236] below.

to what the individual vendors thought about title to the river – for instance whether they thought their rights in relation to the river survived the sale of the riparian land. Instead, the appellants treat the vendors as a homogenous group, the characteristics and thinking of which they derive from historical evidence of a general nature, for instance as to the location of schools in the area, customary Maori usage of the river before the issue of titles, Maori thinking about rivers and so on.

[217] It is, of course, not particularly likely that the vendors all thought alike. So to the extent that the appeal turns on conclusions as to what the individual vendors thought, the case is distinctly artificial.

The creation of title to, and vesting in the Crown of, the Pouakani blocks

[218] The original Pouakani block was created in 1886 as part of the hearings into the Tauponuiatia Block initiated by Te Heuheu Tukino and others on behalf of Ngati Tuwharetoa. It was subdivided into five parcels in September 1887, one of which was Pouakani No 1. This block was valued at £2,000. The Court vested this block in the Crown in recompense for payment of survey and other costs of £1,650. The £350 difference between the value of the land and the costs was paid to 17 of the owners of the block. The order of the Court was made pursuant to s 6 of the Native Land Act Amendment Act 1877.[379] This section provided that:

> … all lands declared in such order to be the property of, or to have been acquired by or on behalf of, Her said Majesty shall, from the date of such order, be deemed to be absolutely vested in Her said Majesty, her heirs and successors, for such estate or interest (if any) as in the said order may be declared.

The operative words of the Court order were as follows:

> … it appears to the Court that her Majesty has acquired an absolute estate of inheritance in the piece of land delineated in the plan indorsed hereon … and the Court hereby declares the same to have been acquired by and to be the property of her Majesty.

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379 This Act was repealed by the Native Land Court Act 1886 but continued to apply to proceedings which were already underway under s 115 of the Native Land Court Act.

[219] Save in relation to Pouakani No 1, the 1887 orders of the Native Land Court were nullified by the Native Land Court Acts Amendment Act 1889.[380] This was because there was controversy and doubt as to whether certain claims which had been dismissed had been appropriately dealt with. The claims to the balance of the block were heard again and determined in 1891 and this resulted in the creation of, inter alia, four additional blocks of land adjoining the river, being Pouakani B6, B8, B10 and C3.

[220] Pouakani C3, B8 and B10 were acquired by the Crown in March 1892.

[221] The Court recognised 242 owners in relation to Pouakani B6. The Crown subsequently acquired the interests of 162 of those owners and sought to have the interests it had acquired partitioned off from the balance of the block. This resulted in the creation of Pouakani B6A in 1899 by order of the Native Land Court. Part of the balance of this block (styled Pouakani B6E) was adjacent to the river. Pouakani B6E was vested in Werohia Te Hiko. She had acted on behalf of Ngati Wairangi during the Native Land Court hearings in 1890 to 1891 and at the 1899 partition hearing had presumably asked for her interest in what had been Pouakani B6 to be carved out into a block of riparian land.

Did the mid-point presumption apply to the Pouakani block titles created by the Native Land Court?

The mid-point presumption

[222] At common law, the mid-point presumption applied to transfers of land adjacent to non-tidal rivers, lakes and roads. The presumption and the general principles as to its application as developed in England and Wales are discussed in the first *Paki* judgment of this Court.[381] Also discussed in that case are (a) the limits of the presumption, in particular in relation to tidal rivers and estuaries, (b) how it operated in conjunction with public rights of way (in relation to rivers which were public highways) and sometimes private rights of way, and (c) when the presumption might be rebutted.

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380 Section 29.

381 *Paki (No 1)*, above n 371.

[223] For reasons canvassed in that judgment, the mid-point presumption was not an obvious candidate for adoption in New Zealand. The history, social conditions, transport networks and topography of England from which the presumption emerged were very different from those of 19th century New Zealand. And in particular, given the significance of rivers to Maori, their lack of familiarity with common law concepts, the informality which tended to surround land purchases from Maori and the limitations of contemporary surveying practice, there was good reason for not applying the presumption to rivers which were significant to Maori.

[224] The Court of Appeal decision in *Mueller v The Taupiri Coal-Mines (Ltd)* established that the mid-point presumption was part of New Zealand law albeit that the majority concluded that its application in that case had been displaced.[382] The legislature responded to the judgment with s 14 of the 1903 Act which declared that the beds of navigable rivers were to "remain and shall be deemed to have always been vested in the Crown".

[225] The riparian land and the stretch of the Waikato River which were in issue in *Mueller* had been confiscated by the Crown as a block, so the Court was not concerned with the application of the presumption to transfers by Maori of riparian land. Whether the presumption did apply to such transfers was not addressed in any detail until the 1950s and 1960s. This was in the context of litigation over ownership of the bed of the Whanganui River to which I now turn.

The Whanganui River litigation

[226] The litigation had a convoluted history which requires some explanation.[383] It began in 1938 with an application by Titi Tihu and others to the Native Land Court for an investigation of the title to the Whanganui riverbed. That Court decided first to determine whether the riverbed was in customary ownership when the Treaty of Waitangi was signed, with individual claims to be deferred until that issue was resolved. On 20 September 1939, Judge Browne held that the bed of the river from

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382 *Mueller v The Taupiri Coal-Mines Ltd* (1900) 20 NZLR 89 (CA) at 109 and 113 per Williams J (Conolly J concurring); at 114–115 per Edwards J, and at 126–127 per Martin J. Stout CJ dissented: see at 111–112.

383 A fuller analysis is provided in chapter 7 of the Waitangi Tribunal's *The Whanganui River Report* (Wai 167, 1999).

its tidal limit at Raorikia to the junction with the Whakapapa River had been in customary ownership when the Treaty was signed.[384] It is appropriate to record some of his conclusions:[385]

> The bed of the Wanganui river belonged to the Natives through whose territory it ran just as much as the land forming its banks did. The test is the fact that if one of the outside tribes had claimed to make use of the bed for the purpose of erecting patunas … the claim would without doubt have been strenuously resisted by the local people and would probably have resulted in bloodshed.
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> …
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> In the Court's opinion, so far as the Maoris are concerned, these rights [being rights of fishing, navigation and domestic use of water], in the case of this River, follow as a matter of course and are incidental to the ownership of the bed of the river and cannot in any way be separated from that ownership. This Court, in all its experience of Native land and the investigation of the titles thereto, never once heard it asserted by any Maori claimant that the ownership of the bed of a stream or river, running through or along the boundaries of the land the subject of investigation, whether that Stream or River was navigable or not, was in any way different from the ownership of the land on its banks. Nor has it ever heard it denied that the tribes or hapus that owned the land on the banks of a stream or river had not the exclusive right to construct eel weirs or fish traps in its bed or exercise rights of ownership over it. The river bed being a source of food in ancient times would be looked upon as [a] highly important asset to any tribe and the right to it would be very jealously guarded by the members of that tribe.

An appeal by the Crown to the Maori Appellate Court was dismissed in December 1944.[386]

[227] In *The King v Morison*, the Supreme Court, on the application of the Crown, made orders preventing any further hearing in the Maori Land Court.[387] This was on the basis[388] that any claim to title was precluded by s 14 of the Coal-mines Act Amendment Act.[389] From the point of view of the claimants, the implication of *Morison* was that s 14, despite its declaratory form, had been confiscatory in substance. Unsurprisingly some dissatisfaction was expressed.

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384 *Wanganui River, Investigation of Title to its Bed* (Judge Browne, 20 September 1939).

385 At 2.

386 *Wanganui River* (1944) 11 Whanganui Appellate MB 111.

387 *The King v Morison* [1950] NZLR 247 (SC).

388 The Crown had also argued that the mid-point presumption applied and that, in consequence, the Maori Land Court had already investigated the title to the bed and that any customary interests had been extinguished. The Judge (Hay J) did not express a conclusion on this point.

389 *The King v Morison*, above n 387.

[228] As a response to that dissatisfaction – and also to avoid appeals – the government appointed a Royal Commission in 1950 to determine whether Maori had been owners of the bed of the river before the 1903 Act and, if so, whether any Maori had suffered loss by reason of the 1903 Act which would, in equity and good conscience, entitle them to compensation. Sir Harold Johnston, a retired judge, was appointed as the sole commissioner. In his report, he concluded that:[390]

> But for the Coal Mines Act, the bed of the river would be owned by the Wanganui Maoris, as it was at the time of the signing of the Treaty of Waitangi.

Sir Harold felt unable to identify the Maori owners of the riverbed in 1903 and he recommended that that issue be referred to the Maori Land Court and that compensation should then be assessed.[391]

[229] Sir Harold's recommendations were not accepted. Instead s 36 of the Maori Purposes Act 1951 was enacted. This provided for the Court of Appeal to determine ownership – as it was before the enactment of the 1903 Act – of the bed of the river from its tidal limit at Raorikia to the junction with the Whakapapa River. The Court was entitled to have regard to the evidence produced before (a) the Native Land Court, (b) the Supreme Court in *The King v Morison*, and (c) Sir Harold Johnston. It was also able to take into account such other evidence as it thought fit to consider.

[230] The case was first considered by the Court of Appeal in 1954. In a judgment released the following year, a majority held that at the time of the Treaty of Waitangi the bed of the river was land held by the "Wanganui Tribe … in accordance with their customs and usages".[392] But the majority was unable to determine whether that position still obtained in 1903. The Crown argument was that the tribe's customary ownership had been displaced by grants of title to the land adjoining the river and this argument required consideration of two issues: first, whether the mid-point presumption applied to grants of riparian title made by the Native Land Court and, if

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390 Sir Harold Johnston "Report of the Royal Commission on Claims Made in Respect of the Wanganui River" [1950] 27 AJHR G2 at 13.

391 At 20.

392 *Re Bed of the Wanganui River* [1955] NZLR 419 (CA) at 425 per Hutchison J; at 432 per Cooke J, and at 463 per North J. The Court rejected the Crown argument that, on the acquisition of sovereignty, the riverbed became the property of the Crown, subject only to Maori rights to fish and take water and to navigate the river in common with members of the public.

so, whether the presumption had been rebutted on the facts. On the first of these issues, the Judges in the majority expressed no concluded view and on the second they considered that further information was required.

[231] The result was that questions were referred by the Court of Appeal to the Maori Appellate Court.[393] The answers it provided were generally consistent with those expressed by Judge Browne in 1939. In particular the Appellate Court noted:[394]

> … nowhere in the evidence, both oral and documentary, which has been put before us, can we find that any suggestion was ever made to the Maori Land Court prior to the hearing before Judge Browne that there was a separate take to the river … . We would think it reasonable to suppose that, if there were, in Maori eyes, a dominion or ownership of the river based upon a take distinct and separate from that of the lands upon its banks, some such assertion would have been made long since and recorded in the minute books of the Maori Land Court relating to the investigations of title to the lands. There being no evidence of such an assertion having been made in those days by persons who would have been more qualified, in our opinion, to make it than those who made such assertion in and since 1938, we concluded that such recent testimony has insufficient value, standing alone, upon which the Court can express an opinion in favour of the Maori claimants.

[232] When the case came back before the Court of Appeal the claimants case rested on a number of considerations including the following:

(a) Prior to 1938 – and the proceedings by Titi Tihu and others in relation to the bed of the Whanganui River – the Maori Land Court (and its predecessor the Native Land Court) had never investigated ownership of the bed of a river.[395] Instead the Court addressed the usage of rivers only to the extent to which it was relevant to title claims to the adjoining land.[396]

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393 A course which was provided for by amendments made to the Maori Purposes Act 1951 by s 6 of the Maori Purposes Act 1954.

394 *Memorandum of the Maori Appellate Court on the matter of a case stated by the Court of Appeal relating to the bed or portions of the Wanganui River* (Judges Prichard, Smith, O'Malley, Jeune and Brook, 6 June 1958) [*Memorandum of the Maori Appellate Court* (1958)] at 2.

395 See *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) at 604. There had been claims in relation to the ownership of the beds of lakes.

396 *Memorandum of the Maori Appellate Court* (1958) above n 394, at 7. For instance, ownership of an eel weir would be evidence of ownership of the river bank to which it was affixed.

(b) It follows that titles in relation to riparian land issued as a result of orders of the Maori Land Court were not based on any assessment as to the extent to which those issued with titles enjoyed customary and exclusive rights in relation to the adjoining river.

(c) The evidence as to usage of the Whanganui River, particularly in respect of eel weirs and fish traps and to some extent as to navigation, suggested customary use of particular stretches of the river was not confined to those who had customary title to the adjacent river banks.[397]

(d) The rights recognised when titles were issued were of a local or hapu character and broader tribal interests had never been addressed.[398]

[233] In its second judgment, the Court of Appeal generally concluded that exclusive customary rights in relation to a river were held by those with customary rights of occupation of the adjoining river banks. The remarks of Judge Browne which I have set out, along with rather similar remarks made by members of the Maori Appellate Court in 1944 and 1958 (particularly those set out above), were seen by the Court of Appeal as showing that there could not be an ancestral right (or *take tupuna*) to the river which was distinct from the ancestral rights of the hapu who occupied its banks.[399] Use of the river for eel weirs and fish traps by those without customary rights over the adjoining land did not detract from this conclusion. Instead such usage was seen as based on a system of "give and take".[400] A similar approach was taken in respect of navigation, which was seen as having been permitted between hapu on the basis of comity.[401] The mid-point presumption was thus seen as being broadly congruent with Maori custom.[402] Such broad congruence was enough as titles issued as a result of Maori Land Court determinations could only be an approximation – and a rough one at that – of the underlying customary

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397 At 607 per Gresson P, and at 617 per Cleary J.
398 At 604–605.
399 At 609 per Gresson P, at 618 per Cleary J, and at 625 per Turner J.
400 At 609 per Gresson P. See also at 616 per Cleary J.
401 At 609 per Gresson P, and at 616 per Cleary J.
402 At 619 per Cleary J.

rights. Given all of these considerations, the Court of Appeal saw the mid-point presumption as appropriate and not rebutted.

[234] What seems to be an alternative approach was also indicated in one of the answers given by the Maori Appellate Court in 1958. It was responding to the suggestion that it would have been possible for the Whanganui tribe to obtain a tribal title under s 23 of the Native Lands Act 1865 to its entire district, including the bed of the river:[403]

> Such order or orders would have been founded upon the claims made by the tribe according to its ancestral and other rights under Maori custom, leaving the claims of the hapus to their respective territories to be determined later by partition or other appropriate proceedings as they made applications to the Court for that purpose.
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> But this procedure was not followed, either by the Maoris themselves or by the Court. On the contrary, the sub-tribes or smaller groups themselves made applications to the Court to be awarded the respective areas of the tribal lands that were in their occupation according to the internal rules of the tribe, whatever they may have been, not being inconsistent with Maori custom as found by the Court. All this took place, not at the one time, but over a period of years extending from the year 1866 to the end of that century. In the practical result, therefore, the original or tribal right, not being insisted on by the tribe, was being converted by these processes into the recognised rights of the sub-tribes or smaller groups as they obtained freeholds in fee simple from the Court.

[235] The appellants rely on the second Court of Appeal decision as establishing that the mid-point presumption applied to titles issued by the Native Land Court. And, at least implicitly, they must also rely on the same decision as establishing, or at least supporting, the proposition that the mid-point presumption was not displaced in relation to the Pouakani titles. This approach, however, is problematical. This is because the Court of Appeal's reasons for concluding that the mid-point presumption applied and was not displaced included the conclusion that the presumption was consistent with Maori thinking.

[236] If the Court of Appeal's conclusions as to Maori thinking about rivers were correct and applicable to the Pouakani vendors, those vendors would have realised that their rights in relation to the river would not survive the sale of the riparian land. If so, they were not in a practical sense under any misapprehension as to the effect of

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403 *Memorandum of the Maori Appellate Court* (1958), above n 394, at 4.

the sales.[404] On the other hand, if the Court of Appeal's approach to Maori thinking about rivers was wrong (or not applicable to the Pouakani vendors), it might be thought to follow that the correct position is either that the mid-point presumption did not apply to the river adjacent to the Pouakani blocks, or had been displaced. Either way, the appellants' case might be thought to fail.

The Whanganui River Report

[237] The approach taken by the Court of Appeal in the second of its judgments has been trenchantly criticised by the Waitangi Tribunal.[405] These criticisms are at a number of levels.

[238] In part, the criticisms proceed on the basis that the Court of Appeal and the Maori Appellate Court got their facts wrong by overstating the importance of local or hapu interests and thus local uses of the river and downplaying the practical significance of the overarching tribal interest in the river as an entity. As well, there is a criticism of the courts for deliberately eschewing symbolic and cultural considerations in favour of an approach which focused on utilisation. And more generally still, there is criticism of the Native Land system which operated from 1866 on the basis of policy settings which were antithetical to the recognition of broad tribal interests.[406]

[239] The view of the Waitangi Tribunal is that the mid-point presumption should never have been applied to the Whanganui River and indeed that it generally should not have been applied to any significant New Zealand rivers and that, if it did apply, it should have been held to have been rebutted.

The Waikato River adjacent to the Pouakani blocks

[240] The stretch of the Waikato River which is in issue in the present case commences just downstream of the Waipapa Stream and finishes at the Waipapa River. In its unmodified state, it included the Ongaroto Rapid, the Whakamaru

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404 Presumably they would have assumed that their rights were customary rather than derived under the mid-point presumption but this is of no practical significance.

405 Waitangi Tribunal *The Whanganui River Report*, above n 383.

406 At 276–278.

Gorge (which ran for approximately 7 kms), the Moanakarakia Rapids and the Maraetai Gorge. Access to the river was made difficult by the gorges just referred to and these problems were exacerbated by the topography associated with the rivers which ran into the Waikato, particularly a gorge on the Mangakino River and a ravine though which the Waipapa River ran.

[241] The river was used by local Maori as a food source. Adjacent to the river were some hot springs which permitted the growing of kumara, a crop which otherwise could not be grown in the district. There were islands in the river on which there were pa and urupa although there is no evidence that these islands were permanently occupied. Canoes were used on the calmer stretches of the river including for river-crossings. The local hapu, occupied both sides of the river which was not in any sense a boundary. The primary areas of permanent settlement were away from the river where the land was more fertile. It is uncertain whether there was any permanent settlement on the river bank. If there was such permanent settlement, it was limited.

[242] The nature of the Waikato River in the vicinity of the Pouakani blocks was thus very different from the stretch of the Whanganui River in issue in the Whanganui riverbed litigation. In particular, it was not used for navigation other than locally. Access to any portion of it was practically dependent upon access to its banks in the near vicinity. As well, there is no suggestion in the evidence of a broad tribal interest in the river running alongside, but distinct from, the hapu interests which were recognised by the Native Land Court.

[243] If the reasoning adopted by the Court of Appeal in the Whanganui riverbed litigation is correct, it applies a fortiori in the present case. As well, at least some of the criticisms which the Waitangi Tribunal has advanced in respect of that reasoning are not applicable in the present context. So there is certainly a reasonable case to be made for the view that, as a matter of law and on the rather limited facts, the mid-point presumption was applicable to the Pouakani titles issued by the Native Land Court.

[244] There is, however, a reasonable case to be made for the other view. The evidence which was adduced before the Native Land Court between 1887 and 1891 simply did not address usage of the river at all. It is therefore not the case – as it sometimes was – that evidence of the use of the river was deployed in support of title claims to the adjacent riparian land. There was no evidence that those with the best occupation-based claims to the river banks saw themselves (or were seen by others) as having exclusive rights to the use of the adjacent river. What, if any, physical structures there were in, or over, the river, was not the subject of detailed evidence save as to a bridge, the construction and use of which involved more than one hapu. As well, customary rights in respect of the river may have been exercised by some Maori who did not occupy any relevant part of the river bank. As noted, there was little or no permanent occupation of the river bank. As far as I can tell, there was no investigation into issues of this kind. And given that the limited survey maps of the area showed the land under consideration as bounded by the river, it is possible that no one saw the need to go into the position as to the river. A strange feature of the case, to my way of thinking, is that there seems to have been no evidence as to who was buried in the urupa on one of the islands or as to the pa, which was on another island. Indeed there was no evidence given about the islands at all. Although there are other possibilities,[407] a plausible explanation for this is that those involved in the process thought that the riverbed and the islands in the river were not in issue.

A problem with Pouakani No 1

[245] As will have been observed, the original title issued in relation to this block was in favour of the Crown. If the mid-point presumption applied (and was not rebutted) in relation to this block, the Crown effectively obtained title directly from the Native Land Court. If anyone was disadvantaged by this it was the customary owners of the river (or that portion of it) rather than those who had customary rights in relation to its banks. So the argument of the appellants – which starts with the assumption that their ancestors obtained title under the mid-point presumption and is not based on customary title – is not obviously engaged in relation to this block.

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[407] Access to the islands required access to the banks of the river in their vicinity, with the result that they may have been seen as going with the adjacent land, although this would have left open the possibility of disputes with the owners of the land on the opposite side of the river.

A different problem with Pouakani B6A

[246] The Crown obtained title to Pouakani B6A in two stages: first, by acquiring the interests of approximately two-thirds of the owners of Pouakani B6, and secondly, by the partition of that block so that the Crown wound up with what became Pouakani B6A. Not all the original owners sold and, through what became Pouakani B6E, one of them retained land which was adjacent to the river.

[247] The appellants' argument could perhaps be taken to apply to the acquisition by the Crown of the particular interests of the owners who chose to sell.[408] But if the mid-point presumption applied, it was most obviously applicable to the creation of the new block Pouakani B6A and thus to the corresponding removal of riverbed ownership rights of those who had not sold their interests.

[248] The availability of access to the river for the owner of Pouakani B6E meant that she continued to be able – in a practical sense – to carry out whatever activities she wanted to in the bed and waters of the river. So perhaps the way in which the partition was effected should be taken as displacing the application of the presumption in relation to the adjoining stretch of the river.

What were they thinking?

[249] The preceding discussion indicates the uncertainties as to what the primary actors – Maori, the Crown agents and the judges and assessors of the Native Land Court – thought as to the impact on riverbed ownership of the processes which I have been discussing.

[250] It is a striking fact that no explicit claims to the beds of rivers were made prior to the Whanganui claim in 1938. Perhaps this is because no one turned their minds to the ownership of the beds of rivers. This is not inconceivable. As the 19th century moved on, rights of navigation in respect of navigable rivers seem to

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[408] In that the Crown was acquiring interests in a title which carried ownership of the adjacent riverbed by reason of the mid-point presumption.

have been largely assumed.[409] It may have been thought that in relation to such rivers at least, there could not be rights of private ownership.[410] The other respects in which Maori made use – in a practical sense – of their rivers tended to be closely associated with ownership and occupation of the adjacent land. So where river banks remained in Maori ownership, the right and ability of the owners to gather food and carry out any traditional activities would have continued, albeit perhaps not necessarily to the exclusion of others. And, in the case of non-navigable rivers at least, once riparian land was sold, the continuation of such activities may have been impracticable because of the loss of the right to river access.

[251] Another possible explanation is that it was seen as obvious – perhaps so obvious that it went without saying – that ownership of the bed of a river went with the adjoining riparian land. There are certainly suggestions that this was a common Maori view in what was said by the Maori Land Court and Maori Appellate Court Judges in relation to the Whanganui River litigation. And although it is unclear whether the judges of the Native Land Court in the late 19th century (not all of whom were lawyers) were familiar with the mid-point presumption, it may be that the rule was known to, and understood by, whoever set up the practices and procedures of the Court.[411] In saying this, I note that long before the *Mueller* case, New Zealand courts had assumed that the mid-point presumption applied in New Zealand.[412]

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409 In *Mueller*, above n 382, at 98, Stout CJ noted that the section of the Waikato River in question had been used as a highway for over 60 years and that "no attempt has ever been made to prevent navigation".

410 This contention and the associated argument that Maori rights over rivers were usufructory in nature were at the heart of the Crown arguments which were rejected by Judge Browne in the Maori Land Court in 1939 and by the Maori Appellate Court in 1944.

411 Waitangi Tribunal *The Mohaka River Report* (Wai 119, 1992) at [3.6] where negotiator Donald McLean is quoted as saying to Maori: "we discussed the propriety of their removing their pigs of[f] the English side of the river also of allowing a passage for timber and boats through the Waikare where they put up eel cuts that stop the passage. I explained to them that half of the river were theirs and half the white peoples…".

412 A point made by Stout CJ in *Mueller*, above n 382, at 103 by reference to *Borton v Howe* (1875) 2 NZ Jur 97, (1875) 3 NZCAR 5; *Costello v O'Donnell* (1882) 1 NZLR (CA) 105; and *The Jutland Flat (Waipori) Gold-Mining Co Ltd v McIndoe* (1895) 14 NZLR 99 (CA) at 111.

[252] A third possibility is that there were conflicting understandings, with:

(a) Crown agents assuming either that the mid-point presumption applied or that navigable rivers at least were vested in the Crown; and

(b) those with customary ownership over – or similar rights to – rivers, and thus their beds, saw those rights as separate and distinct from their ownership of, and rights over, the adjoining land but, for various reasons, either did not see the need, or did not have the practical ability, to insist on their rights when ownership of adjoining land was investigated and titles were issued.[413]

[253] All that can be said with reasonable confidence is that there can be no certainty as to contemporary understandings as to the effect on the title to the riverbed of the processes which occurred between 1887 and 1899.

The legal basis of the claim

Preliminary comment

[254] The appellants' claim is premised on the assumption that the creation of titles to the Pouakani blocks by the Native Land Court conferred title to the mid-point of the river and thereby extinguished all inconsistent customary rights. As explained, this assumption is at least doubtful, albeit not challenged by the Crown. The appellants further contend that (a) their ancestors believed that their rights in relation to the river (which they presumably wrongly thought were customary) would survive the sale of the riparian land, and (b) the Crown agents knew of this belief and that it was wrong.

[255] The appellants cannot prove what their ancestors thought as to the ownership of the river and, in particular, whether they believed that they had rights which would survive the sale of the riparian land. Nor can they prove what the Crown agents thought. They therefore cannot prove that the Crown agents took advantage of the vendors. Conversely, however, the Crown cannot now establish that its agents

[413] This is a view which was adopted by the Waitangi Tribunal in respect of the Whanganui River.

did not knowingly acquire title to the riverbed with an appreciation that the vendors did not realise that this would be the consequence of the sale of the riparian land. So leaving aside any defences associated with the effluxion of time, the case comes down to who bears the onus of proof on the critical issues.

[256] As will become apparent, there are principles of equity under which transactions are set aside unless one of the parties can affirmatively establish that the transaction was fair. For ease and consistency of reference, I will refer to this as a requirement of retrospective justification. If the Crown is subject to such a requirement in relation to its Pouakani purchases, it cannot, for the reasons already given, satisfy it. So in the balance of this section of the reasons, I will address the question whether the Crown is subject to such a requirement in respect of its purchases.

[257] That there are duties of good faith as between the Crown and Maori is well established. This is most particularly so where the principles of the Treaty of Waitangi are directly in issue. There are many cases in which these duties have been described as being of a fiduciary character (at least in relation to the Crown). This has generated much commentary.[414] There is also certainly scope for argument that the Crown may owe relational duties of good faith when dealing with particular groups of Maori. The authorities as to this and the associated considerations are well reviewed in the judgment of the Court of Appeal.[415]

[258] It will be necessary to refer to the leading cases in which the points just mentioned have been discussed. That said, I am not going to express general conclusions as to the extent to which duties of good faith between Crown and Maori, along with the Treaty of Waitangi[416] and its principles, give rise to rights which can be enforced in the courts in relation to particular transactions. Rather, I will focus on

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414 See Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Oxford, 1991) at ch 8; Alex Frame "The Fiduciary Duties of the Crown to Maori: Will the Canadian Remedy Travel?" (2005) 13 Waikato L Rev 70; and Gerald Lanning "The Crown–Maori Relationship: The Spectre of a Fiduciary Relationship" (1997) 8 Auckland U L Rev 445.

415 *Paki* (CA), above n 363, at [96]–[104] with particular reference to the fiduciary principle and then more generally at [105]–[118].

416 And thus see no need to discuss *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).

the more modest question whether a requirement of retrospective justification applies in respect of the purchases by the Crown of the Pouakani blocks.

The appellants' case – an overview

[259] The appellants' case invokes three general arguments. Two (associated with unconscionable bargains and fiduciary obligations) are based on principles which apply primarily to dealings between private individuals. The other focuses on the obligations of the Crown in its dealing with Maori as the indigenous people of New Zealand and in particular as a Treaty partner.

[260] In subsequent sections of this part of these reasons I will discuss briefly the principles and the main authorities relied on by Mr Millard. But before doing so, I need to say a little more about the relevant factual and legal components of the relationship between the vendors and the Crown.

The legal components of the relationship between the vendors and the Crown

[261] Article 2 of the Treaty of Waitangi guaranteed to Maori "the full exclusive and undisturbed possession" of their lands "so long as it is their wish and desire to retain the same in their possession" but conferred a right of pre-emption on the Crown. During the latter part of the 19th century, the legal position as to pre-emption ebbed and flowed. In relation to Pouakani B6 (in respect of which the Crown acquired the interests of individual owners over a number of years), the Crown had a right of pre-emption under s 117 of the Native Land Act 1894 once that statute came into effect and earlier had substantially similar rights by reason of s 16 of the Native Land Purchases Act 1892.[417] And while it appears, at least on the basis of the submissions made by Mr Millard, that the Crown did not have a right of pre-emption in March 1892 in relation to the Pouakani B8, B10 and C3, I accept the view of the Chief Justice that the Crown was, at the time, "effectively a monopsony purchaser".[418]

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417 See "Notice of Entry into Negotiations for Acquisition of Native Lands by Her Majesty" (9 February 1894), 12 *New Zealand Gazette* 265, at 265–266.

418 Above at [2].

[262] The Native Lands Frauds Prevention Act 1881 was amended in 1888[419] and 1889[420] and was repealed in October 1894 by the Native Land Court Act of that year.[421] The legislation provided for Trust Commissioners to review the fairness of transactions involving the sale of land by Maori and in particular to administer s 5 of the 1881 Act which provided:

> **5 No alienation of Native Land shall be valid,—**
>
> (1) If such alienation or the transaction relating thereto is contrary to equity and good conscience … .

This provision was to be enforced, primarily at least, by Trust Commissioners.[422] Section 3 of the 1888 Amendment Act provided:

> **3** A deed executed by a Native shall have no effect as a conveyance or lease by such Native of land, or of any estate therein, to a person not a Native unless—
>
> (a) A statement in the Maori language of the effect of such deed, certified as correct by a licensed interpreter, shall, before the document is signed by any Native, be indorsed on or form part of the document;
>
> (b) The effect of such statement shall be explained to each Native before signing the same;
>
> (c) The signature of each Native shall be attested by at least two witnesses, one of whom shall be a Judge or a Justice of the Peace, or a solicitor of the Supreme Court, or a Clerk of a Resident Magistrate's Court, or a postmaster, and the other a male adult, who shall certify the date upon which such signature shall have been attached to such deed (none of whom shall be concerned in the transaction)[.]

[263] The formalities contemplated by s 3 of the 1888 Amendment Act were complied with in respect of the acquisition by the Crown of Pouakani C3, B8 and B10 (in March 1892) and the acquisition of some of the interests in Pouakani B6 (in respect of which most vendors signed before October 1894). The extent to which the Trust Commissioner procedure applied or was considered to apply to transactions

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419 Native Lands Frauds Prevention Act 1881 Amendment Act 1888.

420 Native Lands Frauds Prevention Acts Amendment Act 1889.

421 Native Land Court Act 1894, s 114.

422 The legislation is extremely badly drafted and it is well-open to argument that the jurisdiction of the Supreme Court was not directly (as opposed to by way of appeal) concerned with s 5 of the Native Lands Frauds Prevention Act 1881. As to this, the jurisdiction of Trust Commissioners included consideration of s 5 and the original equitable jurisdiction of the Supreme Court was preserved by s 20 of the 1881 Act.

with the Crown is unclear to me. There was an ambiguously worded exemption in favour of the Crown in s 8 of the 1888 Act and the Waitangi Tribunal has expressed the view that the Trust Commissioner process did not apply in respect of Crown acquisitions.[423] If this is so, I have difficulty seeing why s 3 of the 1888 Act would have applied. What is clear is that there is no evidence of the Pouakani transactions having been considered under the Trust Commissioner process.

The factual components of the relationship between the vendors and the Crown

[264] There is no specific evidence as to the circumstances of the particular vendors in respect of the sale of Pouakani B8, B10 and C3 or the interests which the Crown acquired in Pouakani B6. Instead the appellants relied on evidence of a more general character and the inferences which they say should be drawn from that evidence.

[265] There were no schools in the vicinity of the Pouakani blocks and it is therefore likely that such of the owners who lived there (rather than elsewhere in New Zealand where there were schools) did not speak English and were illiterate. The use of lawyers in the Native Land Court was discouraged, and there was not a great deal of legal representation at the hearings which took place from 1886 to 1887 and in 1891. The claimants did, however, have access to agents, known as "conductors",[424] who represented them in court. And the fact that those aggrieved by the 1887 determinations were able to have them set aside by statute shows that at least some of the owners had the resources and ability to challenge decisions which they considered to be wrong.

Unconscionable bargains

[266] The law as to unconscionable bargains was referred to in argument but was not heavily relied on. It is, however, potentially of relevance.

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423 Waitangi Tribunal *Te Urewera Pre-publication* (Wai 894, 2009) vol 2 at 790. The exemption must be in what I regard as the rather ambiguous s 8 of the 1888 Act.

424 A conductor was a Maori spokesperson, usually leading rangatira of the hapu: Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) at 403–404.

[267] The relevant principles were developed by courts of equity and are of considerable antiquity. In earlier times, certain groups of the community were seen as being particularly prone to exploitation with the result that bargains made with them were closely scrutinised.[425] The principle that developed was that where the bargaining of one party to a transaction was impaired (for instance by mental illness, old age, illiteracy or even humbleness of social position), the onus was on the other party to establish the fairness of the transaction.[426] This is an illustration of a requirement of retrospective justification.

[268] The law as to unconscionability was reviewed, albeit rather briefly, by the Privy Council in *O'Connor v Hart*.[427] The Privy Council's judgment makes it clear that relief is only available if the plaintiff can point to overreaching behaviour on the part of the defendant. This requires proof that the defendant appreciated or should have appreciated the disadvantage which affected the other party.[428] Also material may be whether the defendant appreciated (or should have appreciated) that the bargain was disadvantageous or unfair to the weaker party.[429] Knowledge of the disadvantageousness of the bargain may put the stronger party on notice of the likelihood that the weaker party is at a bargaining disadvantage. Most commonly, the relevant disadvantage will be inadequacy of consideration, which in most cases will have been appreciated by the stronger party. Meeting the requirement of retrospective justification in these circumstances is thus likely to require the stronger party to show that the other party received independent legal advice and was acting deliberately and with an informed awareness of all considerations relevant to the appropriateness of the bargain.

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425 There was a paternalistic tone to the judgments. Sailors were seen as especially liable to exploitation as "a race of men loose and unthinking, who will almost for nothing part with what they have acquired perhaps with their blood", see *How v Weldon* (1754) 2 Ves Sen 516 at 518, 28 ER 330 (Ch) at 331 per Clarke MR. As the quotation suggests assignments of prize money were particularly liable to be set aside. See also *Taylour v Rochfort* (1751) 2 Ves Sen 281, 28 ER 182 (Ch). Many of the cases concerned expectant heirs and loans secured against, or sales of, reversionary interests, see *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 where the principles are discussed along with the effect of the repeal of the usury laws and the enactment of statutory provisions relating to the sale of reversionary interests.

426 *Baker v Monk* (1864) 4 De G J & S 388, 46 ER 968 (Ch).

427 *O'Connor v Hart* [1985] 1 NZLR 159 (PC).

428 See *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735 at [23] where the Court looked to the stronger party's "knowledge or the knowledge it should have had" in respect of the weaker party's alleged disability, albeit it concluded that there was in fact no relevant disability. See also *Nichols v Jessup* [1986] 1 NZLR 226 (CA).

429 See the remarks of Cooke P in *Nichols v Jessup*, above n 428, at 228–229.

Fiduciary obligations

[269] The joint judgment of Blanchard and Tipping JJ in *Chirnside v Fay*[430] provides an appropriate starting point for this aspect of the discussion. They noted that there are two situations in which relationships will be construed as fiduciary:[431]

> [73] … In the first, the relationship is of a kind which, by its very nature, is recognised as being inherently fiduciary. Most cases involving a breach of fiduciary duty are of this kind. They fall into one of the recognised categories of relationships which are inherently fiduciary. These include the relationships of solicitor and client, trustee and beneficiary, principal and agent, and doctor and patient.
>
> …
>
> [75] The second situation in which a relationship will be classed as fiduciary depends not on the inherent nature of the relationship but upon an examination of whether its particular aspects justify it being so classified. No single formula or test has received universal acceptance in deciding whether a relationship outside the recognised categories is such that the parties owe each other obligations of a fiduciary kind. The literature in this field is voluminous. No useful purpose would be served by an attempt at a general survey.

Relevant to the "second situation" referred to by Blanchard and Tipping JJ is the following passage from the judgment of Millett LJ in *Bristol and West Building Society v Mothew*:[432]

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.

Adopting this language, a fiduciary duty is one of loyalty, characteristically owed by someone who is either formally a trustee for another and, thus, has legal title to assets beneficially owned by that other person, or acts on behalf of someone else such as a solicitor, company director, agent or a partner.

[270] There are very strict rules relating to the purchase by a fiduciary of property which is the subject of the confidential relationship. Such a purchase will be set aside unless the fiduciary can establish that the transaction was fair. So here again is

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430 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [72]–[75].

431 (Footnotes omitted.)

432 *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 18.

a requirement of retrospective justification. In practice this will require the fiduciary to show that full value was given and that there was full disclosure. As well, the fiduciary may well also be required to ensure that the other party received independent advice. In this instance, the requirement of retrospective justification is a function of the obligation of a fiduciary to act with loyalty and, in particular, not to allow personal interest to conflict with duty. Also relevant may be the ability of the fiduciary to influence the judgment of the beneficiary. In this latter respect there is some overlap with the principles relating to undue influence.

[271] The term "fiduciary" is sometimes used otherwise than in respect of confidential or trust-like relationships. Thus cases involving sexual abuse, either intrafamilial or in breach of appropriate professional standards, have been categorised as involving breaches of fiduciary duty.[433] There are also cases in which the position of a local authority vis-à-vis its ratepayers has been characterised as fiduciary in nature. Most commonly, the courts have done this when limiting the ability of local authorities to use ratepayer funds to subsidise services or pay wages in excess of market rates.[434] The underlying idea is that local authorities in relation to their ratepayers "[stand] somewhat in the position of trustees or managers of the property of others".[435] In one New Zealand case, this principle was extended to require local authorities to "seek to balance fairly the respective interests of the different categories of ratepayers".[436] I remain a little sceptical of the utility of the "fiduciary" label in contexts such as these,[437] but see no point in reviewing the cases as they arose in contexts well-removed from that of the present case.

Fiduciary duty owed by the Crown in its dealings with indigenous people

[272] The existence or otherwise of a fiduciary duty owed by the Crown to indigenous people has been addressed in the United Kingdom in *Tito v*

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433 See *M(K) v M(H)* [1992] 3 SCR 6; and *S v Attorney-General* [2003] 3 NZLR 450 (CA).

434 *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 (HL); *Prescott v Birmingham Corporation* [1955] Ch 210 (CA); and *Roberts v Hopwood* [1925] AC 578 (HL).

435 See Lord Atkinson's remarks in *Roberts v Hopwood*, above n 434, at 595–596.

436 *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA) at 47.

437 Compare, for instance, the approach of the High Court of Australia in *Breen v Williams* (1996) 186 CLR 71 and that of the Full Court of the Federal Court of Australia in *Paramasivam v Flynn* (1998) 160 ALR 203.

Waddell (No 2)[438] in a way which is broadly unfavourable to the imposition of a duty and in Australia in *Mabo v Queensland (No 2)*[439] somewhat inconclusively. The overseas cases which have been most significant in New Zealand have come from Canada, where the courts have often had resort to fiduciary principles in respect of dealings between the Crown and indigenous people.

[273] Some of the Canadian cases were decided in the context of a statutory scheme relating to Indian land under which the Crown was to act on behalf of the owners and was interposed between them and prospective purchasers or lessees to avoid exploitation. In both *Guerin v R*[440] and *Blueberry River Indian Band v Canada*,[441] the Supreme Court of Canada held that the Crown owed fiduciary duties to Indian bands who had surrendered land under this regime. Although there may be scope for debate about the metes and bounds of these duties, the categorisation of the underlying relationship as fiduciary is very orthodox given its trust-like characteristics.

[274] There are other cases in which Canadian courts have resorted to the fiduciary language in contexts which are not closely analogous. For instance in *R v Sparrow*,[442] a case involving the interaction between customary fishing rights, statutory regulation of fishing and s 35(1) of the Canadian Constitution Act 1982,[443] the Supreme Court stated:[444]

> … the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

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438 *Tito v Waddell (No 2)* [1977] 1 Ch 106 (Ch).

439 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, where the issue was primarily addressed by Toohey J at 199–205. See also at 60 per Brennan J, and at 164–175 per Dawson J.

440 *Guerin v R* [1984] 2 SCR 335.

441 *Blueberry River Indian Band v Canada* [1995] 4 SCR 344.

442 *R v Sparrow* [1990] 1 SCR 1075.

443 Which provides that, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".

444 *R v Sparrow*, above n 442, at 1108.

And in *Osoyoos Indian Band v Oliver (Town)*,[445] the same Court construed (and limited) statutory provisions allowing for the expropriation of land for public purposes by reference to the fiduciary duty of the Crown to indigenous people.

[275] On the other hand, in *Wewaykum Indian Band v Canada*,[446] Binnie J noted that any assertion of:[447]

> … "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship . . . overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

And the same Judge then listed, in somewhat sceptical language, the range of circumstances in which fiduciary principles had been invoked:[448]

> Since *Guerin*, Canadian courts have experienced a flood of "fiduciary duty" claims by Indian bands across a whole spectrum of possible complaints, for example:
>
> (i) to structure elections (*Batchewana Indian Band (Non-resident members) v Batchewana Indian Band* [1997] 1 FC 689 (CA) at para 60; subsequently dealt with in this Court on other grounds);
>
> (ii) to require the provision of social services (*Southeast Child & Family Services v Canada (Attorney General)* [1997] 9 WWR 236 (Man QB));
>
> (iii) to rewrite negotiated provisions (*BC Native Women's Society v Canada* [2000] 1 FC 304 (TD));
>
> (iv) to cover moving expenses (*Paul v Kingsclear Indian Band* (1997) 137 FTR 275; *Mentuck v Canada* [1986] 3 FC 249 (TD); *Deer v Mohawk Council of Kahnawake* [1991] 2 FC 18 (TD));
>
> (v) to suppress public access to information about band affairs (*Chippewas of the Nawash First Nation v Canada (Minister of Indian and Northern Affairs)* (1996) 116 FTR 37, aff'd (1999) 251 NR 220 (FCA); *Montana Band of Indians v Canada (Minister of Indian and Northern Affairs)* [1989] 1 FC 143 (TD); *Timiskaming Indian Band v Canada (Minister of Indian and Northern Affairs)* (1997) 132 FTR 106);
>
> (vi) to require legal aid funding (*Ominayak v Canada (Minister of Indian Affairs and Northern Development)* [1987] 3 FC 174 (TD));

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445 *Osoyoos Indian Band v Oliver (Town)* [2001] 3 SCR 746.
446 *Wewaykum Indian Band v Canada* [2002] 4 SCR 245.
447 At [81].
448 At [82].

(vii) to compel registration of individuals under the *Indian Act* (rejected in *Tuplin v Canada* (*Indian and Northern Affairs*) (2001) 207 Nfld & PEIR 292 (PEISCTD));

(viii) to invalidate a consent signed by an Indian mother to the adoption of her child (rejected in *G (AP) v A (KH)* (1994) 120 DLR (4th) 511 (Alta QB)).

[276] There are many New Zealand cases in which the view has been expressed that the relationship between the Crown and Maori is either analogous to a fiduciary relationship or actually is fiduciary in character. In the first of these,[449] Cooke P said that the relationship between the Crown and Maori creates "responsibilities *analogous to* fiduciary duties".[450] There are other cases in which fiduciary duties are referred to by way of analogy.[451] But it is also possible to find statements to the effect that the obligations of the Crown to Maori are fiduciary in character. Thus in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*, Cooke P said that:[452]

> [T]he Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.

He commented that in Canada the fiduciary duty concept is used directly and not just by way of analogy in respect of the relationship between the Crown and aboriginal peoples. He saw the Treaty as providing major support for such a duty in New Zealand. And in a passage from the judgment in *Te Runanganui o Te Ika Whenua v Attorney-General*, which was particularly relied on by the appellants, the same Judge said of aboriginal title rights:[453]

> It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes. …
>
> An extinguishment by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power.

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449 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

450 At 664 (emphasis added).

451 See, for instance, *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655.

452 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304.

453 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24.

[277] In a somewhat different tone is the following passage from the judgment of the Court of Appeal in the *New Zealand Maori Council v Attorney-General*:[454]

> The decisions of this Court contain clear statements to the effect that the Crown's duty to Maori is analogous with a fiduciary duty and we see no proper basis for us to revisit them. The law of fiduciaries informs the analysis of the key characteristics of the duty arising from the relationship between Maori and the Crown under the Treaty: good faith, reasonableness, trust, openness and consultation. But it does so by analogy, not by direct application. In particular, we see difficulties in applying the duty of a fiduciary not to place itself in a position of conflict of interest to the Crown, which, in addition to its duty to Maori under the Treaty, has a duty to the population as a whole. The present case illustrates another aspect of this problem: the Crown may find itself in a position where its duty to one Maori claimant group conflicts with its duty to another. If Gendall J was saying that the Crown has a fiduciary duty in a private law sense that is enforceable against the Crown in equity, we respectfully disagree.

Restitutio in integrum?

[278] The general principle of equity is that a bargain will not be set aside unless the parties can be restored practically, although not necessarily precisely, to their pre-bargain positions.[455] Such restoration of the Crown's position in the present case would be at least difficult, and quite likely impossible, and in any event beyond the likely ability of the appellants to provide. A partial rescission of the contracts, under which the Crown lost the riverbed but all other components remained effective, would involve a rewriting of the bargains and thus an exercise in which courts of equity did not engage.

[279] The apparent inability of the appellants to put the Crown in the position it would have been in if the contracts had not been entered into was not explored in argument, at least in the context of such inability providing a basis upon which relief should be declined. For this reason, I merely mention the point as one which may have provided problems for the appellants had their claims not faced other difficulties. As well, the present case, concerned as it is with transactions which took place more than a century ago, would not provide the most appropriate vehicle for determining whether the law of New Zealand should be developed so as to permit

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454 *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 at [84].

455 See the discussion in Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies* (4th ed, Butterworths/Lexis, Chatswood (NSW), 2002) at [24-050] and following.

partial rescission or, perhaps more plausibly, equitable compensation in lieu of rescission.[456]

An evaluation

[280] It is not clear that there was a relevant misunderstanding by the vendors and if there was, it is not clear that the Crown agents appreciated it (or should have appreciated) that this was so. It follows that there is no evidence of overreaching behaviour of the kind that the most recent authorities on unconscionable bargains establish must be shown before a requirement of retrospective justification arises.

[281] The principles of equity which result in strict scrutiny of fiduciary/beneficiary transactions and, in particular, the requirement of retrospective justification, are a function of the duty of loyalty owed by fiduciaries. This duty may be the corollary of a relationship in which one party has power to act for another and thus may without undue awkwardness be seen as applicable to the situation which obtained when the Crown gained sovereignty over New Zealand and its radical title was burdened by customary ownership interests. Viewed in this light, the comments made by Cooke P in *Te Ika Whenua* are easily explicable.[457] But by the time the Crown came to purchase the Pouakani blocks, customary title had been extinguished pursuant to statutory processes which the courts cannot ignore. In acquiring the Pouakani blocks, the Crown agents were not acting on behalf of the vendors. Nor were they dealing with assets which the Crown held on the vendors' behalf. In finalising the acquisitions, those agents had duties to the taxpayer (as we would now say). The vendors must have been acutely aware that the Crown agents were not their agents. All in all, it is entirely unrealistic to see the Crown as owing to those vendors a duty of loyalty of the kind which generates the requirement of retrospective justification.

[282] More generally, the transactions in issue were relatively straightforward. The vendors presumably were well familiar with the characteristics of the land which they owned. They would likely also have been reasonably well aware of the prices

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456 See, for instance, *Rick v Brandsema* 2009 SCC 10, [2009] 1 SCR 295 at [66].

457 See above at [276]. The approach of Toohey J in *Mabo*, above n 439, was expressly premised on this basis.

which were paid for such land. They did not have to sell if the price offered was not acceptable, albeit that this would likely result in partition if other owners did wish to sell. It is not the case therefore that there was necessarily an informational imbalance or an absence of choice.

[283] Counsel for the appellants were critical of the reliance placed by the High Court and Court of Appeal on the reality that the Crown cannot be said to owe to Maori a duty of absolute loyalty. They made the point that the expression "fiduciary" has been applied in contexts in which such a duty has been absent and, as well, noted that "as the Canadian cases recognise, the Crown is no ordinary fiduciary". But what counsel for the appellants were not able to do was to point to cases in which the special rules applying to bargains between "ordinary" fiduciaries and their beneficiaries – and, most relevantly, a requirement of retrospective justification – have been applied otherwise than where a duty of loyalty was owed.

[284] It follows that existing authorities and legal principles do not compel a result which is in favour of the appellants. Indeed they show that a conclusion that the sales of the Pouakani blocks should be set aside would involve an extension of those principles. In issue is whether such an extension would be appropriate. For the – in part overlapping – reasons which follow, I am satisfied that it would not be appropriate.

[285] In the first place, the case is grounded in circumstances which are incommensurably different from current conditions. It could not be suggested that a Crown purchase of Maori-owned land now warrants the imposition of a requirement of retrospective justification. There is thus a distinct element of the artificial in what the Court is being asked to do.

[286] Secondly, I think there would be a distinct element of overreaching if the Court were to extend existing legal principles and to apply the results – and, in particular, a requirement of retrospective justification – to the social and economic conditions of the 1890s for which I certainly have no real feel.

[287] Thirdly, the imposition of a requirement of retrospective justification in the present circumstances would be distinctly unfair given that it cannot be met due to the effluxion of time. The practical result would be the setting aside of the transactions despite complete uncertainty whether the vendors were under any relevant misapprehension.

[288] Finally, there is the reality that remedies are provided for under the Treaty of Waitangi Act 1975 which provides for a process by which claims such as those of the appellants can be addressed by reference to the principles of the Treaty. This provides a more flexible mechanism for addressing the underlying grievance than the rules of equity invoked by the appellants. Under the Treaty of Waitangi Act there are no limitation issues. And outcomes can be calibrated to current circumstances.

Effluxion of time

What happened to the Pouakani blocks after Crown acquisition?

[289] Pastoral leases were granted over Pouakani B6A. In 1915, Pouakani C3 and B8 along with part of Pouakani No 1 were vested in Wairarapa Maori following the Wairarapa Lakes Agreement of 1896. This land was designated Pouakani No 2 and was vested by statute as Maori freehold land. The riparian portions of this land were acquired back by the Crown under the Public Works Act in 1949 and 1963.

[290] The Arapuni Dam was completed in 1929 and the newly created Lake Arapuni extended on to the Pouakani blocks. Subsequently, the Maraetai and Whakamaru Dams were built (between 1949 and 1952 and between 1949 and 1956 respectively) on the river adjoining the Pouakani blocks. Lake Waipapa, created by the construction of the Waipapa Dam, also extends onto the blocks.

[291] The other transactions affecting the Pouakani blocks are:

(a) The setting aside of a riparian strip on Pouakani B10 and its vesting in the Taupo County as a recreational reserve.

(b) The issuing of a certificate of title in 2002 for part of the land within Pouakani C3 (and thus Pouakani No 2), encompassing the riverbed in the vicinity of the Maraetai Dam which is now vested in Mighty River Power Ltd.

(c) Under contractual arrangements with the Crown, Mighty River Power is entitled to have vested in it the land underneath the Whakamaru Dam.

(d) The Crown has granted Mighty River Power easements in respect of the beds of Lakes Whakamaru, Maraetai and Waipapa.

(e) An easement affecting a section of the Pouakani river bank land has been granted to Transpower Ltd.

When the claim was commenced

[292] A claim in relation to the riverbed was first advanced in the Waitangi Tribunal in 1989. Proceedings seeking ownership of the riverbed were commenced in the Maori Land Court in 2000 and the current proceedings were filed in the High Court in 2004. Accordingly, time stopped running in 2004 for the purposes of limitation, while the defence of laches and acquiescence can most fairly be evaluated on the basis that the claim was formulated in 1989.

Are the claims subject to limitation?

[293] The Real Property Limitations Act 1833 (UK) (the 1833 Act) was in force in New Zealand when the events giving rise to the litigation occurred.[458] Accordingly, its provisions are relevant to the limitation defences. But, as will become apparent, rather more relevant (at least for practical purposes) is the Limitation Act 1950 (the 1950 Act).

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[458] By reason of the English Laws Act 1858. The position in New Zealand as to limitation before the Limitation Act 1950 and the changes effected by that Act are helpfully summarised by EC Adams "The Limitation Act, 1950" [1951] NZLJ 337.

[294] The combined effect of ss 2 and 24 of the 1833 Act was to prescribe a 20 year limitation period for claims to recover equitable interests in land. The corresponding provision in the 1950 Act was s 7:

> **7 Limitation of actions to recover land**
>
> (1) No action shall be brought by the Crown to recover any land after the expiration of 60 years from the date on which the right of action accrued to the Crown or to some person through whom the Crown claims.
>
> (2) No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or to some person through whom he claims:
>
> Provided that, if the right of action first accrued to the Crown, the action may be brought at any time before the expiration of the period during which the action could have been brought by the Crown, or of 12 years from the date on which the right of action accrued to some person other than the Crown, whichever period first expires.

Because the s 2 definition of "land" encompassed equitable interests in land, s 7(2) imposed a 12 year limitation period for the recovery of equitable interests in land.[459] In this respect, the practical effect of the 1950 Act was therefore to reduce the limitation period from 20 to 12 years.

[295] Under s 25 of the 1833 Act, the s 24 limitation period did not apply in the case of "express trusts." This corresponded, at least broadly, to a more general equitable principle under which limitation periods were not applied (by analogy) to claims to recover trust property. This principle, however, was not confined to express trusts.[460] It was given statutory effect by s 13 of the Trustee Act 1883 Amendment Act 1891 which provided (a) that claims against trustees were generally subject to a limitation period of six years, but (b) for exceptions in respect of, inter alia, claims:

> To recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use.

This section was re-enacted as s 94 of the Trustee Act 1908 and its effect was embodied in the 1950 Act, where the exception appeared as s 21(1)(b). For the

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459 See also s 10 of the 1950 Act.

460 See, for instance, *Soar v Ashwell* [1893] 2 QB 390 and *Cohen v Cohen* (1929) 42 CLR 91.

purposes of these sections, the expressions "trust" and "trustee" were defined to include "implied and constructive trusts".[461]

[296] All of this means that subject to the possible application of s 25 of the 1833 Act or s 21(1)(b) of the 1950 Act and its precursors, the appellants' claims are subject to limitation under s 24 of the 1833 Act and s 7 of the 1950 Act. The s 21(1)(b) exception is broader than that provided by s 25 of the 1833 Act (which was confined to "express trusts"). It follows that if the appellants cannot rely on s 21(1)(b) (or its precursors), they likewise cannot rely on s 25 of the 1833 Act. For this reason I will confine my subsequent discussion of this aspect of the case to the operation of s 21(1)(b) of the 1950 Act.

[297] The English provision which corresponds to s 21(1)(b) of the 1950 Act was addressed by Court of Appeal of England and Wales in *Paragon Finance Plc v DB Thakerar & Co*.[462] As Millett LJ explained, the subsection is not confined to express trustees. Rather it encompasses:[463]

> … trustees *de son tort* and … directors and other fiduciaries who, though not strictly trustees, were in an analogous position and who abused the trust and confidence reposed in them to obtain their principal's property for themselves. Such persons are properly described as constructive trustees.

He then went on to say:[464]

> Regrettably, however, the expressions "constructive trust" and "constructive trustee" have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.

Of a trustee in the second class, he observed:[465]

> He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction

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461 By reason of the definitions of those terms in the Trustee Acts of 1883, 1908 and 1956.
462 *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA).
463 At 408.
464 At 408–409.
465 At 409.

> which is impugned by the plaintiff. In such a case the expressions "constructive trust" and "constructive trustee" are misleading, for there is no trust and usually no possibility of a proprietary remedy … .

The policy reasons for excluding limitation in relation to express trusts apply to claims against constructive trustee in the first category but not to claims against constructive trustees in the second category. The remedial constructive trust which is imposed where such a claim is successful is a form of equitable relief against fraud and such claims have always been subject to limitation.

[298] Mr Millard for the appellants did not challenge the approach of Millett LJ and, in company with Harrison J, I accept its accuracy. I note that the Supreme Court of the United Kingdom has recently approved this reasoning.[466]

[299] Harrison J concluded that *Paragon Finance* was controlling on this aspect of the case. Mr Millard disputed this as based on a misunderstanding of the nature of the appellants' claim, which rests on what he says was a "pre-existing equitable relationship" between the Crown and the Pouakani people. In my view, however, Harrison J did not misunderstand the nature of the claim. Any claim for breach of fiduciary duty made directly against a fiduciary is necessarily based on a pre-existing relationship (as was the claim in *Paragon Finance*). The existence of a pre-existing relationship between the Crown and the vendors would thus not be enough to engage s 21 of the 1950 Act. On the appellants' case, the Crown's acquisition of title to the riverbed was not pursuant to "a lawful transaction which was independent of and preceded the breach of trust" which is complained of. Instead, the transactions by which title was acquired are "impeached". To continue to use the language of Millett LJ, the Crown acquired title pursuant to the transactions which are "impugned" and did so "adversely" to the appellants.

[300] It follows that the appellants cannot rely on s 21(1)(b) of the 1950 Act (and its precursors) and, a fortiori, on s 25 of the 1833 Act. Their claim is accordingly subject to limitation under s 24 of the 1833 Act and s 7 of the 1950 Act.

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466 *Williams v The Central Bank of Nigeria* [2014] UKSC 10, [2014] 2 WLR 355.

A continuous breach?

[301] The appellants suggested that the Crown has been, and remains, in continuous breach of its fiduciary obligations in relation to the riverbed.[467] This presupposes that the Crown's fiduciary obligations persisted after the acquisition of the riverbed. If this is so, every denial by the Crown of the appellants' entitlement to the riverbed is a fresh breach which sets time running again. This, however, is just a variant of the argument rejected by the Court of Appeal in *Paragon Finance* and inconsistent with the scheme of the legislation to which I have referred.[468]

When did time start to run?

[302] The 1833 Act stipulated that time began to run against a person who had been in possession of the land when that person either was dispossessed or discontinued possession.[469] To this the courts added the gloss that time only started to run once someone else had taken adverse possession of the land.[470] Consistently with this, ss 8(1) and 13(1) of the 1950 Act provided:

> **8 Accrual of right of action in case of present interests in land**
>
> (1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

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467 A line of reasoning discussed in *Wewaykum Indian Band v Canada*, above n 446, at [135]; and *Ermeskin Indian Band v Canada* 2006 FCA 415, [2007] FC 245.

468 The Supreme Court of Canada has indicated that acceptance of a continuing breach argument in aboriginal cases would defeat the legislative purpose of limitation periods and raised the concern that there would be "no repose" for a fiduciary, see *Wewayakum Indian Band v Canada*, above n 446, at [135]. The Canadian limitation statutes are different, but the principle remains the same. The appellants relied on a dissenting opinion in *Ermineskin Band v Canada*, above n 467, at [331] per Sexton JA for the proposition that indigenous beneficiaries "should always have recourse against a trustee who is holding their property given every day that a trustee wrongly holds the beneficiary's property is arguably a new breach". However, *Ermineskin* concerned facts entirely different to this case — the mismanagement of funds held on express trust for the indigenous beneficiaries.

469 See s 3 of the Real Property Limitations Act 1833 (UK).

470 See Adams , above n 458. For a discussion of the legislative history, see *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419.

> **13 Right of action not to accrue or continue unless there is adverse possession**
>
> (1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as adverse possession), and, where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

[303] There is no evidence either way as to whether, in the immediate aftermath of the sales, the vendors continued to use, or discontinued their use of, the river. And there is likewise no evidence of adverse possession by the Crown until the development of the river for the purposes of electricity generation which started in 1918.

[304] Also potentially material is s 28 of the 1950 Act:

> **28 Postponement of limitation period in case of fraud or mistake**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> …
>
> (c) The action is for relief from the consequences of a mistake,—
>
> the period of limitation shall not begin to run until the plaintiff has discovered … the mistake, … or could with reasonable diligence have discovered it:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—
>
> …
>
> (e) In the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

[305] I am prepared to assume that the appellants' claims are "for relief from the consequences of a mistake". Accordingly, the commencement of the limitation period under the 1950 Act was deferred until the mistake either was, or with

reasonable diligence, could have been discovered, save that in relation to Pouakani No 2, it must be at least arguable that s 28(e) applies.

[306] It is likely that until the history of the Pouakani blocks began to be fully investigated (which I assume was not until the 1980s), no one had thought in any detail about the possible impact of the mid-point presumption on title to the riverbed and thus of the possibility that the original vendors were mistaken as to the effect of the sales. As will already be apparent, it is far from clear that there was any relevant mistake by the vendors. But if there was, such mistake would have been apparent to them and their descendants reasonably quickly and at the latest when the Crown began to develop the river for power generation. For this reason, s 28 does not assist the appellants.

Laches and acquiescence

[307] The principles applied by the courts when dealing with laches and acquiescence were explained and applied by this Court in *Eastern Services Ltd v No 68 Ltd*[471] in which the following remarks by Lord Selborne in *The Lindsay Petroleum Co v Hurd* were described as being the classic exposition of the doctrine:[472]

> Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

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471 *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335.
472 *The Lindsay Petroleum Co v Hurd* (1874) 5 LR PC 221 at 239–240.

[308] In the present case:

(a) There has been extraordinary delay, with the transactions which are impeached occurring in or before 1899 and the claim in respect of them not being formulated until 1989.

(b) The delay has caused substantial forensic prejudice. For the reasons explained, there is substantial uncertainty as to what the vendors and the Crown agents thought about ownership of the riverbed. This is because everyone involved in the transactions has long since died and the documentary record is not complete.[473] The result is that it is simply not possible to be confident about what happened. For these reasons the ability of the Crown to defend the proceedings (particularly if subject to a requirement to prove that the transactions were fair and understood by the vendors) has been seriously compromised.

(c) Acting on the assumption that it owned the riverbed, the Crown has extensively developed it for power generation. There have also been other interests created in the riverbed.

(d) Once power generation development began, it must have been obvious to the appellants' ancestors that the Crown was asserting ownership of the riverbed. This development began in 1918 at a time when some of those who had been involved in, and thus could have explained the transactions, were presumably still alive.

[309] The appellants say that it was impracticable to commence litigation earlier than they did. They say that up until the last 25 years or so, the courts tended to dismiss claims based on the Treaty. As well, by the time that the Crown began to develop the river for power generation, their ancestors had been dispossessed and disempowered as a result of Crown actions and inactions and were in no state to

[473] For instance, the minute books for the Pouakani B6A partition are not available. The reality, however, must be that far more documents would have been brought into existence in respect of the transactions than have been able to be located.

commence complex litigation. This argument, if accepted, would result in the examination of 19th century transactions through a 21st century lens, with a resulting risk of distortion. And more generally and importantly, the force which the argument undoubtedly has is outweighed by considerations already referred to. The delay has simply been too long for the case to be able to be determined fairly and too much has happened on the river for it to be practicable or fair to return to the situation as it was in the last years of the 19th century.

Effluxion of time defences in the context of claims by indigenous people

[310] Mr Millard contended that the Court should be slow to allow effluxion of time defences to succeed given the very particular relationship between the Crown and Maori. In essence, Mr Millard argued that effective redress of Treaty wrongs justified the disapplication of limitation periods where they would deny Maori claimants relief. He argued there were two aspects to this Treaty wrong. First, the Crown's right of pre-emption meant that the Pouakani people were at the mercy of the Crown's discretion as to what land it would purchase, when, at what price and from whom. Secondly, the appellants' claim concerned their interest in the riverbed, a Maori taonga. For this reason, I have examined the Australian and Canadian jurisprudence in respect of similar claims in those jurisdictions.

[311] The issue has not received much attention in the Australian cases save that it appears to be assumed (and perhaps accepted) that limitation and laches and acquiescence are available as defences against native title claims.[474] In contradistinction, the Canadian courts have often considered and determined effluxion of time defences in contexts which are broadly analogous to the present. The position is that in general the Crown may rely on limitation periods[475] or the defence of laches and acquiescence.[476] The only exception is in respect of claims for declaratory relief in relation to constitutionality[477] (or otherwise) of Crown

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474 See *Mabo v Queensland (No 2)*, above n 439, at 89–90 per Deane and Gaudron JJ.

475 *Attorney-General of Canada v Lameman* 2008 SCC 14, [2008] 1 SCR 372; *Wewaykum Indian Band v Canada*, above n 446; *Blueberry River Indian Band v Canada*, above n 441; and *Guerin v R*, above n 440.

476 *Wewaykum Indian Band*, above n 446, and *Chippewas of Sarnia Band v Canada (Attorney-General)* (2000) 195 DLR (4th) 135 (ONCA).

477 A concept which was applied broadly.

actions,[478] an exception which, if adopted in New Zealand, would not be capable of application in the present case given the private law remedies which the appellants' seek.

A conclusion as to effluxion of time

[312] For the reasons given, the appellant's claims are barred by limitation and the defence of laches and acquiescence is made out.

Disposition

[313] I would dismiss the appeal for the reasons which I have provided.

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[478] See *Manitoba Metis Federation Inc v Canada (Attorney-General)* 2013 SCC 14, [2013] 1 SCR 623.

GLAZEBROOK J

[314] The factual and procedural background to this appeal is fully set out in the judgments of Elias CJ and William Young J. In this judgment I will not duplicate that analysis. I will just explain briefly why I too would dismiss the appeal.

[315] It seems to me that the appellants' case rests on the following propositions:

(a) they, through the titles created by the Native Land Court, owned the riverbed to the half-way point;

(b) they did not know that the titles had that effect; and

(c) it should have been explained to them that the titles included part of the riverbed before they sold the adjoining riparian land to the Crown.

[316] The parties have been content to assume that the first proposition is a correct statement of the legal position. For the reasons given by Elias CJ,[479] I do not consider that the Court can assume that to be the case.

[317] I am inclined to agree with the Chief Justice that *Re the Bed of the Wanganui River*[480] is not authority for the proposition that the mid-point presumption reflects universal Maori custom.[481] But, even if it were authority for that proposition, we would of course be at liberty to depart from it, given it is not a decision of this Court. Much more research has been done since that case was decided on the history of land transactions and on Maori custom. New instruments may also be relevant (such as the United Nations Declaration on the Rights of Indigenous Peoples).[482]

[318] I am also inclined to agree with the Chief Justice that the issue as to whether the riverbed was owned to the mid-point is to be determined by reference to the

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479 At [29] of her reasons.
480 *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA).
481 At [18] of her reasons. See also at [175] of McGrath J's reasons.
482 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).

custom of the particular region involved.[483] The mid-point presumption is only a presumption and may be displaced. It would likely be displaced if it did not accord with local Maori custom. In this regard, I agree with the comments made at paragraphs [60] to [66] of Elias CJ's reasons. I also agree with the points made at paragraph [223] of William Young J's reasons and with the comments at paragraph [244] of his reasons that, whatever the custom was, there are real doubts as to whether the Native Land Court process undertaken ever engaged with the riverbed at all.

[319] I do not, however, find it necessary to come to any concluded view on whether or not the mid-point presumption applied. This is because, whatever the position, the appeal must fail.

[320] If custom accorded with the mid-point presumption, then the other two questions fall away.[484] The appellants' ancestors can be presumed to know about their local custom and therefore know that selling the riparian land would necessarily carry with it the riverbed to mid-point. It follows that there was no obligation for the Crown to inform them of what they already knew, even if the Crown owed a fiduciary (or other) duty to them.

[321] If custom did not accord with the mid-point presumption, then the riverbed never belonged to the appellants by virtue of the titles created by the Native Land Court[485] and therefore they cannot have sold it to the Crown when they transferred the riparian land that was the subject of the titles. Again the other two questions necessarily fall away.

[322] Given that the appeal can be resolved on the above basis, I would leave the issues of whether the Crown owes a fiduciary duty (or other obligations) to Maori and the extent of any such duties for another case. The same applies to any statutory limitation issues and possible equitable defences arising from the effluxion of time.

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483 See at [15]–[18] and [25] of her reasons.

484 This is essentially the point made at [15] of Elias CJ's reasons, at [177]–[181] of McGrath J's reasons and at [236] of William Young J's reasons.

485 The appellants may of course have a claim to customary ownership but this would be separate from the title created.

[323] I would therefore dismiss the appeal on the same basis as the Chief Justice.[486] I agree that there should be no order for costs.[487]

Solicitors:
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Crown Law Office, Wellington for Respondent
Chapman Tripp, Wellington for First Intervener
Pitt & Moore, Nelson for Second Interveners

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[486] At [32] of her reasons.
[487] See the Chief Justice's reasons at [167].