IN THE SUPREME COURT OF NEW ZEALAND

SC 13/2015
[2017] NZSC 17

BETWEEN	PROPRIETORS OF WAKATU First Appellant
	RORE PAT STAFFORD Second Appellant
	RORE PAT STAFFORD, PAUL TE POA KARORO MORGAN, WAARI WARD-HOLMES, JAMES DARGAVILLE WHEELER (SUING AS TRUSTEES OF TE KAHUI NGAHURU TRUST) Third Appellants
AND	ATTORNEY-GENERAL Respondent
	TE RUNANGA O NGATI RARUA Intervener

Hearing:	12, 13, 14 and 15 October 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	A R Galbraith QC, K S Feint, M S Smith and K C Johnston for Appellants D J Goddard QC, J R Gough and J M Prebble for Respondent T J Castle and L T I Lovell for Intervener
Judgment:	28 February 2017

JUDGMENT OF THE COURT

A The appeal by the second appellant is allowed in part and a declaration is made that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the customary owners and, in addition, to exclude their pa, urupa and cultivations from the land obtained by the Crown following the 1845 Spain award.

B **The appeals by the first appellant and the third appellant are dismissed.**

C **The cross-appeal by the respondent is dismissed.**

D **The claim by the second appellant is remitted to the High Court for determination of all remaining questions as to liability, loss and remedy to be determined in accordance with the reasons given in this Court.**

E **The respondent must pay the second appellant costs of $55,000 together with reasonable disbursements to be fixed if necessary by the Registrar. We certify for second counsel. All costs orders in the High Court and Court of Appeal are quashed. If costs are sought by the second appellant in respect of the lower Court hearings, application must be made to those Courts if the parties are unable to agree.**

SUMMARY OF RESULT
(Given by the Court)

[1] In accordance with the opinion of the majority comprising Elias CJ, Glazebrook, Arnold and O'Regan JJ, Mr Stafford has succeeded on the principal point on which his claim failed in the High Court. The majority decision in this Court is that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the customary owners and, in addition, to exclude their pa, urupa and cultivations from the land obtained by the Crown following the 1845 Spain award. The appeal is allowed on this point and Mr Stafford has been granted a declaration to that effect. Mr Stafford's claim may therefore proceed in the High Court for determination of matters of breach and remedy.

[2] The Court has unanimously dismissed the cross-appeal by the Attorney-General against the determination of the Court of Appeal that Mr Stafford has standing to pursue the claim.

[3] By majority, comprising William Young, Arnold and O'Regan JJ, the Court has held that the Proprietors of Wakatu and Te Kahui Ngahuru Trust lack standing to bring the claims on behalf of the customary owners.

[4] A majority, comprising Elias CJ, Glazebrook, Arnold and O'Regan JJ, has held that Mr Stafford's claims are not barred by the Limitation Act 1950 to the extent that they are within the terms of s 21(1)(b) of the Act because they seek to recover from the Crown trust property either in the possession of the Crown or previously received by the Crown and converted to its use. Any other issues relating to limitation, including the availability of a limitation defence to any claim for equitable compensation, are remitted for consideration by the High Court. It will also be necessary for the High Court to determine, once the facts as to breach and possible prejudice have been found, whether the claims are barred in application of the equitable doctrine of laches.

[5] A majority of the Court, comprising Elias CJ, Glazebrook, Arnold and O'Regan JJ, has held that Mr Stafford's claims are not barred by the Ngati Koata, Ngati Rarua, Ngati Tama ki Te Tau Ihu and Te Atiawa o te Waka-a-Maui Claims Settlement Act 2014. They consider, however, that the effect of the settlement achieved by that Act may be shown on determination of the facts to have caused prejudice to the Crown or to others which it is appropriate to take into account in considering application of the doctrine of laches. These matters turn on determinations of breach and loss still to be considered by the High Court.

[6] Findings of breach and as to the extent of any consequential losses were not made in the High Court or Court of Appeal. The Court is not able to make final determinations concerning liability, loss, and remedy in the absence of primary findings of fact in the lower courts and in the absence of full submissions on these matters, which were not the focus of the present appeal. While it is acknowledged by the Crown that 10,000 acres of the tenths reserves awarded by Spain were never reserved, the extent of loss to the suburban and town reserves is not clear. Nor is it clear to what extent the customary owners have been deprived of their occupied lands which should have been excluded from the Crown land obtained following the Spain award.

[7] Mr Stafford's claim is remitted to the High Court for determination of remaining issues of liability, defence and relief, in accordance with the opinions of this Court.

[8] Although the appeal does not finally determine the litigation, and significant issues have been referred back for the determination of the High Court (as indicated in the reasons for this judgment), Mr Stafford has succeeded on significant issues. The Court has held that he is entitled to costs and to have the costs orders made against him in the High Court and Court of Appeal set aside. Because the claims advanced by all three plaintiffs were the same, the Court has also set aside the costs orders made in the lower courts against Wakatu and Te Kahui Ngahuru Trust, even though they have not been successful in their argument that they have standing to advance the claims themselves. In the result, the respondent must pay costs to Mr Stafford of $55,000 together with reasonable disbursements. We certify for second counsel.

[9] The reasons of the Court for this result are given in the separate opinions delivered by:

	Para No.
Elias CJ	[10]
Glazebrook J	[502]
Arnold and O'Regan JJ	[724]
William Young J	[828]

REASONS

ELIAS CJ

Table of Contents

	Para No.
The appeal	[10]
(i) The basis of the claims	[10]
(ii) The decision of the High Court	[52]
(iii) Settlement of Waitangi Tribunal claims	[62]
(iv) The decision of the Court of Appeal	[67]
(v) The appeal to this Court	[77]
Approach	[87]
Facts and historical context	[96]
(i) Crown title to land	[96]
(ii) The Land Claims Ordinance 1841	[104]
(iii) The New Zealand Company's land claim	[108]
(iv) The Spain investigations	[117]
(v) The Spain award	[149]
(vi) Occupied lands and tenths reserves	[156]
(vii) Strains in the Nelson settlement	[166]
(viii) Background to the 1848 grant	[170]

(ix)	***1848 grant***	[188]
(x)	***The New Zealand Company Loans Act 1847***	[193]
(xi)	***The Wairau purchase and surveys in Massacre Bay***	[199]
(xii)	***No "waste lands" policy applied***	[229]
(xiii)	***Management of the native reserves***	[234]
(xiv)	***Significance of the Crown's management of the reserves***	[287]
Legal context for the claims of equitable obligation		[294]
(i)	***The New Zealand legal order***	[295]
(ii)	***Regina v Fitzherbert***	[303]
(iii)	***The Crown as trustee or fiduciary***	[331]
Fiduciary duties in Crown dealings with indigenous people		[340]
Inapplicability of the "political trust" cases		[367]
Fiduciary duties arising in the present case		[379]
Existence of a trust over the reserves		[392]
(i)	***The terms on which the Crown took ownership***	[402]
(ii)	***Crown conduct demonstrating assumption of trust***	[410]
Breaches of trust		[417]
(i)	***The failure to set aside the rural reserves***	[420]
(ii)	***The failure to exclude the occupied lands***	[437]
(iii)	***The transactions which diminished the tenths estate***	[438]
The effect of the Limitation Act 1950		[446]
The application of the equitable doctrine of laches		[455]
The effect of the Settlement Act		[483]
Standing		[489]
Conclusion		[495]

The appeal

(i) The basis of the claims

[10] The background to the appeal is one of the more audacious of the old land claims based on purchases of land before the Treaty of Waitangi. The 1839 purchase by William Wakefield for the New Zealand Company from Ngati Toa chiefs at Kapiti and Te Atiawa chiefs at Queen Charlotte Sound covered some 20 million acres of land on both sides of Cook Strait. The Kapiti purchase included lands in western Te Tau Ihu, the top of the South Island comprising Blind Bay (Tasman Bay) and Massacre Bay (Golden Bay). The owners of this land according to native custom were found by the Native Land Court in 1892 to have been hapu of Te Atiawa, Ngati Rarua, Ngati Tama, and Ngati Koata. In 1893 the Court produced a list of the individual hapu members who were entitled to be recognised as owners.[1]

---

[1] The original list of 253 names was expanded in 1895, but it is the 1893 list of 253 names that is relied on in the agreed statement of facts and has continued to be the foundation of entitlement and which has been used for the purposes of the litigation (including in the statement of claim).

[11] Following the Treaty of Waitangi and the establishment of Crown Colony government, all pre-Treaty sales were of no effect by reason of the Land Claims Ordinance 1841 until confirmation after investigation by commissioners that the purchases had been "on equitable terms".[2] Only then did the land become Crown land, able to be granted by the Governor.[3]

[12] By agreement between the Imperial Government and the Company in November 1840, the Company had secured arrangements for its proposals for systematic settlement. A principal consideration for the purchases it had made before 1840 had been the reservation for the benefit of the native owners of a proportion of the land of each settlement in addition to the payments it made directly to those with whom it dealt in the sales. Under the 1840 agreement with the Imperial Government, the reserves promised by the Company for the benefit of Maori were to be vested in the Crown.[4] The Crown also reserved the power to make further provision for Maori, a power that enabled it to insist on the exclusion of Maori occupied lands and other land necessary for their support.[5]

[13] The New Zealand Company had hoped that its land purchases for systematic settlement would be treated as a special case and would not need to be investigated for fairness under the provisions of the Land Claims Ordinance. That hope was dashed by the Colonial Secretary, Lord Stanley. Until confirmation after investigation that the purchase had been on equitable terms, no land could vest in the Crown to be granted by it to the Company.[6]

---

2 Lands Claims Ordinance 1841 4 Vict 2, ss 2 and 3. The Ordinance replaced earlier legislation enacted in New South Wales to the same effect in 1840 (the Court of Claims Act 1840 (NSW) 4 Vict 7).

3 Delay in obtaining an award under the Land Claims Ordinance was addressed by providing in the Land Claimants Estates Ordinance 1844 7 Vict 20 (s 1) that the legal estate was deemed to be in the claimant from the time of purchase, rather than the date of the Crown grant.

4 Clause 13 of the agreement provides: "It being also understood that the Company have entered into engagements for the reservation of certain lands for the benefit of the Natives, it is agreed that, in respect of all the lands so to be granted to the Company as aforesaid, reservations of such lands shall be made for the benefit of the Natives by Her Majesty's Government, in fulfilment of, and according to the tenor of, such stipulations". In a letter of 29 January 1843 to the Acting Governor, Commissioner Spain interpreted this clause as meaning that the Government was to "take the management of such reserves into its own hands".

5 Clause 13 confirmed that the Government reserved "in respect of all other lands, to make such arrangements as to them shall seem just and expedient for the benefit of the Natives".

6 As is more fully described below at [98]–[99].

[14] The Company seems to have had some expectations too that the reserves it proposed to make for the Maori owners would mean that the balance of the land for its settlements, for which it sought Crown grants, would be free of Maori interests. That hope was also rejected by the Colonial Office which pointed out from 1840 that the Crown engagements to Maori in the Treaty of Waitangi (and echoed in the Charter and Instructions given when New Zealand was set up as a separate colony) preserved to Maori their occupied lands. They remained outside the Crown lands obtained by purchase or through the Land Claims clearance of native title. The Crown officials in England and in New Zealand regarded the tenths reserves as part of the purchase price, not fulfilment of the obligation to reserve occupied land. The Crown's position was eventually acquiesced in by the Company in January 1844, allowing the Land Claims investigation into its purchases (which had broken down) to continue. It is reflected in the terms of the award made in 1845 by the Commissioner who investigated the Company's claim, William Spain, who found the purchase of the Nelson districts to have been on equitable terms on the basis that the tenths were reserved and that in addition Maori occupied lands were excluded.[7] A complication which has continued to vex the present proceedings is that the Company's 1842 surveys of the Nelson districts may not have proceeded on the basis of a clear distinction between occupied sections and tenths reserves. Certainly, they do not seem to have attempted any comprehensive identification of the lands occupied by Maori at the date of the surveys.

[15] The Nelson settlement, like the earlier Port Nicholson settlement, was under way before questions of entitlement under the Land Claims Ordinance were resolved. In Nelson, the tenths reserves (part of the consideration for the sale) were one-tenth of the allotments first offered by the Company for purchase in London in 1841.[8] Each allotment was to comprise one section in the township of Nelson of one acre, a "suburban" (or "accommodation") section of 50 acres and a rural section of 150 acres.

---

7 Spain found that land in the Wairau Valley, which had also been claimed by the Company, had not been purchased; see below at [151].

8 In the Company's terms of purchase for its Nelson settlement, the reserves were described as an additional amount of land, equivalent to one-tenth of the Company land, and therefore one-eleventh of the area for which the Company sought a grant. The Colonial Office did not accept that the area promised was one-eleventh of that to be included in the grant and the Commissioner in his award made it clear that the terms on which the sale was approved as equitable entailed the reservation of one-tenth of the Company's land, as is further described at [152]–[154].

[16] Before the investigation under the Land Claims Ordinance took place, selection of town and suburban sections for the allotments by settlers and for the tenths reserves (on behalf of Maori) had already occurred following an order established by ballot. The town and suburban sections of the tenths reserves, amounting to 5,100 acres, had already been surveyed, selected by the Police Magistrate, and taken under the control of Governor Hobson in 1842. The rural sections for all allotments in the settlement remained to be identified following completion of the surveys of the Nelson districts.

[17] Spain's award in 1845 found that the purchase had been made on equitable terms, after he had taken into account additional "gifts" made in 1841 by Captain Arthur Wakefield[9] at the time the Nelson site was selected and after additional payments to the owners were made under his supervision. His determination cleared the land of native title and vested it as demesne lands of the Crown (Crown land), able to be granted by it to the Company under the authority provided to the Governor in the 1840 Charter and Instructions to Governor Hobson.[10]

[18] Spain recommended that the Company be granted 151,000 acres for its Nelson settlement with exclusion of one-tenth as reserves as had been promised and, in addition, whatever land was occupied by Maori pa, urupa, and cultivations, leaving such occupied lands with Maori. The award annexed plans which purported to show the tenths reserves but which in fact showed only the 5,100 acres of "town" and "suburban" tenths reserves already identified in the districts surveyed in 1842, leaving 10,000 acres of rural land to be incorporated into the tenths reserves.[11]

---

9 Captain Arthur Wakefield was the brother of Colonel William Wakefield, the principal agent for the New Zealand Company in New Zealand. Also mentioned in this judgment is the eldest Wakefield brother, Edward Gibbon Wakefield, who was an influential member of the New Zealand Company.

10 This was held to be the effect of the Land Claims Ordinance and consistent with established doctrine in *R v Symonds* (1847) NZPCC 387 (SC). The effect was described by Martin CJ as being that "So soon, then as the right of the Native owner is withdrawn, the soil vests entirely in the Crown for the behoof of the nation": at 395. The terms of the Land Claims Ordinance accordingly made it clear that whether to make a grant was not determined by the award but was a matter for the Governor to determine.

11 Originally, the Company had intended the tenths reserves to include 100 rural sections, totalling 15,000 acres, aligning with the 100 town and 100 suburban sections. Spain however had recommended a smaller area be granted to the Company than it had envisaged. The area to be included in the tenths reserves shrank proportionately, meaning that only 10,000 acres remained to be included in the rural sections in accordance with the Spain award.

[19] The districts already fully surveyed at the time of the Spain award were Wakatu (Nelson), Waimea, and Moutere, all surveyed in 1842. Motueka was only partially surveyed and the substantial territory in Massacre Bay and the far west of Blind Bay (Tasman Bay) in the Motueka district had not yet been surveyed. On the face of the Spain award, therefore, the maps annexed were not controlling of the extent and location of the full tenths reserves and did not identify the occupied lands even within the surveyed blocks (perhaps because when the surveys were undertaken the Company had not expected to have to exclude areas of occupation as well as to reserve the tenths). Nor were the surveys accurate as to the identified tenths suburban reserves because they were the original plans and did not capture exchanges of some of the suburban sections which had been undertaken before and during the Spain inquiry.[12]

[20] The Spain award was the basis of a Crown grant of July 1845 in the same terms to the New Zealand Company. Under it, the Company was obliged to reserve one-tenth of the land granted to it for the benefit of the Maori owners of the district. Excluded, too, were "[a]ll the pas, … burial-places, and grounds actually in cultivation by the Natives".

[21] The Company refused to accept the grant. It was disappointed about its size. It had been looking to receive 221,000 acres on the assumption that its purchase included the Wairau Valley, but Spain found the Wairau had not been sold to it. The Company also considered that the terms of the grant provided insufficient security of title both because of the indeterminacy of the exclusions of the pa, cultivations and burial grounds of Maori, which had not been identified and surveyed, and because of a similar exclusion of any land earlier sold to Europeans. The Company lobbied in London and New Zealand for something better. In the end, it did not receive a new grant in terms acceptable to it until 1848.

[22] Under the terms of the 1848 grant, the grant of land to the Company was "excepting and reserving all the pahs, burial places, and Native reserves situated within the said block of land hereby granted to the New Zealand Company as aforesaid, which are more particularly delineated and described upon the plans

---

12 These exchanges are discussed at [144]–[148].

annexed hereto". The plans annexed to the 1848 grant for the districts which had already been surveyed at the time of the Spain award continued to be the 1842 plans used by Spain (with corrections to reflect exchanges already effected and which had made the plans erroneous in the 1845 award and Crown grant). As already described, they contained all the suburban and town tenths sections but not the rural sections because identification of the rural tenths reserves could not be undertaken until the districts were fully surveyed. Nor did the 1842 plans used in the 1848 grant identify the land occupied by Maori pa, urupa and cultivations (as already indicated, perhaps because at the time they were undertaken in 1842, the Company hoped that the reservations from its grant would be limited to the tenths reserves). The only occupied lands identified for exclusion in the plans annexed to the 1848 grant were areas of cultivation and pa in Massacre Bay and western Blind Bay contained in plans based on later 1847 surveys of those districts, undertaken in order to allow rural sections in those areas to be made available to the settlers (as they eventually were in March 1848).

[23] As is described later in these reasons,[13] the Colonial Government had first thought that the Company's concerns about the indeterminacy of its title (because of the exclusions in the 1845 grant) could be met by granting to the Company only the land required by it for the purpose of its obligations to the settlers, net of the tenths reserves and occupied lands (which would be retained by the Crown). It seems that in order to prepare a Crown grant on that basis (with the areas of occupation excluded from the Company's grant), inquiries were made by the colonial administration as to whether there were any areas of occupation (pa, urupa or cultivations) within the settler sections surveyed in 1842 and by treating the occupied land in Massacre Bay identified in the 1847 surveys as "occupation reserves".

[24] The eventual form of the 1848 grant did not follow the initial suggestion however. That was because, as William Wakefield pointed out, the Company was not in a position to identify the land it was to be granted because the surveys for the rural sections had still to be undertaken (and were not eventually undertaken until months after the Crown purchase of the Wairau in March 1847 was made available for that

---

13 Below at [173]–[174].

purpose). Instead, the 1848 grant was made for an area much more extensive than was required for the Company settlement and which included the Wairau purchase (net of the large occupation reserve for Ngati Toa at Kaituna). As is explained in what follows,[14] I consider that this extensive grant was made on the basis that land surplus to the needs of the settlement was held on trust for the Crown and was to be returned to it (a proposal made by Wakefield on the basis of a suggested side agreement, rather than an arrangement on the face of the grant, but which was ultimately the effect of the New Zealand Company Loans Act 1847 (Imp)[15]).

[25] As a result, the August 1848 grant excluded from the grant to the Company only the tenths reserves already identified (the suburban and town sections surveyed originally in 1842) and the "occupation reserves" that had been identified in the Massacre Bay survey in 1847 (undertaken in order to identify the rural sections available for the settlers in that district). It did not identify occupied land within the districts of Nelson surveyed in 1842 (because that survey had not undertaken the exercise). The limited inquiries in 1847 as to whether there were areas of occupation in the "sections of the settlers" (undertaken when it was proposed to grant to the Company only the land it required for the settlement, net of reserves and exclusions) had not attempted to identify occupied lands beyond the settler suburban and town sections. Nor did the 1848 grant identify and exclude the rural tenths reserves, which had not been selected when the settler selections of rural sections were undertaken.

[26] For the reasons explained in what follows,[16] I consider that the form of the Crown grant to the Company did not remove the pre-existing obligations assumed by the Crown to provide the rural tenths reserves and to exclude occupied lands not yet identified and set apart under the terms of the Spain award (as only the Massacre Bay occupation lands were at the time of the grant). The grant was made to the Company for the purposes of enabling it to fulfil its obligations to the settlers for their allotments but on the basis, foreshadowed in Wakefield's proposal and required by the terms of the New Zealand Company Loans Act 1847, that land not required for the purposes of the Company allotments would be held on trust and returned to the Crown.

---

14 Below at [183]–[187].
15 New Zealand Company Loans Act 1847 (Imp) 10 & 11 Vict c 112. See discussion below at [193]–[198].
16 Below at [188]–[192].

[27] The tenths reserves in the suburban and town sections which had already been set apart and were held as Crown land (on trust, as I consider), were excluded. So too were the "occupation reserves" identified in Massacre Bay. Other occupied lands in the districts were not distinctly excluded because they had not been identified. Although that potentially created a problem if occupied land was found to be included in settler sections, the problem pre-dated the 1848 grant. The rural tenths reserve sections had not been identified and were not excluded from the terms of the grant. Again, the obligation to provide the rural reserves does not seem to me to have been affected by the form of the 1848 grant (even if it potentially created difficulties if insufficient land remained after fulfilment of the settler allotments to fulfil the rural tenths reserves). It is true that the loss of the preferential choice for the Maori reserves (secured by the lot drawn in London and observed in the selection of the suburban and town sections) is likely to have impacted on the value of the reserves when eventually set aside (after return to the Crown of the land surplus to the requirements of the Company), but the obligation to provide them from the land surplus to the Company's requirements remained.

[28] After the Commissioner's award in March 1845 cleared the land of native title so that it became Crown land, the Crown continued to manage the identified town and suburban tenths reserve sections, as it had done since 1842. The intended tenths rural reserves were never identified and reserved, although, as has been indicated, rural sections for the settlers were selected in March 1848. The failure to reserve the rural tenths sections is claimed in the present proceedings to have been in breach of the Crown's duties as trustee or in breach of fiduciary duties it owed to the beneficiaries of the tenths reserves.

[29] The already-identified tenths reserves in the town and suburban sections were administered by officials and agents appointed by the Governor. The Native Trust Ordinance 1844,[17] which might have provided a statutory framework for management of such reserves (as Governor FitzRoy seems to have envisaged would happen), was not brought into effect. No legislative arrangements for the management of the tenths reserves were made until the enactment of the New Zealand Native Reserves Act 1856.

---

[17] Native Trust Ordinance 1844 7 Vict 9.

Even then, the Act did not purport to be constitutive of trust or to deal with ownership of the tenths reserve lands, but simply provided for their administration, including by providing powers of disposition of the land.

[30] In 1882 the Nelson tenths reserves were vested by statute in the Public Trustee as "[l]ands comprised in blocks guaranteed to or set apart for the benefit of Natives … according to the directions of any Commissioner appointed to investigate purchases of land made from Natives by the New Zealand Company".[18] The present litigation is confined to the period before the Public Trustee was constituted trustee of the tenths reserves.

[31] By the time the tenths reserves were vested in the Public Trustee, they had been diminished by exchanges and grants undertaken by the officials managing them, which occurred from the time of the selection of the town and suburban sections of the tenths reserves. These losses to the tenths reserves are claimed in the present litigation to have been caused by breaches of trust or fiduciary duty on the part of the Crown.

[32] Some of the exchanges had swapped originally-selected town and suburban tenths reserves for sections occupied or part-occupied by Maori, which should rightly have been excluded altogether and not included in the tenths reserves. Although the extent of the tenths reserves may have been formally preserved in most of these exchanges, the effect was to diminish their benefit for all Maori of the district. And the use by particular families and individuals sanctioned and facilitated by the exchanges set up the conditions for later subdivision or vesting of the occupied land in the particular families or individuals, leading to later removal of land from the tenths reserves altogether.

[33] The exchanges and reductions, effected from 1844 to 1849, are said in the pleadings to comprise: 400 acres (eight suburban sections) in Motueka allocated to occupying Maori during the Spain investigation;[19] 400 acres (eight suburban sections)

---

[18] Native Reserves Act 1882, s 3(4). "Benefit" was defined in s 14 to mean "the physical, social, moral, or pecuniary benefit of such Natives" including by "the providing of medical assistance and medicines".

[19] Section numbers 157, 159, 160, 161, 183, 187, 241 and 242 on the plans annexed to Spain's award. See below at [141].

in Motueka and Riwaka exchanged in 1844 for settler sections occupied by Maori;[20] a straight reduction of the town sections held as tenths reserves from 100 to 53 (a loss of 47 acres approved by Governor Grey in 1847 as a measure to help the struggling Nelson settlement);[21] and an exchange in 1849 (by the Board of Management of the reserves appointed by the Governor) of six suburban tenths reserves for six sections allocated to settlers near Te Maatu occupied by Maori (a loss to the tenths of 300 acres).[22] In addition, the tenths reserves are said to have been diminished by 918 acres by the grant of land at Whakarewa to the Bishop of New Zealand in 1853[23] and by a further exchange in 1864 of three suburban sections in Motueka for a settler's rural block in Massacre Bay.[24] It is claimed that in 1862 James Mackay, when Assistant Native Secretary, vested 12 suburban sections in the ownership of the Maori occupiers, reducing the tenths by a further 600 acres.[25]

[34] In addition to the losses to the tenths reserves occasioned by exchanges and grants of the suburban sections, it is claimed by the appellants that 12 of the town sections in the tenths trust were in fact occupied by pa or cultivations and should have been excluded from the sale so that a further 12 town sections should have been brought into the tenths.[26] As a result, it is said that the tenths were further reduced by 12 acres of town sections.

[35] The appellants say that by 1882 the Nelson tenths town and suburban reserves comprised only 2,774 acres of the original 5,100 acres identified in 1842.[27] In 1877

---

20 The former settler sections which became occupation reserves were section numbers 162, 163, 164, 182, 188, 212, 219 and 220. Those surrendered were sections 7, 8, 10, 11, 16, 28, 256 and 262. See below at [141].

21 As described at [168]–[169].

22 The sections obtained were 181, 184, 210, 211, 218 and 243. The sections relinquished were 20, 29, 35, 36, 73 and 74. The arrangements are further described at [266].

23 Comprising suburban sections of 429 acres being whole or part of sections 6, 22, 137, 138, 145–147, 221–223, and 240; and 489 acres of "occupied tenths" comprising whole or part of sections 157, 159–164, 181, 218–220 and 241–243. See below at [269]–[271].

24 The Motueka sections given up were sections 139, 140 and 141 (each of 50 acres), in exchange for section 9 in Takaka (150 acres). See below at [281].

25 The sections were 126, 127, 129 and 132 at Tu Kumera; 111, 113, 117 and 118 at Marahau and 144–147 at Puketutu. See below at [144].

26 Sections 5, 50, 62–66, 148, 203, 205, 229, 344 and 1099. See below at [135].

27 Further dealings in the land, outside the scope of the proceedings, meant that when the residue of the 5,100 acres of the 1842 reserves was vested in the Proprietors of Wakatu in 1977, it comprised just 1,626 acres. In the High Court, the figure of 3,066 acres was given, but this includes the residue of the occupation reserves in Massacre Bay: *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [14].

Alexander Mackay estimated, in a report tabled in the House of Representatives, that the loss to the tenths reserves of the 800 acres at Motueka and the 918 acres given to the Church cost the trust annual income of approximately £1,500.[28] He put the loss of annual income resulting from the failure to reserve the rural sections at a further £1,500 (although this calculation was based on the value of the more fertile land in the Wairau).

[36] The extent and effect of diminution of the tenths reserves is a matter of contention in the litigation. The dealings are described in more detail in the section of these reasons dealing with the Crown management of the tenths reserves.[29] Whether these dealings were in breach of trust or fiduciary obligations and the extent of any losses were not the subject of full findings of fact in the Courts below because the questions of breach were not reached. For present purposes it is sufficient to note that some of the land obtained for the tenths by exchange with the sections originally selected seems to have continued to be included in the tenths reserves, even though occupied or partly occupied. Some of the occupied tenths lands seem later to have been vested in the occupiers and lost to the tenths reserves.

[37] There may be some confusion in the use of the terms "reserves" and "occupation reserves". "Occupation reserves" were created in Massacre Bay and the far west of Blind Bay, which were surveyed in 1847 (later than the other districts). These occupation reserves at Massacre Bay were not Crown land (they were recorded as being in native ownership), but were administered with the tenths reserves (as is explained below).[30] Under the terms of the Spain award, the same process ought to have been followed in Nelson and Motueka,[31] but was not. Instead, some Maori-occupied lands were included within the tenths reserves, which were owned by the Crown but held for the benefit of all hapu who were owners according to custom. These occupied Motueka tenths were not "occupation reserves". They are listed as

[28] Alexander Mackay "Native Reserves, Nelson and Greymouth" [1877] II AJHR G3a at 1.
[29] Below at [234]–[286].
[30] Below at [283] and [291].
[31] As Alexander Mackay and Thomas Brunner pointed out in 1870; discussed below at [145].

"Reserved 'Tenths'" in the schedules to the Native Reserves Act 1873 and the Native Reserves Amendment Act 1896.[32]

[38] It is claimed in the proceedings that the Crown breached equitable duties it owed to Maori to exclude the occupied land (urupa, pa and cultivations). Some of these areas were however later identified and reserved, as counsel acknowledged at the hearing. The extent of the deficiency was said to require investigation and determination.

[39] As already indicated, apart from the reductions in the town and suburban reserves identified in 1842, the tenths were never completed by the additional ten thousand acres of rural tenths reserves promised, although land from which such reserves could have been made was cleared of native title by the Spain award and became Crown lands. Although conditionally granted to the New Zealand Company under the New Zealand Company Loans Act 1847 and the 1848 grant (on terms that returned to the Crown land surplus to that required for the New Zealand Company settlement[33]), the land from which the rural tenths reserves could have been provided in any event reverted to the Crown when the New Zealand Company failed in 1850.[34] A significant part of the present claim relates to the failure to reserve the 10,000 acres of rural reserves.

[40] In 1892 the Public Trustee applied to the Native Land Court, under the provisions of s 16 of the Native Reserves Act 1882, for orders identifying those with beneficial interests in the tenths reserves. Judge Mackay made orders in the Native Land Court in 1893 as to the identity of 253 beneficiaries of the tenths reserves, after first in 1892 identifying the hapu entitled and establishing the proportions in which they were to share in the benefit of the 151,000 acres by reference to the apportionment made in the Spain award.

---

32 Later, at least some of these reserves seem to have been treated on a similar basis to the Massacre Bay occupation reserves and to have been devolved upon the members of the hapu and families who from an early stage occupied them with the acquiescence of the managers of the tenths reserves. See below at [144] and n 157.

33 As is described below at [195].

34 At which point the Crown took over all the assets of the Company and assumed the burden of discharging its obligations, as described at [198] below.

[41] The Crown historical researcher, James Parker, rightly observes in his evidence that “some of the districts represented in the [Spain] award were not districts in which tenths reserves were allocated”. That is consistent with the purpose that the reserved tenths were not for occupation (occupied lands having been separately excluded by the terms of the award) but endowments which would be used for the benefit of all hapu having traditional ownership within the total area of the award.[35]

[42] In 1920 the native tenths reserves were transferred to the Native Trustee (later to become the Maori Trustee). And in 1977 the remaining tenths reserves were vested in the Proprietors of Wakatu, the first appellant. Wakatu holds the tenths reserves on trust for the descendants and successors of those identified by the Native Land Court in 1893 as beneficiaries of the tenths reserves.

[43] The second appellant, Rore Pat Stafford, is kaumatua of Ngati Rarua and Ngati Tama and a beneficiary of the tenths reserves by descent from owners identified in 1893. The third appellants are the trustees of Te Kahui Ngahuru Trust, formed in 2010 by Mr Stafford as settlor to represent the descendants of those identified as beneficiaries of the Nelson tenths reserves by the Native Land Court while removing those who had succeeded by law but are not descendants of the owners identified in 1893.

[44] There is considerable overlap between the beneficiaries of Wakatu and the beneficiaries of Te Kahui Ngahuru Trust. The main differences arise out of the basis of succession under Maori land legislation in the years since 1893 which has meant that, today, not all beneficiaries of Wakatu are descendants of those identified by the Native Land Court in 1893. In addition, some individuals were removed as owners of the tenths under the provisions of the Maori Reserved Lands Act 1955. Although the beneficiaries of Wakatu are the substantial body of descendants from the 1893 owners,

---

35 By the time of the Mackay judgment, the original intent had been affected by the acquiescence of those managing the trust in some sections being occupied or partly occupied by families and individuals of the hapu entitled. Mackay directed that the rents accruing from land allocated to individual Maori were not to accrue for the benefit of the tenths, as is accepted in the agreed statement of facts. This paved the way for later subdivision and vesting of the land, in some cases taking it out of the tenths reserves altogether. The effect of these dealings is dealt with below at [158]–[159].

Te Kahui Ngahuru Trust was intended as a vehicle to reintegrate as beneficiaries those who had been excluded and their descendants.

[45] The Nelson tenths reserves were the subject of a claim to the Waitangi Tribunal[36] seeking redress for the failures of the Crown to protect and reserve the full tenths and arising out of the management of the reserves by the Crown.[37] The claim, Wai 56, was filed in 1986 by Mr Stafford and another claimant for themselves and on behalf of Wakatu, Ngati Tama, Te Atiawa, Ngati Koata, Ngati Rarua, and "all Maori people affected by [the] claim".[38]

[46] The Waitangi Tribunal heard the claim as part of its wider inquiry into Treaty breaches in Te Tau Ihu brought before it in a number of different claims, of which Wai 56 was one only.[39] The Tribunal reported on the claims in 2008 but, as is its practice, did not proceed to consider questions of relief, to allow the Crown and claimant groups in the various claims the opportunity to negotiate a settlement. Before the Tribunal, the Crown accepted that it had committed a number of breaches of Treaty principles in connection with western Te Tau Ihu, including in relation to the tenths reserves.

[47] The Crown's preference in resolving claims under the Treaty of Waitangi Act 1975 is to deal with large iwi groupings and to bring in all grievances in a district,

---

36 The Tribunal is set up under the Treaty of Waitangi Act 1975 to "to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty" (as per the Act's long title). The Tribunal has the function of inquiring into and making recommendations upon any claim submitted to it under s 6. The jurisdiction of the Tribunal is to inquire into claims that any Maori or group of which the claimant is a member is "prejudicially affected" by New Zealand legislation since 6 February 1840 (whether or not it is still in force), any regulations, proclamations, notices or statutory instruments made since 6 February 1840, any policy or practice adopted or proposed to be adopted by or on behalf of the Crown (whether or not still in force) or "by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown" since 6 February 1840. If claims are found by the Tribunal to be "well-founded", the Tribunal may recommend action to compensate for or remove the prejudice. Such recommendations are not binding on the Crown.

37 In addition to the failures to reserve and protect the tenths reserves and manage them for the benefit of Maori entitled, the claim cited "the failure of legislation to ensure the fulfilment of trusteeship obligations".

38 The copy of the statement of claim provided to the Court is dated 1988, but the evidence of Mr Morgan indicates that the claim was originally lodged in 1986, following the 1985 extension of the jurisdiction of the Waitangi Tribunal to deal with historic claims arising before 1975.

39 Wai 56 was heard concurrently with claims concerning, for example, the Crown's purchases and compulsory acquisitions of Maori land over the past 160 years; loss of access to fisheries and other natural resources; and the use of violence against Maori by the Crown in Te Tau Ihu. See: Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 1 at [1.5].

rather than addressing them separately. It usually negotiates with a representative who has secured the mandate of the other claimants. Mr Stafford signed the mandate which allowed Tainui Taranaki ki te Tonga to negotiate for a settlement on behalf of all claimants in respect of all Treaty claims in the district, including Wai 56, but on the basis that Wakatu would be kaitiaki (guardian) of the Wai 56 (Nelson tenths) claim in the negotiations.

[48] The present proceedings were brought in the High Court in 2010 after it became clear that the Crown was not prepared to accede to a request by counsel for Tainui Taranaki ki te Tonga and further subsequent representations by Mr Stafford that there be a distinct settlement of the Nelson tenths claims brought under Wai 56. Rather, the Crown took the view that the claims on behalf of the tenths reserves would be part of the wider settlement of all grievances with all iwi groupings in Te Tau Ihu represented by Tainui Taranaki ki te Tonga.

[49] Before the proceedings were brought, the Wai 56 claimants sought an urgent hearing in the Waitangi Tribunal seeking distinct relief in that claim and alleging a further breach of the principles of the Treaty in the process of negotiation being followed by the Crown. The urgent hearing was declined by the Tribunal on the basis that the settlement negotiations had not broken down, the mandate was still effective, and there was no necessary prejudice in the refusal to deal separately with Wai 56. It was a material consideration that the iwi groups wanted the negotiation to continue.

[50] The proceedings were filed in the High Court before the settlement negotiations had been concluded. In them, the appellants claimed equitable relief against the Crown as trustee or fiduciary for breaches of duties in failing to preserve the tenths reserves and failing to get in the 10,000 acres of rural reserves; for dealings and disposals of the tenths reserve lands which diminished the trust estate before 1882 (when the tenths reserves vested in the Public Trustee); and for failure to reserve and exclude their pa, cultivations and urupa.[40] They sought declarations that the Crown acted in breach of trust and that it holds any land it has in the Nelson district on

[40] They also claimed that the tenths should have been augmented by a proportionate increase that reflected the later expansion of Nelson (the "uplift" claim). Since this claim was not maintained on the present appeal it is not necessary to refer further to it.

constructive trust for the beneficiaries of the tenths reserves. The plaintiffs sought declarations that the Crown is obliged to restore the tenths reserves or pay compensation for the losses or, alternatively, to account for its profits in disposal of the land.

[51] Other iwi in Te Tau Ihu – Ngati Rarua, Ngati Koata and Ngati Tama – intervened to oppose the claims.[41] Following the issuing of the court proceedings, the negotiations of the settlement of the claims made under the Treaty of Waitangi Act were at first suspended.

(ii) The decision of the High Court

[52] The plaintiffs were unsuccessful in the High Court in 2012.[42] Clifford J held that all lacked standing to bring the claims. He took the view that Wakatu was a statutory incorporation which could not represent the customary groups who held mana whenua over the land in western Te Tau Ihu in the 1840s, even though its members originally had derived their own rights from membership of the customary groups. The Judge considered it was sufficient to say of the claim by the trustees of Te Kahui Ngahuru Trust that "merely by creating a trust a settler cannot vest in that trust property that it is not the settlor's to vest".[43] While Mr Stafford might have had standing as a beneficiary of a trust (had such a trust been established, as the Judge held it had not been), he was found by Clifford J not to have standing in respect of the claim for breach of fiduciary duties. Such duties could have been owed only "to the relevant customary groups".[44] Mr Stafford was not shown to represent these groups. Nor had he sought a representation order on their behalf.

[53] Clifford J rejected the contention that the Crown was a trustee of the tenths reserves. He considered that the Crown was "acting as government" in its dealings with the New Zealand Company and in the management of the reserves (including through the exchanges).[45] Despite the references to "trust" and "trustees" in its own

---

41 Ngati Kuia and Ngati Apa maintained largely watching briefs in the High Court, while Te Atiawa chose not to intervene.
42 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 (Clifford J).
43 At [315].
44 At [316].
45 At [230].

records, the Crown actions were "best understood as interim and somewhat pragmatic arrangements put in place pending the creation by statute of some form of trust or arrangement".[46] Such dealings entailed reconciliation of the interests of the Company, settlers, and Maori in a manner which was necessarily "political". There was no evidence of intention to create a trust sufficient to constitute the Crown as trustee and no "private law trust" (as opposed to higher-order "political trust") had "crystallised" through either the 1845 or 1848 Crown grants.

[54] In addition, although there may have been sufficient certainty of subject-matter in the town and suburban reserve sections for the purpose of trust, Clifford J considered there was insufficient certainty of subject-matter in relation to the rural sections (which had never been surveyed or identified) and the occupied lands (the pa, urupa, and cultivations that should have been excluded).[47] The argument that the Crown was a constructive trustee of the lands it obtained required "a private law characterisation of arrangements, for example the 1840 Agreement, which are in my view fundamentally political matters".[48]

[55] On the other hand, Clifford J indicated that, if there had been sufficient certainty of intention to constitute the Crown a trustee in respect of the identified tenths reserves, the trust would not have failed for lack of certainty of objects. He thought such certainty could be obtained by reference to the expression of purpose in the Native Trust Ordinance of 1844 and a letter written on behalf of Hobson in 1842 giving instructions in relation to administration of the reserves.[49] Clifford J also indicated that he would not have accepted the submission of the Crown that any trust in the town and suburban reserves was invalid by reason of the rule against perpetuities. In that connection he cited the decision of the Privy Council in *Cooper v Stuart*[50] when indicating that in his view the rule was "flexible and context-specific".[51] In the context

---

46 At [235].
47 At [246].
48 At [260].
49 At [247]–[248].
50 *Cooper v Stuart* (1889) 14 App Cas 286 (PC).
51 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [250]–[251]. The Attorney-General challenged this position before the Court of Appeal, but Ellen France J (with whom the other members of the Court agreed) held that it was not necessary to decide the point given the Court's overall conclusion: *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [164].

of property rights of Maori which were inalienable by custom he considered the rule could have no application.

[56] For essentially the same reasons he had rejected the claim to trust (the characterisation of the Crown's dealings as "political" or "governmental"), Clifford J rejected the claim that the Crown owed fiduciary duties to the beneficiaries of the tenths. He cited a 2007 decision of the New Zealand Court of Appeal which expressed the view that the fiduciary duties recognised in Canada in *Guerin v The Queen*[52] as owed by the Crown to indigenous bands "reflect the different statutory and constitutional context in Canada".[53] The Court of Appeal there suggested that recognition of enforceable fiduciary duties to Maori would place the Crown in a position of conflict in relation to its "duty to the population as a whole". Clifford J took the view that there was nothing in New Zealand equivalent to the role imposed on the Crown under s 18(1) of the Indian Act RSC 1985 c I-5 (Canada).[54] He thought that, before 1848, the Crown was balancing competing interests and could not owe Maori a duty of utmost loyalty, as is the hallmark of fiduciary relationship.[55] After 1848, he considered that the Crown was free from any obligations arising out of the clearance of customary title. "No concept of trust" was referred to in the 1848 grant.[56] Clifford J rejected the notion that "the concept of a reserve for Maori in and of itself points to a fiduciary obligation for the Crown as regards the land reserved".

[57] Clifford J considered that the strongest argument for fiduciary duty was in relation to the identified town and suburban tenths in the period between 1845 (when the Spain award was made) and 1856 (when the Native Reserves Act came into force).[57] He considered that after 1856 any fiduciary duty "would have to be found in the provisions of that legislation",[58] an exercise the plaintiffs had not undertaken. During the period between 1845 and 1856 (in which most of the exchanges and reductions to the reserves occurred), the Crown was not exercising its pre-emptive

---

52 *Guerin v The Queen* [1984] 2 SCR 335.
53 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [278]; quoting *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA) at [81].
54 At [289].
55 At [301]–[302].
56 At [304].
57 At [307].
58 At [305].

right so that the governmental interest did not weigh as heavily against the assumption of equitable responsibility to Maori. Of this period, Clifford J said:[59]

> The more I have thought about it, the more it seems to me that the Crown could not have been acting in a vacuum, in terms of some form of enforceable legal accountability to Maori, during that period.

[58] Despite that view, however, Clifford J found it hard to reconcile "the factual realities" ("the very imperfect and incomplete arrangements which developed over time whereby reserves, including the Nelson Tenths Reserves, were recognised and administered"), with "the concept of there being in existence at the same time a fiduciary duty owed by the Crown to Maori as regards the administration of those reserves".[60] In effecting the exchanges by which it is claimed the tenths were diminished, he considered that Spain had operated "not as a pure Commissioner inquiring but as an umpire, referee or arbitrator – as his role was variously described – to reconcile the company and settlers' requirements for land, and the Crown's recognition of the need to protect and preserve the interests of Maori, both as regards Nelson Tenths Reserves and also as regards their pa, cultivations and burial grounds".[61] The Crown had to consider "the competing interests of the settlers of the Nelson area" in the whole process of administering native reserves, "in the situation that existed at that time".[62]

[59] Clifford J thought it significant that the administration of the identified reserves, once the arrangements made by Hobson in 1842 had "fallen into disuse", were undertaken by government officials. He pointed out that it had been suggested in *Tito v Waddell (No 2)*[63] that the involvement of officials could be an indication that an arrangement was a governmental one, rather than one that gave rise to equitable duties.[64] Although the plaintiffs had argued that the Crown, in administering the reserves, should have considered only the interests of local Maori and "the preservation and inalienability" of those reserves that had been identified, Clifford J thought it significant that "when the legislative arrangements were put in place, the

---

59 At [307].
60 At [308].
61 At [239].
62 At [308].
63 *Tito v Waddell (No 2)* [1977] 1 Ch 106 (Ch).
64 At [304].

Native reserves were not inalienable and a considerable degree of flexibility was given to the administrators in determining what was or was not a proper use of those reserves".[65]

[60] Clifford J nevertheless acknowledged the strength of the argument that once the tenths reserves had been recognised, any need for balancing of competing interests had ended and the Crown might be a fiduciary in respect of the reserves "as no-one but Maori had an interest in the recognised reserves".[66] He had some hesitation in developing this view in his reasons, however, since "that very time and fact specific argument was not the one which the plaintiffs made, nor one which the Crown responded to".[67] More importantly, he decided that it was unnecessary for him to resolve the matter because of the conclusion he reached that the plaintiffs before him lacked standing to bring the proceedings. As a result, Clifford J left open the question whether the Crown owed fiduciary duties in the administration of the identified reserves in the years between 1845 and 1856, while rejecting such claims in relation to the periods before 1845 and after 1856.[68]

[61] As a result of his conclusion on standing and absence of trust or fiduciary duty, Clifford J did not determine questions of breach, and found it unnecessary to engage with the Crown arguments that the claims were in any event barred by the Limitation Act 1950 or by equitable principles which provide defences on the grounds of delay.[69]

(iii) Settlement of Waitangi Tribunal claims

[62] The plaintiffs lodged an appeal to the Court of Appeal. The appeal was given the number CA 436/2012. Before the appeal was heard, settlement negotiations between Tainui Taranaki ki te Tonga and the Crown resumed. Deeds of settlement were signed with the relevant iwi in December 2012 and April 2013. They included the hapu recognised in the Spain award as being entitled to the Nelson tenths. The deeds of settlement acknowledged that in the expected enactment of the settlement in legislation (as is the practice in such settlements) the rights of the parties to have the

---

65 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [308].
66 At [309]–[310].
67 At [310].
68 At [301]–[307].
69 See at [317].

appeal determined and to appeal further to the Supreme Court would be preserved. Draft legislation was annexed to the deeds, which preserved the appeals in CA436/2012 and any further appeal to this Court.

[63] Before the matter was heard in the Court of Appeal, the Ngati Koata, Ngati Rarua, Ngati Tama ki Te Tau Ihu and Te Atiawa o Te Waka-a-Maui Claims Settlement Act 2014 was enacted. It came into effect on 23 April 2014. Under the Settlement Act, the Crown is discharged from any liability, including legal or equitable liability, in relation to "historical claims", including those concerned with the Nelson tenths reserves. The "historical claims" are those arising before 1992 and which are founded on:[70]

> …a right arising—
>
> (i) from the Treaty of Waitangi or its principles; or
>
> (ii) under legislation; or
>
> (iii) at common law (including aboriginal title or customary law); or
>
> (iv) from fiduciary duty; or
>
> (v) otherwise …

[64] By s 25(4) of the Act, the courts are deprived of jurisdiction in relation to such claims. There is however a saving under s 25(6) for the present proceedings, identified by the file number allocated in the Court of Appeal. Preserved are the appeal to the Court of Appeal and any further appeal to the Supreme Court:

> (6) Subsections (1) to (5) [the ouster provisions] do not affect—
>
> (a) the ability of a plaintiff to pursue the appeal filed in the Court of Appeal as CA 436/2012; or
>
> (b) the ability of any person to pursue an appeal from a decision of the Court of Appeal; or
>
> (c) the ability of a plaintiff to obtain any relief claimed in the Wakatu proceedings to which the plaintiff is entitled.

[70] Ngati Koata, Ngati Rarua, Ngati Tama ki Te Tau Ihu and Te Atiawa o Te Waka-a-Maui Claims Settlement Act 2014, s 24(2)(a).

[65] To the saving provided by s 25(6), s 25(7) provided an explanation "to avoid doubt" and s 25(8) defines the terms "plaintiff" and "Wakatu proceedings":

> (7) To avoid doubt, subsection (6) does not preserve any claim by or on behalf of a person who is not a plaintiff.
>
> (8) In this section,—
>
> **plaintiff** means a plaintiff named in the Wakatū proceedings
>
> **Wakatū proceedings** means the proceedings filed in the High Court as CIV–2010–442–181 [the number assigned to the present litigation in the High Court].

[66] The effect of the Settlement Act became an additional issue on appeal to the Court of Appeal. The Attorney-General contended that it precluded any substantive relief because relief on the basis of the claim that the Crown had breached equitable duties owed to the descendants of the original owners would be relief "on behalf of persons who are not named plaintiffs".[71]

(iv) The decision of the Court of Appeal

[67] The Court of Appeal held that the Settlement Act preserved the claims. Harrison and French JJ however were of the view that the terms of the legislation meant that any declarations of liability as sought would be meaningless because the settlement covered the same lands:[72]

> … a declaration would lead the parties back to the same starting point: the same dispute about ultimate entitlement would remain unresolved between Wakatū and the interveners.

Ellen France J disagreed. She considered that the Crown argument accepted by the majority would undermine the preservation of the appeal in the Settlement Act.[73] She rejected the narrow view urged by the Crown that the Act preserved claims only to relief of benefit to the plaintiffs themselves rather than those necessarily advanced on behalf of others, as was the case with claims based on customary collective interests.

---

71 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 (Ellen France, Harrison and French JJ) at [39].

72 At [215].

73 At [38]–[41].

[68] The Court of Appeal allowed Mr Stafford's appeal against the determination in the High Court that he had no standing to bring a claim for breach of fiduciary duty.[74] It considered that he had "standing as the rangatira of the collective or at least of part of the collective" and did not need to obtain a representative order to rely on his customary authority in the proceeding. The Court made a declaration that Mr Stafford had standing. The appeals by the other parties, Wakatu and the trustees of Te Kahui Ngahuru Trust, against the decisions that they lacked standing to bring the claims were however dismissed.[75] The Court did not accept that Wakatu was properly treated as a successor trustee to the Crown for the purpose of standing and it agreed with the decision in the High Court that Te Kahui Nghuru Trust did not have standing.

[69] The Court was unanimous in holding that the Crown owed no fiduciary duties to the plaintiffs or those they represented, but differed as to the reasons. Harrison and French JJ took the view that the Crown acted throughout in a governmental capacity in its dealings in relation to the Nelson tenths and that, in the absence of an express undertaking from which fiduciary obligation could be derived (an undertaking they considered to be lacking), the Crown's constitutional responsibilities to all precluded its being under a duty of loyalty to one group.[76]

[70] Ellen France J differed from the majority in accepting that there was no reason why the Crown could not be subject to enforceable fiduciary duties and obligations (although she considered that such cases would be difficult to prove because they would require a duty of loyalty and an assumption of responsibility).[77] She concluded, however, that any such duty was excluded on the facts.[78] They did not disclose any undertaking of responsibility or duty of loyalty. The tenths arrangements were of a political nature, intended to be realised in legislation, and the Crown was balancing a number of interests through the relevant period in a manner which was inconsistent with a duty of loyalty to the beneficiaries of the tenths reserves. If there had been "no other remedy available for those in the position of the current appellants", Ellen France J thought that "a more flexible approach to fiduciary duty and the requirement of a

---

74 At [29]–[30].
75 At [13]–[28].
76 At [206]–[209].
77 At [96]–[119].
78 At [121]–[146].

duty of loyalty" might have been required. But she considered (in evident reference to the availability of redress through the Waitangi Tribunal process) that the case demonstrated that "there are avenues of redress available and, moreover, they have borne fruit in the settlement that has been reached".[79]

[71] The Court of Appeal was unanimous in rejecting the claim that the Crown was a trustee for the tenths reserves. It accepted Clifford J's conclusion that the class of persons benefiting was identifiable.[80] The Court considered, however, that there was no basis to depart from the "factual finding" of Clifford J that there was no certainty of intention from which it could be inferred that the Crown was a trustee.[81] Ellen France J thought that this conclusion followed from the reasons she had given in rejecting the existence of a fiduciary duty.

[72] Although strictly speaking unnecessary (because of the conclusions that the Crown owed no fiduciary duties as claimed and was not a trustee in respect of the tenths reserves), the Court of Appeal dealt with the claims of breach to the extent of indicating "which if any of the Judge's factual findings provide a basis to establish breaches of fiduciary duty as pleaded, on the assumption that a duty crystallised in 1845".[82] The Court acknowledged that the facts described by Clifford J suggested that failure to reserve one-tenth of the land granted to the New Zealand Company and the failure to except pa, cultivations and burial grounds could amount to breaches of the pleaded duties. It took the view however that these matters of breach would require further consideration on the evidence.[83]

[73] The Court of Appeal similarly did not need to deal with the Crown contentions that the claims were barred by lapse of time. It nevertheless indicated that it saw "force" in the argument for the Attorney-General that the claim did not fall within s 21(1) of the Limitation Act, which prevents the limitation period of six years prescribed by s 21(2) applying to actions by beneficiaries in respect of fraudulent breach of trust or to actions to recover trust property or its proceeds in the possession

79 At [115].
80 At [162]–[163].
81 At [153].
82 At [173].
83 At [190].

of the trustee or previously converted to his use.[84] The Court took the view, however, that the issue was heavily dependent on factual findings that had not been made in the High Court and that it was not properly able to determine.

[74] Harrison and French JJ indicated however that they would have found any claim by Mr Stafford to have been barred by lapse of time in application of the equitable doctrine of laches. While they agreed with Ellen France J that the historical record was relatively intact and there was no sufficient prejudice to the Crown in establishing the facts of the claim due to delay, they considered that the Crown and the iwi parties who had intervened in the proceedings had altered their positions by undertaking the Treaty settlement.[85] It had only been at a late stage in resolving the long-standing grievances, after expenditure of "considerable resources, time and money in finding a fair resolution", that the present proceedings had been issued.[86] On balance, Harrison and French JJ considered that "it would be wrong to allow a separate claim relating to the same land to be instituted so long after the alleged breaches occurred".[87]

[75] Ellen France J disagreed with this conclusion, being of the view that reliance on prejudice in the settlement process could not be reconciled with preservation of the proceedings in the Settlement Act.[88] She referred, too, to the disadvantage and impecuniosity suffered by the tenths owners by reason of what had happened to the reserves, which had impeded their seeking earlier redress. By the time of the incorporation of Wakatu, that position of disadvantage may have changed, but by then the prospects of a successful claim were "fairly bleak".[89]

[76] The appeal was allowed by the Court of Appeal only to the limited extent of the declaration that Mr Stafford had standing to bring the proceeding. Otherwise it was dismissed, with costs to the Crown.

---

84 At [194].
85 At [221]–[227].
86 At [226].
87 At [227].
88 At [196]–[198].
89 At [197].

(v) The appeal to this Court

[77] The appellants appeal to this Court against the determinations adverse to their claims in the Court of Appeal, including the determination that the plaintiffs other than Mr Stafford lacked standing to bring the claims. Counsel for the appellants confirmed that the essence of their claim is that the Crown acted in breach of trust or fiduciary obligations to the customary owners of land in western Te Tau Ihu at the time of the sale in failing to fulfil the terms of the 1845 award by:

(a) identifying all Maori pa, burial grounds and cultivations within the boundaries of the 151,000 acres;

(b) ensuring that these lands were in fact excepted from the New Zealand Company grant;

(c) completing the reservation of the tenths by obtaining the rural reserves; and

(d) protecting and preserving the tenths lands and excepted lands from alienation.

[78] The appellants maintain that the Crown was in breach of equitable duties it owed to the beneficiaries in its dealings with the tenths reserves. They argue that the Crown had constituted itself trustee of the tenths reserves or had by its dealings with them become subject to fiduciary duties to the beneficiaries, upon the principles developed in Canada in *Guerin* and the cases which have followed it.[90] They argue that the Crown breached its duties as trustee or fiduciary by failing to bring in the trust property (the shortfall of 10,000 acres for the rural sections) and in the actions by which the identified tenths reserves in the town and suburban sections were diminished from the 5,100 acres identified in 1842. They say that the Crown breached its duties in failing to exclude occupied land from the demesne land it obtained following the Spain award. Apart from the 12 acres of town reserves said to have been occupied and the sections converted to "occupation reserves" in the Big Wood, there is no

---

90 *Guerin v The Queen* [1984] 2 SCR 335. See below from [340].

quantification or identification of the land that should have been excluded because occupied. The appellants say there must have been land which was not excluded and that identification of the loss would require reference back to the High Court. They indicate that on reference back to the High Court for determination of breaches of trust and fiduciary duty (not made in the lower Courts because the issues were not reached) they will seek consequential relief, including damages and recognition of constructive trust.

[79] At the hearing, the appellants revised the declaratory relief they are seeking in this Court, should they succeed in the appeal. They now seek declarations that the Crown breached "legally enforceable obligations" owed to "the particular hapu and whanau who held aboriginal title (mana whenua)" to the land acquired for the New Zealand Company's Nelson settlement. In addition, they seek declarations that their rights to enforce such obligations have not been lost through defences available to the Crown by reason of lapse of time and that all three appellants have standing to bring the proceeding and to seek and obtain relief.

[80] The "legally enforceable obligations" in respect of which the declarations are sought are said to consist of:

(a) an obligation to reserve and hold on trust for the hapu and whanau who held aboriginal title (mana whenua) to the land acquired by the New Zealand Company one-tenth of that land, being the 15,100 acres as identified in the 1845 grant;

(b) an obligation to except pa, burial places and cultivation grounds from any Crown grant to the Company; and

(c) an obligation to protect and not to act adversely to the interests of the hapu and whanau who held aboriginal title (mana whenua) in any such land.

[81] In the High Court and Court of Appeal trusts representing other iwi concerned with the settlement with the Crown appeared as interveners to challenge the standing

of all plaintiffs. In this Court Ngati Rarua only appeared. At the hearing counsel indicated on behalf of Ngati Rarua that the iwi did not dispute Mr Stafford's standing to bring the claim but contends that the other appellants (the two incorporated bodies) do not represent the iwi and do not have standing or any entitlement to relief. Ngati Rarua indicated in its submission to the Court that it did not oppose any declaratory relief to which Mr Stafford might be entitled, but sought the opportunity to be heard further if other relief is to be provided.

[82] The Attorney-General cross-appeals the declaration made in the Court of Appeal that Mr Stafford has standing to bring the claim. His position is that any duties of the kind alleged could have been owed only to the customary owners of the lands. Mr Stafford had not sought a representative order on behalf of those customary owners. The Attorney-General also argues that, even if Mr Stafford had standing, a declaration to that effect should not have been made as a form of substantive relief when the claim brought was wholly unsuccessful. The Attorney-General supports the lower Court decisions that Wakatu and Te Kahui Ngahuru do not have standing to bring the claims. He says they are strangers to any trust and do not represent the collective, customary group to which any fiduciary duties might have been owed by the Crown.

[83] In an argument linked closely to the argument made on standing, the Attorney-General also contends that the Court of Appeal was wrong to hold that the appellant's claims to relief were not barred by the terms of the Settlement Act. He argues that the terms of the Settlement Act preclude the claims because those with the mandate to settle claims arising out of obligations owed to the customary owners have settled them, and the legislation gives statutory effect to that settlement. Although the terms of the Settlement Act preserve the present proceedings, the Attorney-General says that this is only to the extent that the named plaintiffs claim relief in their own right. He submits that the claim was not pleaded as a representative claim on behalf of the collective customary owners, and therefore that allowing the appellants to claim for relief on their behalf would be to evade the purpose of the Settlement Act.

[84] The Attorney-General supports the determinations in the High Court and Court of Appeal that the Crown owed no equitable duties as claimed. It is argued on his

behalf that no trust in the tenths reserves was ever constituted in the period between their partial creation in 1842 and 1882, when they were vested in the Public Trustee (the period to which the appellants confine their claim). It is said that, in any event, the conditions upon which trusts are recognised in law were not present here because there was insufficient certainty of subject-matter, objects and intention to constitute a trust. The Attorney-General contends that any fiduciary duties such as are relied upon by the appellants are inconsistent with the governmental role the Crown played throughout, in which it had public responsibilities to balance competing interests which are inconsistent with the duty of loyalty which is the hallmark of a fiduciary.

[85] In addition to supporting the Court of Appeal decision in rejecting the claims based on breaches of trust and fiduciary obligation, the Attorney-General continues to maintain that the proceedings are barred due to lapse of time under the Limitation Act or under the equitable doctrine of laches. Although not developed in oral argument in this Court, he continues to assert that any discretionary trust for the individuals named as owners by the Native Land Court in 1893 (as opposed to a trust for the "collective customary groups") would fail because in breach of the rule against perpetuities (a point rejected in the High Court but not dealt with in the Court of Appeal).[91]

[86] The principal issues on the appeal are:

(a) whether the Crown breached equitable obligations it owed to the beneficiaries of the Nelson tenths in the period 1842 to 1882;

(b) whether the appellants can enforce such obligations;

[91] *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [250]–[251]; and *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [164]. In argument, Mr Goddard QC accepted that there could be a trust "for a collective customary group" which does not raise perpetuity concerns and assumed (although noting that the matter was not clear on the appellants' submissions) that it was the basis of claim. It is not clear to me that assumption is correct or, even if it is, whether it is to be maintained. Questions of relief beyond the limited declaratory orders sought were not developed by the appellants, who sought referral back to the High Court.

(c) whether the claims are prevented by the terms of the Ngati Koata, Ngati Rarua, Ngati Tama ki Te Tau Ihu, and Te Atiawa o Te Waka-a-Maui Claims Settlement Act 2014;

(d) whether the claims are time-barred either by the Limitation Act 1950 (directly or by analogy) or the equitable doctrine of laches; and

(e) what relief is appropriate, should the appellants be otherwise successful.

Approach

[87] The parties place the Crown grants to the Company of 1845 and 1848 at the forefront of their arguments. They differ as to the effect of the grants.

[88] The appellants rely on the 1845 grant as crystallising the trust for which they contend and the scope of the fiduciary duties owed. By it, the New Zealand Company was required to reserve the tenths reserves out of the land it obtained by grant and was obliged, in addition, to exclude the land occupied by Maori (which was to remain in Maori ownership).

[89] The Attorney-General says that the 1845 grant was superseded by the 1848 grant and that, as a result, it was treated by the Crown Grants Amendment Act 1867 as "absolutely void *ab initio* to all intents and purposes whatever".[92] As a consequence, the 1845 grant could not crystallise any equitable obligations. The Attorney-General repeated his argument in the Courts below that since the Company did not accept delivery of the 1845 grant and delivery was essential for the validity of a deed, the 1845 grant was of no effect for that reason also (a technical argument, but one with which Ellen France J had expressed some sympathy in the Court of Appeal[93]).

[90] It is convenient to say immediately of the more technical argument concerned with delivery of the Crown grant (which was not greatly stressed in this Court) that

92 Crown Grants Amendment Act 1867, s 10.
93 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [138].

the requirement of delivery for a deed was "not necessary in any case" under the Conveyancing Ordinance 1842.[94] That Ordinance was enacted "to facilitate the Transfer of Real Property and to simplify the Law relating thereto"[95] and for that purpose set out "What [is] Essential to a Deed".[96]

[91] More substantively, I am of the view that the differences between the parties on the effect of the two grants are largely beside the point.[97] As is explained in what follows, I consider that the Spain award constituted the basis on which the land in western Te Tau Ihu became Crown land, able to be granted by the Governor if surplus to the Crown's own requirements. The Land Claims Ordinance procedure was the only legal mechanism for clearing native title on the basis of pre-Treaty purchases. It required the Company to establish that its purchase was "on equitable terms".[98] The 1848 grant, just as was the case for the 1845 grant it replaced, depended on and was subject to the Spain award.[99] Those terms included both the reservation of the tenths reserves and the exclusion of occupied land, as well as the payments and "gifts" provided by the Company. The 1845 Spain award was the foundation of the 1848 grant, even though it was not recited in the grant itself,[100] because there was no other basis upon which the Company was "entitled" to a grant (as the recital to the 1848 grant stated it was).[101] The validity of the grant to the New Zealand Company (that is, whether the Company obtained good title to the land contained in the grant it received) did not affect the critical conversion of the land into Crown land, able to be granted by it. It is in the clearance of native title and the vesting of the land in the Crown that

---

94 Conveyancing Ordinance 1842 5 Vict 10, s 3.

95 Long Title.

96 Part One.

97 That is a view taken in the High Court by Clifford J: *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [243], although for slightly different reasons. Clifford J considered that the 1845 grant could evidence creation of a trust, even if not itself legally effective. And he was of the view that if the trust was established, the subsequent invalidity of the grant, even if "void ab initio" would not affect the validity of the trust, which had a separate existence from the grant. As is developed below at [402]–[409], I consider, rather, that the trust arose on the Crown's acceptance of the Spain award and the validity of the grants to the New Zealand Company did not affect it.

98 Land Claims Ordinance 1841, s 3.

99 Compare *R v Clarke* (1851) NZPCC 516 (PC).

100 Recitals of the fact of the award were dropped from Crown grants after the Company queried whether Spain's awards were decisive or still required acceptance by the Governor. The Attorney-General suggested a simple compromise of "altogether omitting from the recital in the Grant any reference to the Style or Title of the Commissioner which I believe to be unnecessary".

101 See the discussion on native title below at [99].

the trusts and fiduciary obligations to the Maori vendors (arising out of the terms on which the sale was found to have been equitable) are founded.[102]

[92] I regard the Land Claims Ordinance and the Spain award made under it as the correct starting point for analysis of the claims. I differ from the High Court and Court of Appeal in the conclusion that the Crown was under fiduciary duties to Maori to fulfil the basis upon which Spain concluded that the agreement with the Company was "on equitable terms". It has been necessary to consider the primary materials put before the Court to explain why I disagree with the conclusions in the lower Courts that the Crown was acting in a governmental capacity which was inconsistent with any fiduciary duties to Maori when it obtained the land cleared of native title. In part this conclusion turns on the nature of Crown title and the authority of the Governor to make grants of land. It is necessary too to consider the historical record as to why the rural tenths reserves were never identified and why the only occupied lands excluded from the 1848 grant to the Company were "occupation reserves" in Massacre Bay, in order to justify the conclusions I reach that there was no lawful justification for the failures to reserve the rural tenths sections and exclude the occupied lands in the districts outside Massacre Bay and that these failures constituted breaches of fiduciary obligations owed by the Crown. Because of the conclusions in the lower Courts that the Crown was not a trustee of the identified tenths suburban and town sections, it is necessary to set out the evidence upon which I conclude that the Crown constituted itself as trustee from 1842. There are also good grounds to consider that the exchanges and grants from the trust lands made by the Crown before 1862 (which I traverse in some detail) were in breach of trust, even if the extent of the breaches and their effect requires further consideration (a point on which I agree with Clifford J and the Court of Appeal) .

[93] With the background as to ownership and management of the reserves, I then deal with the legal consequences. I conclude that the Crown was trustee and under fiduciary duties to Maori who had held customary ownership of the lands cleared of native title by the Spain award. I explain why I agree with Ellen France J in the Court of Appeal that the claims for breach of trust and fiduciary duty are not barred by the

---

[102] As described below at [402]–[406].

provisions of the Settlement Act. I would allow all appellants to continue as plaintiffs in the High Court, to which the matter must be remitted for determination of breach and liability and any further consideration of remedy. I do not agree with the suggestions made in the Court of Appeal[103] that the plaintiffs ought to have applied for a representation order in order to advance a claim which is a collective one. Representation orders are concerned with achieving finality in litigation and efficiency, not with determination of substantive rights. A representation order cannot confer status to bring a claim where a right does not exist independently.[104] But a representation order is not necessary where a right to bring a claim exists.[105] If it does not, the plaintiff will not succeed at trial. Even if the plaintiff succeeds in showing breach of equitable duties, discretionary relief may be withheld if relief would cut across other interests.

[94] The question whether Mr Stafford is entitled to substantive relief in equity remains to be finally determined. I conclude that while the Limitation Act does not bar the claims for breach of trust and fiduciary duty, it is not possible to determine the application of the doctrine of laches because it is closely linked with assessments of breach, which remain to be finally determined. Even in relation to the rural tenths, in respect of which no justification for the failure to set aside the reserves has been shown, whether relief is barred by lapse of time in equity requires consideration of any change of position and other equitable considerations not yet properly assessed.

[95] The questions not resolved have not been the subject of findings of fact in the Courts below and have not been adequately addressed in this Court. It is necessary for the matter to be remitted to the High Court for further consideration of questions of breach and liability and any consequential relief in accordance with the judgment of this Court.

---

103 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [25]–[30].

104 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [53]; *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [13]; and *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 (Ch) at 254–255.

105 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [57].

Facts and historical context

(i) Crown title to land

[96] In the English text of the Treaty of Waitangi, the power of government was ceded by Maori to Queen Victoria in exchange for a Crown guarantee of the "full exclusive and undisturbed possession" of their land to the chiefs, tribes and common people of New Zealand. No land could be alienated by Maori, except to the Crown. The Crown's exclusive right of pre-emption was granted by Maori to the Crown in the Treaty and was imposed by legislation on European would-be purchasers of land, including in respect of pre-Treaty purchases. The Crown recognised no title to land in New Zealand other than that held by Maori according to their customs and usages and that established by the Crown's own grants (following extinguishment of native title).

[97] Legislation invalidating pre-Treaty dealings in land and setting up machinery for permitting Crown grants to be made on the basis of such dealings, if on investigation they were found to be fair, was enacted first in New South Wales in 1840[106] and later in New Zealand, following its establishment as a separate colony, in June 1841.[107]

[98] Under the Land Claims Ordinance, Europeans who had purported to purchase sometimes vast tracts of territory before the Treaty was entered into were required to submit to investigation of the fairness of their purchases. If cleared by the process, the purchasers became eligible to receive a Crown grant, limited to no more than 2,560 acres out of the lands originally purchased (except where there was special dispensation by the Governor).[108] The decision to make a grant on the recommendation of the Commissioner was reserved to the Governor.

---

106 Court of Claims Act 1840.
107 Land Claims Ordinance 1841.
108 Section 6.

[99] No land in New Zealand became Crown land until native title was first cleared away.[109] Native title could be cleared in two ways: by direct exercise of the Crown's exclusive right of pre-emption, through purchase by the Crown from Maori; or through a determination by a Commissioner under the Land Claims Ordinance process that a pre-1840 purchase had been on equitable terms. Whether obtained by direct purchase or on confirmation that a pre-Treaty purchase had been on equitable terms, Crown land was then able to be granted by the Governor if surplus to Crown needs and subject to the restrictions on Crown grants imposed by the Imperial Government.

[100] The 1840 Charter for New Zealand, issued under the Great Seal, established the powers of government in New Zealand to be exercised by the Governor, Executive Council and Legislative Council. It provided that "nothing in these our letters patent contained shall affect or be construed to affect the rights of any aboriginal natives of the said colony of New Zealand to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony now actually occupied or enjoyed by such natives".[110]

[101] The accompanying Instructions under the Royal Signet and Sign Manual (which under the terms of the Charter the Governor was obliged to follow) recited the power given under the Charter to the Governor, acting with the advice and consent of the Executive Council "(but subject nevertheless to such provisions as should be in that respect contained in any instructions which might from time to time be addressed to him in that behalf)",[111] to issue proclamations to organise the colony into districts and towns and to make grants of land. In relation to land grants, the Instructions permitted the Governor:[112]

> … to make and execute in our name, and on our behalf, under the public seal of our said colony, grants of *waste land to us belonging* within the same, to private persons for their own use and benefit, or to any persons, bodies, politic or corporate, in trust for the public uses of our subjects there resident, or any of them; provided nevertheless, that nothing in the said charter contained shall affect or be construed to affect the rights of any aboriginal natives of the said

---

109 *R v Symonds* (1847) NZPCC 387 (SC). This was also the view taken by Lord Stanley, Secretary of State for the Colonies, in January 1843, as is discussed below at [116]; and by the Commissioner who investigated the Kapiti purchase, William Spain, in an interim award in September 1843, discussed below at [120].

110 Charter and Letters Patent for erecting the Colony of New Zealand 1840.

111 Royal Instructions (5 December 1840), cl 37.

112 Clause 3.

> colony to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony then actually occupied or enjoyed by such natives. [Emphasis added.]

As the words emphasised in this extract make clear, disposal of waste lands (lands surplus to its requirements) by Crown grant was to be made only out of lands already "belonging" to the Crown. No grant could affect Maori customary interests in land, which were acknowledged to be able to pass by descent.

[102] In a despatch from Lord John Russell which accompanied the Charter and Instructions, Russell explained that, with the setting up of government in New Zealand, the Court of Claims Act 1840 enacted in New South Wales[113] should be replaced by a local ordinance "for the same general purpose" by which a commission would issue to suitable independent persons to clearly separate the demesne lands of the Crown (Crown land) "from the lands of private persons, and from those still retained by the aborigines".[114] Once that was done, land could be disposed of by the Crown, if not needed for public purposes. The "sale and settlement of that demesne" was then to proceed according to the rules laid down in the Instructions.[115]

[103] On the subject of the New Zealand Company purchases, Russell said:

> It remains to notice the special case of the society who have been acting under the title of the "New Zealand Land Company", and who have laid claim to some millions of acres of land in the neighbourhood of Port Nicholson. On that subject I would, however, observe in this place only, that I have entered upon what I trust will be a satisfactory adjustment of these claims. But the subject will be treated of at large in another and separate communication.[116]

---

113 Court of Claims Act 1840 (NSW) 4 Vict 7.

114 The terms of the Russell despatch are hardly compatible with the theory developed by William Young J at [839]–[840] and [888] that all land in New Zealand from 1840 was Crown land, subject only to rights of occupancy or usufructuary interests.

115 In a further despatch of 28 January 1841, Lord John Russell conveyed "additional instructions" on the subject of "the protection of the aborigines of New Zealand", described as "this very arduous and important branch of the duties of the Executive Government in reference to that colony". He instructed that "the lands of the aborigines should be defined with all practicable and necessary precision on the general maps and surveys of the colony" and should be "regarded as inalienable, even in favour of the local government".

116 It was the subject of the 1840 Agreement between the Government and the Company described at [110]–[111] below.

(ii) The Land Claims Ordinance 1841

[104] The Land Claims Ordinance was adopted in June 1841 by the Governor and Legislative Council to replace the similar legislation enacted in New South Wales. That legislation put beyond argument the invalidity of all purchases of land by Europeans from Maori unless recognised by the Crown. It proceeded on the basis of the Crown's exclusive right to purchase land from Maori, extinguishing native title. By s 2 it was provided that "all unappropriated lands within the … Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants …, are and remain Crown or Domain Lands of Her Majesty, her heirs and successors".[117] The Queen retained the "sole and absolute right of pre-emption from the said aboriginal inhabitants".

[105] The Ordinance provided that purchases made before 1840 could be allowed by the Crown after investigation by Commissioners to establish that they had been made on equitable terms. The Commissioners were to be guided by "the real justice and good conscience of the case without regard to legal forms and solemnities".[118] All titles not derived from the Queen were declared to be "absolutely null and void" unless allowed by the Crown.[119]

[106] The Ordinance invoked the Instructions given to Hobson where the Queen had indicated her intention to recognise claims to land "which may have been obtained on equitable terms from the said chiefs or aboriginal inhabitants" and which were not "prejudicial to the present or prospective interests of such of her Majesty's subjects who have already resorted or who may hereafter resort to and settle in the said Colony".[120] For this purpose it was "expedient and necessary" that inquiries be held into the way in which such claims had been acquired and the circumstances, "and also to ascertain the extent and situation of the same". As a result, by s 3, the Governor was empowered to issue one or more commission or commissions and to appoint

---

[117] Usage that shows domain (or "demesne" as it was sometimes spelled) and Crown lands are the same thing.

[118] Land Claims Ordinance, s 6.

[119] Section 2.

[120] Section 3.

Commissioners with "full power and authority under the same to hear examine and report on all claims to grants of land".

[107] Under the Ordinance, the Commissioners were required to inquire into the circumstances of the acquisitions and the price paid for the land.[121] They were required to report on the number of acres the consideration paid would bring on the basis of a formula set out in the Act. If satisfied that the claimant was entitled to a grant, in accordance with the declaration made in the Instructions, the Commissioners were to report that to the Governor, together with details of the lands and its measurement. No recommendation was to be for more than 2,560 acres unless the Commissioner had been specially authorised to make a recommendation in excess of that amount by the Governor acting with the advice of the Executive Council. Grants were not to be recommended to cover areas of land required for defence purposes, or for villages or towns, or for public utilities (but in such cases the grantee would be entitled to land in lieu).[122] Nor was any grant to include the foreshore. Notwithstanding the recommendation of a Commissioner, the Governor was not obliged to issue a grant as recommended "unless his Excellency shall deem it proper to do so".[123]

(iii) The New Zealand Company's land claim

[108] The New Zealand Company was a private venture for systematic settlement in New Zealand. A plank in its schemes of colonisation was the reservation for the native vendors of a proportion of the land in the settlements. The instructions given by the Company to Colonel William Wakefield had been to reserve one-tenth of the land for the benefit of the native vendors and he was told that "[t]he intended reserves of land are regarded as far more important to the natives than anything which you will have to pay in the shape of purchase-money".[124] A reservation in these terms was included in the Company's Port Nicholson (Wellington) purchase deed. The Kapiti and Queen Charlotte deeds (which included the land in western Te Tau Ihu) were differently-

---

[121] Section 6.
[122] Section 7.
[123] Section 6.
[124] Enclosed in a letter from William Hutt (Director of the Company) to Lord Normanby (Secretary of State for the Colonies) (29 April 1839).

worded and promised to reserve "in trust ... for ever" for the benefit of the chiefs, their tribes and families a portion of the land ceded "suitable and sufficient" for their residence and proper maintenance.

[109] The purpose of the reserves for the "future benefit" of the Maori vendors was explained by the Company's officials in evidence to a House of Commons Select Committee in 1840. Edward Gibbon Wakefield referred to the reservation of one-tenth of the land as the "true" consideration provided in the purchases, rather than the gifts which had been passed over.[125] Mr Ward, the Company's Secretary, explained that the land would not be passed over to Maori but that "Trustees will be appointed to hold it for their benefit". Ward referred to "a gentleman" who had been appointed by the Company to take control of the reserves and manage them (in apparent reference to the appointment of Edmund Halswell, referred to later in these reasons). It was intended that the land would then be "vest[ed] in trustees, who [would] hold it for the inalienable use of the natives", with the proceeds being applied for the benefit of the Maori who had surrendered the land in the sale to the Company.[126]

[110] After considerable political manoeuvring, the New Zealand Company was granted a charter of incorporation by the Imperial Government in early 1841. Before then, an agreement of 18 November 1840 between the Company and the Imperial Government established "the terms on which the Government will deal with [the Company] in regard to Crown lands in New Zealand", by way of "retrospective adjustment" of the Company's pre-Treaty purchases. This was the arrangement referred to by Russell in his despatch to Hobson.[127] It included the term that the Company would receive land grants by the Crown in respect of the purchases it had already undertaken in New Zealand on a formula based on its expenditure and capped in terms of the acreage and the numbers of blocks of land to be made available to it. The Company, for its part, agreed to give up to the Crown all claims to lands not within the terms of the adjustment. The agreement recorded that it was "understood" that the

---

125 *Report from the Select Committee on New Zealand Together with the Minutes of Evidence, Appendix and Index* (House of Commons, 29 July 1844) at 24.

126 *Report from the Select Committee on New Zealand Together with the Minutes of Evidence, Appendix and Index* (House of Commons, 29 July 1844) at 75.

127 Cited at [103] above.

Company would honour its commitments to settlers from the lands to be granted and the Government disclaimed any liability to them.

[111] Clause 13 of the agreement provided for assumption of government responsibility for lands reserved for the benefit of Maori in the purchase deeds and, in addition, reserved to the Crown the right to make further provision for their benefit:

> It being also understood that the Company have entered into engagements for the reservation of certain lands for the benefit of the Natives, it is agreed that, in respect of all the lands so to be granted to the Company as aforesaid, reservations of such lands shall be made for the benefit of the Natives by Her Majesty's Government, in fulfilment of, and according to the tenor of, such stipulations; the Government reserving to themselves, in respect of all other lands, to make such arrangements as to them shall seem just and expedient for the benefit of the Natives.

[112] Once its agreement with the Government was reached, the New Zealand Company issued a "terms of purchase" dated 15 February 1841 for what would be its second settlement (after Port Nicholson). In November 1841 Wakatu (Nelson), in Blind Bay, was chosen by Arthur Wakefield as the site of the settlement. By then, settlers were already on the way to New Zealand to take up allotments within the districts of Wakatu (Nelson), Waimea, Moutere, Motueka and Massacre Bay. Under the terms of purchase, investors were offered a total of 1,000 allotments of 201 acres in the Nelson settlement at a price of £300. Each allotment comprised an acre of town land, 50 acres of "suburban" or "accommodation land" proximate to the town, and 150 acres of rural land in the wider district.

[113] Under the terms of purchase and "subject to an arrangement with her Majesty's Government" (in evident reference to the November 1840 agreement), the Company engaged to "add to the 201,000 acres offered for sale, a quantity equal to one-tenth thereof as native reserves so that the quantity of land to be appropriated will in fact consist of 221,100 acres, and the town of 1,100 acres." The terms of purchase indicated that the native reserves were to follow "the plan of the native reserves in the First Settlement [Port Nicholson] … unless the regulations of Her Majesty's Government, or any unforeseen difficulty, should prevent its adoption".

[114] The arrangement at Port Nicholson (Wellington) had been that the native reserves would be selected by lot in the same manner as the investor sections. In

August 1841 a ballot was held in London to settle the order of choice for the three types of allotment in the second settlement: those intended for investors, those retained by the New Zealand Company (which was to keep some allotments itself), and those for "Native reserves".

[115] The New Zealand Company had hopes that its 1840 agreement with the Government and the formula concluded as to the extent of the lands to be made available to it by Crown grant would exempt it from the requirement of proving to Commissioners that its purchases had been made "on equitable terms" under the Land Claims Ordinance. Lord John Russell advised Governor Gipps of New South Wales on 21 November 1840, however, that the investigations would include the Company's purchases. Although the position of the Colonial Office was communicated to the Company in December 1840,[128] once the Company obtained its charter of incorporation it tried to argue again that its agreement of 1840 with the Government exempted its purchases from the requirement of validation through investigation by Commissioners.[129] The Company maintained that it was entitled to Crown grants of land in accordance with the 1840 agreement formula of one acre for every five shillings expended as ascertained by an accountant in London, Mr Pennington.

[116] The continued attempts by the New Zealand Company to re-litigate the point were categorically rejected by the new Secretary of State for the Colonies, Lord Stanley, in a letter of 10 January 1843. Stanley considered that such exemption from investigation would violate the engagements made by the Crown to recognise the proprietorship in the soil of Maori. This was a further indication that the Imperial Government took the view that Maori remained proprietors of the land until native title was cleared by investigation.[130] The Company was reminded that, by the 1840

128 In a letter from Vernon Smith (for Lord John Russell) to Mr Somes (of the New Zealand Company) regarding the general principles of the government and colonisation of New Zealand (2 December 1840).

129 In letters from Mr Somes to Lord Stanley (who had replaced Lord John Russell as Secretary of State for the Colonies) dated 11 November 1842 and 21 December 1842.

130 Lord Stanley advised the Company, in a letter of 10 January 1843 tabled in Parliament, that "Her Majesty has …distinctly recognized the proprietorship of the soil in the natives and disclaimed alike all territorial rights, and all claims of sovereignty, which should not be founded on a free cession by them". Whether land had been validly sold to the Company therefore required investigation. Compare William Young J at [839]–[840] and [888].

agreement, it had "surrendered to Her Majesty all title, or pretence of title, to the larger amount, the native claims to which they alleged themselves to have extinguished by purchase":

> Lord Stanley cannot now permit it to be maintained, either that the natives had no proprietary right, in the face of the Company's declaration that they had purchased those very rights, or that it is the duty of the Crown either to extinguish those rights, or to set them aside in favour of the Company. The fact of the validity or invalidity of the purchase was known to the Company, and to them alone; the assumed validity was the basis of the promised grant; and if the facts were incorrectly stated at the time, or were incapable of proof, with the Company must rest the inconvenience and loss resulting from their own misstatement.
>
> … The grant by Her Majesty of any land must be taken to be conditional upon the fact asserted by the Company, that by their previous arrangements Her Majesty had it, in fact, to grant; and the investigation of that question has been committed by law, with which Lord Stanley cannot interfere, not to Mr Pennington, but to a local and legally-constituted tribunal. It is the duty of that tribunal not to suffer native rights, which have been recognized by Her Majesty, to be set aside in favour of any body of settlers, however powerful; and Her Majesty has neither the power nor the desire to influence their decisions.[131]

(iv) The Spain investigations

[117] The Company's purchase (on which its eligibility to receive a Crown grant depended) remained uncertain, pending its examination by the Commissioner under the provisions of the Land Claims Ordinance. Although the Commissioner appointed to investigate the sales, William Spain, arrived in New Zealand at the end of 1841, his initial efforts were directed to the highly complicated position at Port Nicholson. That inquiry was made more difficult by the attitude of the Company, which was still disputing the legitimacy of the Spain inquiry in relation to its purchase, given its agreement with the Imperial Government in 1840. Throughout the period, Colonel Wakefield appears to have clung to the view that the inquiry would be overtaken by a solution in its favour imposed from London.

---

131 Recognising the inconvenience being suffered by settlers through the delay in securing their titles by Crown grants, Lord Stanley had proposed a conditional grant to the Company, as a concession justified by the "peculiar circumstances of the case", subject to prior titles. He was not however prepared to accede to Company suggestions of a reduction in the native reserves. Those reserves were described in his letter as "proportionate parts of the lands sold by the natives, which have been conveyed to the Government, to the benefit of which the natives are entitled, in addition to the continued enjoyment of such land as belongs to them and they have not sold". Such reduction could be made only if it were established that "more than the proper proportion had been set apart as a reserve".

Port Nicholson

[118] In Port Nicholson, the delays in finalising title and Governor Robert FitzRoy's grants of land to other claimants greatly confused matters as Company settlers developed land in respect of which other Europeans held Crown grants. Maori pa, urupa and cultivations had not been excluded from the town sections made available to settlers and, in addition, new Maori cultivations had continued to be established on land apparently unappropriated but surveyed by the Company and selected by absentee owners.

[119] It became apparent at an early stage of Spain's inquiry at Port Nicholson that the Kapiti purchase had been for grossly inadequate consideration. Given the establishment of the settlement at Port Nicholson in the interim, a finding that the sale was invalid would have been extremely inconvenient. Willoughby Shortland, as Acting Governor following Hobson's death in September 1842, approved an arrangement suggested by Spain and agreed to by Wakefield to settle additional compensation for the Maori vendors through an arbitration in which the Sub-Protector of Aborigines[132] would represent the Maori interest in negotiation with an agent for the Company, and with Spain acting as umpire if the parties were unable to agree.[133] This arbitration further delayed Spain's ability to get on to the Nelson settlement investigation.

[120] In September 1843, after the negotiations about further compensation had broken down,[134] Spain produced an interim report for the Governor. In his interim report, Spain too rejected the New Zealand Company contention that the 1840 agreement between it and the British government was sufficient recognition of the Company purchases to make it unnecessary for Spain to inquire into the fairness of the 1839 purchases. He took the view that such course would be contrary to the undertakings given by the Crown in the Treaty and thereafter, saying it "would have

---

[132] As the Chief Protector of Aborigines had oversight over all of New Zealand, over time Sub-Protectors were appointed with oversight of particular districts. George Clarke Junior was appointed Protector of Aborigines for the Southern District of New Munster in October 1842.

[133] The arbitration arrangement was confirmed by the Colonial Secretary in correspondence of 16 January 1843.

[134] On 25 August 1843 Spain wrote to Wakefield to inform him that Wakefield's insistence on a "final and conclusive settlement of all claims of the natives within the limits of the … Port Nicholson deed" precluded any further negotiations.

been a direct contravention of and in utter opposition to the spirit of the Treaty of Waitangi, and in violation of all the assurances of Her Majesty's Government to the aborigines, of affording them justice and protection". In his opinion the Company could not ask for a Crown grant irrespective of whether the native title had been properly extinguished because "the Crown could not grant what the Crown did not possess". (In this the Commissioner echoes the views expressed by Lord Stanley in his letter of 10 January 1843 to the Company).[135]

[121] Spain also took the view that Maori could not be taken to have agreed to part with their pa, burial grounds and cultivations in the absence of proof of clear consent. In Port Nicholson the evidence was clear that no such consent had been given. As a result he indicated that such lands would have to be excluded from any Crown grant. This too was a reason why the Company participation in the Spain inquiry broke down in mid-1843.

[122] By January 1844, the Company's hopes of relief from London seem to have faded, not surprisingly given the terms of the January 1843 letter from Lord Stanley. The Company tried to argue that it had been led to believe by George Clarke Snr, the Chief Protector of Aborigines, that Maori pa and cultivations would not have to be further excluded after the additional payments supervised by Spain were made. But in a meeting in Wellington in January 1844 between Company representative William Wakefield and Governor Robert FitzRoy,[136] with Spain and Clarke also present, FitzRoy pointed out that George Clarke in correspondence had made it quite clear that he could not be party to arrangements for Maori to be dispossessed of their pa and cultivations because such action was totally contrary to his instructions:[137]

> … my official instructions pointedly and repeatedly inform me, that under any circumstances the Government will maintain the natives in the possession of their pahs and cultivations so long as they are desirous to retain them; and I, on my part, and on behalf of the aborigines, beg to be clearly understood, that it is contrary to my instructions, and utterly out of my power, to become party to any arrangements which stipulate for the cession by the natives of their pahs

---

[135] The approach taken by William Young J at [892] is not in my view consistent with these statements.

[136] Robert FitzRoy was appointed as Governor Hobson's replacement on 7 April 1843 and arrived in Auckland on 23 December 1843.

[137] The conversation took place at a conference in Wellington on 29 January 1844 regarding the settlement of Port Nicholson and other land claims.

> and cultivations to the New Zealand Company, under any circumstances, without their own free consent.

[123] This approach was fully supported by the Governor. He remarked at the meeting in Wellington that "If Mr Clarke had been sitting before Lord Stanley when he wrote that letter, he could not have expressed Lord Stanley's views more clearly". It was finally determined at the meeting that additional compensation would be paid by the Company to the Maori vendors at Port Nicholson and that pa and cultivations would be excluded from the Crown grant to the Company. Of the last agreement (in relation to exclusion of cultivations and pa from the land made available for settlement), the Governor remarked "[t]he principal difficulty is now removed". Spain was asked to "continue your exertions as umpire, in effecting the speedy settlement of this question". The Governor reserved the power of final determination of any grant to the Company, as was consistent with the terms of the Land Claims Ordinance.

[124] The local administration and the Colonial Office were also in agreement that, as was provided in cl 13 of the Company's 1840 agreement with the Crown, the native tenths reserves were to vest in the Crown, rather than remaining part of the Company's lands in the Crown grant. The Government's obligations in relation to the reserves had been dealt with in a despatch from Lord Stanley to FitzRoy of 18 April 1844 in response to a request for directions as to whether "the extent of the lands to be selected by the Company … is to be calculated inclusive or exclusive of the native reserves":

> Turning now to the subject of the native reserves, there can, I think, be no question that they should be taken out of the Company's lands. The Company had, in former instructions to their agent, provided for reserving one-tenth of all the lands which they might acquire from the natives, for their benefit. By the 13th clause of their agreement of November 1840, the Government was, in respect of all the lands to be granted to them, to make reservation of such lands for the benefit of the natives, in pursuance of the Company's engagements to that effect. It seems quite plain, therefore, that the Government is to reserve for this purpose one-tenth of the Company's lands. The fact is almost proved by the very language of Colonel Wakefield's accounts themselves; for, in assuming that the Government was to allow for native reserves, over and above the quantity assigned for the Company, he is obliged to designate those lands as the eleventh of the total grant; a proportion which was never heard of until the present statement arrived.

> The reserves in question must, therefore, be taken from some part or other of the Company's lands.[138]

Nelson

[125] With the Port Nicholson inquiry substantially completed,[139] Spain was finally able to consider the Nelson land grants. He arrived in Nelson in August 1844 but did not make his award until 31 March 1845. The town and suburban sections, including the native reserve sections, had already been surveyed and selected in April and August 1842 in accordance with the Company's terms of purchase and according to the order drawn by lot in London. The 100 town sections and 100 suburban sections (amounting in total to 5,100 acres) which were to be the tenths reserves were chosen by Mr Thompson, the Police Magistrate. Although the suburban sections of 50 acres each which were offered for selection were in the districts of Motueka, Moutere, Waimea and Riwaka, the native suburban tenths reserve sections chosen by Thompson were in Motueka (81 sections) and Moutere (19 sections) alone. The capacity in which Thompson made the selections is not entirely clear from the record but seems to have been as representative of the Colonial Government in Nelson, a function fulfilled by the Police Magistrate in other districts and later gazetted as a duty of the Police Magistrate in Nelson when Thompson's successor was appointed.[140]

[126] Spain found that the position of the Nelson town sections was not confused to the same extent as in Port Nicholson (where there were competing Crown grants and where significant pa and Maori cultivations had been included in the sections allocated to settlers). In Nelson, however, the Company's purchase was vulnerable, not only because of inadequacy in the consideration provided in 1839, but because the right to the land according to custom of the Ngati Toa chiefs with whom Colonel Wakefield

[138] It should be noted that the last statement (that "elevenths" had not previously been heard of) was not the understanding of all colonial officials. Shortland, in his letter of 26 July 1842 asking the Chief Justice to be a trustee of the reserves had described them as "one-eleventh of [the] town, suburban and country allotments". Lord Stanley's view however prevailed and was adopted in Spain's awards.

[139] The final report was not delivered until 31 March 1845.

[140] When Thompson's successor, Donald Sinclair was appointed as Police Magistrate in 1844, the Gazette notice described him as representative of the government in the district (and in that capacity he witnessed the deeds of release entered into in 1844, as described at [132]). Although the Gazette notice of Thompson's appointment does not contain a similar description, it may well have been an arrangement observed earlier. In New Plymouth in 1848 the Police Magistrate signed deeds of release on behalf of Maori in connection with the purchase there.

had treated in 1839 was seriously in doubt since they had not followed up their conquest of western Te Tau Ihu by occupation.

[127] Imperial Government instructions and Colonial Government directions were that areas of Maori occupation and cultivation were to be excepted from sale altogether and did not become Crown land unless "indisputably sold". There was no suggestion of any intention to sell cultivated and occupied lands in Te Tau Ihu. The Commissioner later concluded that the Maori proprietors had "stipulated" in the dealings in 1841 with Captain Arthur Wakefield that their occupied and cultivated lands were to be excluded and that they would retain the Big Wood (Te Maatu) at Motueka.

[128] There is further substantiation of these stipulations not only in the oral history described by the appellants in the High Court[141] but in a diary entry made in May 1842 by Samuel Stephens, the New Zealand Company's surveyor, when undertaking the surveys of the suburban sections for the Nelson settlement in Motueka and Moutere. It described an exchange with the Ngati Rarua chief Te Poa Karoro about Te Maatu:

> There is a fine Pine Forest called the Matu in this part of the district and the land around it is very rich – and will no doubt be caught at early and eagerly by the early choices.[142] The natives have a large potatoe clearing at this wood where they grown annually some hundreds of tons of potatoes. They were very jealous of our coming to this part of the district: Epoa one of the chiefs and proprietor at Te Matu, I met with there – he told me he did not like our coming there "to make de road" as they call surveying – as they had given up the Riwaka valley they wished to keep this themselves. I explained to him through the interpreter I brought with me, that their potatoe grounds would be left entirely for their own use – and that they would also have one tenth of all that we surveyed besides – he appeared to comprehend this, and I left him more satisfied.

[129] In the course of the hearings into the Company's purchase of the lands in western Te Tau Ihu, Spain was convinced that, although the Ngati Toa chiefs were not entitled to sell the land (not having followed up their conquest by occupation), the additional goods provided by Captain Arthur Wakefield at the time Nelson was selected as the site of the second settlement in 1841 were treated by the real owners as consideration for a sale they were willing to acknowledge. In 1841, Arthur Wakefield had held a number of meetings with hapu of Ngati Koata, Ngati Rarua, Ngati Tama,

---

141 See *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [56].

142 In apparent reference to the selections to be made according to the order drawn by lot.

and Te Atiawa to explain the settlement plans. They included an important gathering at Kaiterere where he provided the hapu with goods to the value of £980 15s. These meetings and exchanges were important for Spain's confirmation that the sale had been "on equitable terms" and therefore in the establishment of the Company's entitlement to a Crown grant.

[130] In addition, at the hearing of their claim by Spain in August 1844, the Company made additional "gifts" of payments totalling £800 to the vendors.[143] The deeds of release obtained for the additional payments explicitly excepted occupied lands from the expressed relinquishment of claims to ownership. They also remedied what Spain considered to be the further deficiency in the Company's claim that there was no adequate description of the land sold. In the case of "the Natives of Motueka" this was done by recording that the payments had been accepted by the proprietors in "relinquishment of all [their] claims … to all … land at Whakatu, Waimea, Moutere, Motueka, Riwaka and Te Taitapu (Massacre Bay) in New Zealand, excepting [their] pahs, cultivation, burial-places, and wahi rongoa"[144] in favour of "the Directors of the New Zealand Company". The deeds of release given by "the Natives of Whakapuaka" and "the Ngatiawa Natives" were identical, save with the omission of mention of Motueka (indicating that neither group had claims in that district).

[131] The deeds of release are confirmation in 1844 that the consideration received and critical to the fairness of the Company's purchase (which included the tenths reserves as well as the payments and "gifts") was for land which excluded pa, cultivations and urupa. These lands in their use and occupation were retained by the vendors and were not part of the lands sold, as was consistent too with the requirements imposed by the Imperial Government.[145]

---

143 Payments were made pursuant to deeds of release entered into by various groups of Maori in August 1844, including £200 to Ngati Rarua; £200 to Ngati Tama of Whakapuaka; £100 to Te Atiawa; £10 to the chief Ngapiko; and £290 to Maori from Massacre Bay.

144 The meaning of "wahi rongoa" is unclear. It may be perhaps a reference to healing places or places where healing plants are collected. There is contemporary evidence that Te Maata was valued in part for its medicinal plants. The appellants suggested, although tentatively, that this could have been a reference to the "places reserved" (the tenths reserves). But, (as is further discussed at [154]), that is not consistent with the tenths endowments which provided the vendors with a stake in the settlement established in the sold lands rather than being outside the sale, as was the case for pa, cultivations and urupa.

145 Referred to at [122]–[123] and [127].

[132] In addition to the principal signatories on behalf of Maori, George Clarke Junior, the Sub-protector of Aborigines, also signed the releases on behalf of the "remainder of the natives of" Motueka, Wakapuaka and Ngatiawa. The witnesses to the three deeds signed on 24 August 1844[146] included "William Spain Commissioner, George Clarke Jun., Protector of Aborigines … Donald Sinclair, Chief Police Magistrate and Govt. Representative". Although the Maori from Massacre Bay had not attended the Court hearing, George Clarke Junior, as Sub-Protector, offered no opposition on their behalf to the Company's claim. Their share of the money was paid into an account at the Union Bank until the sum was accepted in May 1846 and the deed of release in relation to Massacre Bay signed (an acknowledgement that cleared the way for the long-delayed completion of the survey of that district).

[133] As already indicated, the New Zealand Company seems to have hoped until a late stage that the lands confirmed to it after investigation would not be further reduced by exclusion of any occupied or cultivated lands within the area confirmed and granted. That hope was not abandoned by the Company until the January 1844 meeting, when it became clear it was a break-point for Governor FitzRoy and Commissioner Spain in the investigation of its titles.[147]

[134] Despite the Company's acceptance in the January 1844 meeting that the lands it obtained would have to exclude areas of Maori occupation and the acknowledgement of exclusion in the deeds of release, the already-accomplished earlier selection of the town and suburban sections was not immediately reconcilable with such exclusion. The selections of sections for settlers and for the tenths reserves alike had proceeded on the basis of surveys which had not excluded all cultivations and occupations.

[135] Perhaps up to 12 of the native reserve town sections were occupied to some extent.[148] The principal problem was however in relation to the suburban sections at Motueka, near the Big Wood.

---

146 The English version of the deeds dates them at 14 August 1844, but this is a mistranslation.
147 See above at [122].
148 This includes five sections on which a significant pa for trading and fishing, Matangi Awhio (Auckland Point) was situated. In 1842 Thompson exercised his first five selections to choose five contiguous sections here.

The Big Wood

[136] In selecting the suburban sections for the tenths reserves in 1842, Thompson seems to have given priority to land at the Big Wood. It is not clear whether some, perhaps much, of the land may have been selected because of the stipulation, referred to by Spain in his report, that the Big Wood would be reserved to Maori in addition to their cultivations and kainga. Putting this land in the tenths reserves may have been seen as a practical way to give effect to the stipulation, to the extent that the land was not subject to the exclusion for pa, urupa and cultivations.

[137] There was at least one significant pa on a section near the Big Wood: Pounamu. The section it was located on was section 157, one of Thompson's original suburban section selections for the tenths reserves. A witness for the appellants described this pa as "one of our important occupation sites in Motueka" and said that it was selected in 1842 "even though Wi Parana and his whanau were living on that land".

[138] Most of the Big Wood was not cleared at 1842, and may have been valued in part as "our medicine cabinet and our pantry".[149] It seems likely however that the fertility of the land (established by the existing cultivations on the edge of the bush) was also appreciated. The wish for its retention may have been partly because of its value for future cultivations.

[139] Quite apart from the stipulation of retention of the Big Wood, the sections abutting it contained significant cultivations established in clearings of the bush, as Stephens' diary note indicates.[150] In Stephens' 1842 survey map, 71 acres of cultivations were marked along the margin to the bush. A map of 1844 used at the time of Spain's exchanges of sections and apparently based on the 1842 survey also shows 71 acres of cultivated land within the strip earlier identified by Stephens along the edge of the bush.

[140] One of the Native Land Commissioners later appointed to administer the reserves under the 1856 Native Reserves Act, Thomas Brunner, told a Commission of

---

149 As it was described in the affidavit of Ropata Wilson Tamu Taylor.
150 Referred to at [128].

Enquiry in 1870 that Stephens had expanded the boundaries of the adjoining sections to include the cultivations in addition to the 50 acre surveyed blocks.[151] Given the pattern of surveyed sections that course does not seem likely. And although some of these sections are listed in the schedules to the legislation in 1873 and 1896 as being smaller than 50 acres (reflecting subdivisions before those dates), none of them is larger than the original 50 acres, as might have been expected if they had been expanded to bring in cultivations.

[141] Brunner seems to have been right however in the evidence that the inclusion of cultivations in the sections meant that Thompson felt obliged to select these sections as native reserves, "in order to keep the cultivations of the Natives" and that this "created a confusion in administering the trust, because the Commissioners found themselves obliged to treat the New Zealand Company's reserves as land originally belonging to and always retained by the Natives themselves". This is in substance the complaint made by the appellants that the tenths reserves were effectively diminished by eight 50-acre sections in the exchanges arranged by Clarke and Spain in 1844 and by the additional eight 50-acre sections already selected by Thompson on which some cultivations were situated.[152]

[142] In evidence before the High Court, witnesses for the appellants disputed the size of the cultivations described in the 1842 map and said that the evidence of potato production suggested the area in cultivation was almost certainly more extensive. It is difficult to be sure. Given the use of the 1844 map which identified 71 acres in cultivation at the time of the Spain inquiry and the exchanges then undertaken, it seems to me the map is the best evidence we have. These cultivations and pa ought however to have been excluded altogether in terms of the Spain award, official policy, and the agreement reached in January 1844.[153]

---

151 Evidence of Thomas Brunner on 3 January 1870, recorded in "Evidence of the Third Report of the Religious, Charitable and Educational Trusts Commission" in Alexander Mackay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 289 at 304.

152 As described in Alexander Mackay "Memorandum on the origination and management of Native Reserves in the Southern Island" in Alexander Mackay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 263 at 265.

153 Discussed at [121]–[123] and [147]–[150].

[143] Even if the choice of tenths reserves in the vicinity of the Big Wood was in large part prompted by preference to retain it, rather than the presence of existing cultivations, further cultivations seem to have been undertaken soon afterwards. In June 1848 the Colonial Secretary was asking the Superintendent of Nelson to provide information about "the unauthorised occupation or possession by Natives of some of the reserves at Motueka".[154]

The exchanges

[144] Because pa, urupa and cultivations had not been excluded from the available sections, selection according to the order drawn by lot in London did not allow Thompson to select all the occupied land in the vicinity of the Big Wood for the tenths reserves. Some of the sections selected by settlers included areas of Maori occupation and cultivation, and so further exchanges of those sections were made in 1849[155] and 1862,[156] effectively diminishing the tenths reserves by benefiting particular families and individuals in possession (when the land should properly have been excluded from the tenths and additional provision made).[157]

[145] As Thomas Brunner pointed out in 1870, the cultivated lands should have been set aside completely, rather than being included within parts of the tenths sections. Alexander Mackay, also a Commissioner under the 1856 Native Reserves Act, pointed out that the loss to the Trust Estate from allowing occupation of "some of the richest land belonging to the Estate" was "greatly to be regretted".[158] He considered that

---

154 Letter from Domett (Colonial Secretary) to Richmond (Superintendent of Nelson) (21 June 1848), recorded in Alexander Mackay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 at 277.

155 In 1849 the Board of Management exchanged six accommodation tenths sections totalling 300 acres for six sections that had been allocated to settlers in and around the Big Wood, described further at [266] below.

156 In 1862 James Mackay identified particular individuals or hapu entitled to occupy 12 Motueka accommodation sections. Those were sections 111, 113, 117, 118, 126, 127, 129, 132, and 144–147. The allocation of sections 111, 113, 117 and 118 appears to have been earlier undertaken by Donald McLean, but was confirmed in an 1862 memorandum of James Mackay.

157 In some cases the possession acquiesced in by those managing the tenths reserves was ultimately perfected by recognition of the beneficial ownership of the occupiers in the blocks, and later by granting them title. As is indicated at [497], this matter was not canvassed in argument on the appeal and was not the subject of findings of fact in the High Court or Court of Appeal and requires further consideration.

158 Alexander Mackay "Memorandum on Native Reserves dated January 3rd, 1870" in Alexander Mackay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 300 at 302.

either land should have been provided for Maori "elsewhere", or equivalent land should have been provided to the tenths reserves.[159]

[146] This inclusion in the tenths reserves of occupied land was an outcome that the local government and the Colonial Office had intended to avoid. It failed to fulfil the terms of the Spain award, which had excluded such land. There is however no necessary inconsistency in the exchanges undertaken during the course of the Spain inquiry if his understanding was that the exchanges to bring the Big Wood sections into the tenths reserves were to fulfil the stipulation of retention, rather than to retain cultivations, as may indeed be suggested by the terms of his award.[160] Although there is no necessary inconsistency between Spain's award and his understanding of the exchanges at the Big Wood, it was however the case that the Company's surveys of 1842, on which he relied, had not separately identified the areas of occupation (perhaps because the Company had not expected at that date to have to provide reserves which exceeded the tenths). Some occupied lands were undoubtedly included in the tenths reserves when the suburban and town sections were selected by Thompson in 1842.

[147] Whatever the position in relation to the originally selected town and suburban reserves, later swaps to bring further occupied land (which may have been new cultivations) within the tenths were incompatible with the different purposes of the tenths reserves and the exclusion of occupied lands from sale, as officials such as Mackay and Brunner recognised in 1870. Earlier, when Edmund Halswell, the Governor's agent for administration of the native reserves in the Southern District, reported to Governor Hobson in 1842 that he had taken care in selecting tenths reserves in Ohariu, Porirua, Manawatu, and Horowhenua to include pa and cultivations, he was immediately corrected. Hobson instructed Willoughby Shortland to respond on 27 July 1842 that "his Excellency cannot sanction native residences, which do not appear to have been originally sold, being included in the reserves for the benefit of the aborigines". Such occupied land was to be "retained by the natives

159 Mackay suggested that at least some Maori who were allocated land within the tenths estate had moved on to the land only after the tenths reserves had been established, in what was "a contravention of the original scheme". He also argued that Spain had exceeded his authority in awarding tenths land to its Maori occupiers because "it has never been considered that the Natives had more than a life interest in the land".

160 Set out at [153].

in their own possession, and the reserves selected independently of them". Only if the pa had been "indisputably sold" would the Governor not object to their being selected as reserves. It may be that the selection of the town and suburban tenths reserves by Thompson, which occurred in April and August 1842, was before the insistence of the government on exclusion of occupied lands was communicated to Thompson.

[148] The Colonial Office took the same line as the local administration. Lord Stanley, when rejecting the Company's request in late 1842 for a reduction in the tenths reserves fixed as a proportion of the sold lands, emphasised in a letter of 10 January 1843 that Maori were entitled to the full amount of the reserves "in addition to the continued enjoyment of such land as belongs to them and they have not sold". He explained at that time why using the tenths reserves to fulfil the obligation to protect occupied lands would be unfair:

> To compensate, out of the former, parties who expected to have obtained the latter would be … to make the natives pay for the disappointment of expectations which they were not answerable for having raised; a course which would at once involve injustice towards them, and a *breach of trust* on the part of the Government. [Emphasis added.]

A reduction of the tenths reserves could be made only if it were established that "more than the proper proportion [had] been set apart as a reserve". But Lord Stanley could "permit no diminution to take place in the amount once definitively ascertained to be the proper proportion". The town and suburban tenths reserves in Nelson had been selected months before Lord Stanley's communication. There seems to have been no consequential reassessment of the selections already made.

(v) The Spain award

[149] With the additional payments and the releases obtained, Spain completed his award under the Land Claims Ordinance on 31 March 1845. He was "satisfied from all the evidence that the Natives had always looked upon the transaction with Captain Wakefield as an alienation of their rights and interests in the lands treated of". He added that his satisfaction was "more particularly" because the stipulation by Maori of retention of the Big Wood at Motueka had been "in a great measure complied with by the allotment into Native reserves of a considerable portion of the 'Big Wood' in that district". These had been achieved through "one or two exchanges of the reserves

for their use and benefit … effected by Mr Clarke, at their instance and in compliance with their wishes".

[150] This seems to refer to the exchanges of suburban sections earlier selected for sections at the Big Wood. Although some sections may have contained existing cultivations, it seems from Spain's report that he considered the exchanges gave effect to the stipulation for retention of the Big Wood. The Stephens map does not suggest that the cultivations covered the sections retained. Spain's reference may not mean that he understood that the exchanges were solely in order to retain existing cultivations. To the extent that they covered cultivations that should rightly have been excluded altogether, it is likely that they were adjustments necessary to tidy up the deficiencies caused by reliance on the 1842 surveys, undertaken before government correction of the Company's assumption that it was liable to provide the tenths reserves only. Against the requirement expressed by Lord Stanley and the colonial officials that cultivations be excluded and not taken as part of the tenths reserves and following Wakefield's capitulation in January 1844 (when the point had led to breakdown in the Land Claims investigation) and against the background that the tenths reserves were established for the benefit of the former proprietors of the wider district, I do not accept the Attorney-General's argument that the exchanges made during the Spain inquiry demonstrate that the tenths reserves were always regarded as land for occupation by Maori.

[151] The Company claims had included 60,000 acres in the Wairau Valley. Spain did not accept that the Wairau had been sold. He remarked on the denials by Te Rauparaha and Rangihaeata that they had sold the land (a position to be contrasted with their acknowledgement of sale of Nelson, Massacre Bay, Taitapa and Blind Bay). Spain pointed to the absence of evidence by the Company in support of the purchase of the Wairau and the fact that the £800 provided by the Company for additional payments in western Te Tau Ihu had not included the Wairau. In those circumstances, Spain was not prepared to include the Wairau in his recommendation as to grant.

[152] In result, Spain recommended a grant to the Company of 151,000 acres in the Nelson districts by reference to surveys provided by the New Zealand Company (only partially completed for the districts of Motueka and Massacre Bay), Spain's

recommended grant was made expressly excepting the pas, cultivations and burying-grounds. In addition, he excepted all the native reserves marked on the maps attached, "the entire quantity of land so reserved for the Natives being one-tenth of the 151,000 acres hereby awarded".

[153] The full text of the award reads:

> I, William Spain, Her Majesty's Commissioner for investigating and determining titles and claims to land in New Zealand, do hereby determine and award that the Directors of the New Zealand Company and their successors are entitled to a Crown Grant of 151,000 acres of land, situate, lying, and being in the several districts of the settlement of Nelson, in the southern division of New Zealand, which said districts are divided as follows, that is to say: –Wakatu or Nelson district, 11,000 acres, already surveyed; Waimea district, 38,000 acres, already surveyed; Moutere district, 15,000 acres, already surveyed; Motueka district, 42,000 acres, partly surveyed – the remaining quantity required to be selected from the portions of land coloured red in the Plan No.1, hereunto annexed, and hereinafter more particularly referred to; and Massacre Bay district, 45,000 acres, partly surveyed; the remaining quantity required to be selected from the portions of land coloured red on the said plans; which said several districts and the quantity of land contained in each is particularly described and referred to in the enclosed schedule of the land required for the settlement of Nelson, as put into my Court at Nelson by the Agent to the New Zealand Company, and which said lands are more particularly delineated and described upon the accompanying plans, marked No. 7, saving and always excepting as follows:– All the pas, burying-places, and grounds actually in cultivation by the Natives, situate within any of the before-described lands hereby awarded to the New Zealand Company as aforesaid, the limits of the pas to be the ground fenced in around their Native houses, including the ground in cultivation or occupation around the adjoining houses without the fence; and cultivations, as those tracts of country which are now used by the Natives for vegetable productions, or which have been so used by the aboriginal Natives of New Zealand since the establishment of the Colony; and also excepting all the Native reserves upon the plans hereunto annexed, marked No. lA, No. 1B, coloured green, the entire quantity of land so reserved for the Natives being one-tenth of the 151,000 acres hereby awarded to the said Company; and also excepting any portions of land within any of the lands hereinbefore described, to which private claimants have already or may hereafter prove before the Commissioner of Land Claims a title prior to the purchase of the New Zealand Land Company.

[154] It is to be noted that in the Court of Appeal Spain's award is misstated when it is suggested that the "entire quantity of land" reserved, amounting to ten per cent of the 151,000 acres, included the occupied and cultivated lands.[161] That is not how the award is expressed. The ten per cent refers to the tenths reserves noted on the New Zealand Company survey plans and those still to be surveyed (since the native

[161] *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [4].

reserves on the plans were confined to the suburban and town sections). The cultivations, urupa, and other occupied lands are excluded in addition to the reserved proportion, as is consistent equally with the concession wrung by Governor FitzRoy from William Wakefield in January 1844,[162] the official line from London and Auckland since mid-1842,[163] the nature of Crown title to land in New Zealand (which did not include land occupied by Maori),[164] the fact that most occupied land (pa, urupa and cultivations) had not been surveyed and excluded at the time of Spain's award[165] (meaning that the exclusion remained to be done), and the fact that the suburban reserves identified were not spread throughout the districts (as was to be expected if they reflected areas of occupation) but were clustered in Moutere and Motueka (suggesting an indifference as to distribution consistent with their being endowment lands for letting for the benefit of Maori of the wider district and separate from the occupied lands which were to be retained by Maori and excepted from sale).

[155] As was clear from the terms of the grant and from the survey maps annexed to both Spain's report and the 1845 Crown grant, the surveys of the districts had been only partially completed. The rural sections required for all allotments, settler and tenths reserves, had not been identified. No selections of rural sections according to the ballot system of choice had accordingly been made. The upshot was that the rural sections required to make up "one-tenth of the 151,000 acres hereby awarded", which were to be reserved for Maori, were not identified on the plans. The sections identified as native reserves were the town and suburban reserves selected in 1842 and coloured green on the survey plans attached to the Crown grant. Indeed, by the time of the Crown grant in 1845, it was clear that the Company was having considerable difficulty locating sufficient lands for the rural sections within the Nelson districts – a circumstance that had led to the surveys which resulted in the deaths at the Wairau.

---

162 Discussed at [122].

163 Discussed at [121]–[124].

164 Discussed at [99].

165 As acknowledged in Spain's award, much of the land in western Te Tau Ihu had not been surveyed by 1845. Nor were all urupa, pa and cultivations identified in the surveyed lands. It was therefore not possible to delineate on the plans attached to the grant all the lands occupied by Maori that could not be conveyed to the Company. Instead, they were identified by a written description of their characteristics.

(vi) Occupied lands and tenths reserves

[156] On the basis of the 1845 Crown grant, exclusion of both tenths reserves and occupied land was the responsibility of the Company as grantee. If the 1842 surveys had been inadequate to identify the occupied land, as seems to have been the case, it was the Company's responsibility to exclude the occupied land and to provide the tenths sections in addition. The occupied land in the town and suburban sections could have been excluded following the Spain award by re-surveying and taking the occupied land out of the sections for selection, making up the deficit with additional land within the area of sale or effecting a proportionate adjustment of the settler sections and tenths reserves. Given that less than half the allotments had been sold to investors at the time, such redistribution may have been achievable without too much effort. It was not, however, undertaken by the Company.

[157] Nor was there later recourse to any procedure to identify and exclude occupied lands. In New Ulster,[166] the Crown Titles Ordinance 1849, aimed at quieting titles to land, provided for inquiry to be made to identify land excluded from the granted land.[167] Section 12 of the Ordinance provided:

> And whereas in certain of the said Crown grants an exception is made from the land comprising therein of "sacred places" or land claimed by a certain Native or Natives therein mentioned, the particular piece or parcel of land so accepted is not particularly set forth and described: be it enacted that it shall be lawful for the Governor or other the Officer Administering the Government of the Province for the time being, to ascertain, by means of an inquiry to be made in that behalf by a Commissioner to be appointed for that purpose, the particular piece or parcel of land so excepted as aforesaid, and at the request of the grantee named in any such grant, his heirs appointees or assigns, to cause a description of such piece or parcel of land to be [e]ndorsed upon such grant; and every such description shall be deemed and taken to define the lands so excepted from such grant as aforesaid.

It does not appear that any comparable provision was adopted by legislation in relation to the province of New Munster.

[158] The appellants say that, because of the failure to identify and exclude the occupied lands, in result the tenths reserves of the suburban sections were effectively

---

166 From 1848–1853, New Zealand was divided into the provinces of New Munster and New Ulster (the boundary ran through the North Island from the mouth of the Patea River).

167 Crown Titles Ordinance 1849 13 Vict 4.

immediately diminished to the extent of 800 acres.[168] Further swaps of tenths sections for sections occupied by Maori were made in 1849 and in 1862 further tenths sections were allocated to Maori who were occupying them, effectively diminishing the tenths reserves by an additional 900 acres.[169]

[159] Quite apart from this effective loss in relation to the suburban sections (which however continued to be held as tenths reserves, sometimes with rental income for the excess land being paid to the occupying Maori[170]), the appellants say that 12 town sections should have been excluded because they were occupied by Maori.

[160] In addition to the exchanges to accommodate Maori occupations within the tenths, further land amounting to 918 acres was taken out of the tenths and granted to the Bishop of New Zealand in 1853 (although in 1993 it was ultimately returned by the Church to a statutory trust for the benefit of the descendants of those of the original vendors who held mana whenua in Motueka at the time of the grants).[171] The tenths reserves were also reduced by other transactions during the 1850s and 1860s (although the proceeds of some transactions were used to purchase other lands).[172]

[161] The upshot was that by 1882 (when the tenths reserves were vested in the Public Trustee), the tenths reserves obtained by the Public Trustee, which had been treated as Crown land since 1845, comprised approximately 2,774 acres of the original reserves of 5,100 acres. In addition, the occupied tenths reserves (amounting, on the appellants' analysis, to some 34 suburban sections[173]) were effectively unavailable to the wider beneficiaries of the tenths. In some cases they were left in the sole occupation of Maori who had kainga or cultivations on the land. In some cases parts

---

168 Sixteen 50-acre suburban sections.

169 See above at [144].

170 See below at [283].

171 Under sch 3, cl 2 of the Ngati Rarua-Atiawa Iwi Trust Empowering Act 1993, the land was vested in "those Maori people comprising members of the Ngati Rarua and Te Atiawa manawhenua ki Motueka tribes who can establish a direct lineal descent (by birth or adoption including either formal legal adoption or customary Maori adoption) from the persons listed in the Second Schedule hereto being the original owners of the lands the subject of the Crown grants dated 25th July 1858 and 4th August 1853 (such owners being listed in 1845 by Land Commissioner Spain and found in judgments of the Maori Land Court delivered in 1892) and their descendants and families."

172 These subsequent exchanges and dealings are dealt with in connection with management of the reserves from [254]–[286].

173 See below at n 528.

only of the sections were left in their occupation and the remainder of the land was managed by the Trustee. In the case of some occupied tenths, the rents obtained from the unoccupied part of the sections which were let were kept apart from the trust income and paid to the Maori occupiers. The extent of the loss to the tenths reserves through the exchanges was not the subject of findings of fact in the lower Courts and was not adequately addressed in argument in this Court to enable confident findings to be made.[174]

[162] Although in extent the tenths were not immediately diminished by exchanges for the occupied sections, the trust was adversely affected by loss of use of the lands for its purposes. As discussed, the occupation by local Maori of tenths reserves appears to have been a direct result of the failure to exclude Maori occupations and cultivations in accordance alike with government requirements and the terms of the Spain award.[175] In the longer term, as already indicated,[176] the occupations on tenths reserves and other occupations permitted by those administering the reserves in later years, ultimately set up the conditions for subdivision and vesting of the occupied lands in the occupiers. Again, the extent of loss to the tenths through this process has not been the subject of findings of fact in the lower Courts and was not sufficiently addressed in argument in this Court to enable findings of fact to be made. While such loss may seem to be balanced by benefit to the particular occupiers, the effect is not compensatory, for the reasons given by Lord Stanley.[177] The customary owners were meant to have both their occupied lands (which were to be excluded and retained by them) and were to share with all the customary owners of the wider district in the benefit of the tenths reserves vested in the Crown.

[163] Occupied land outside the surveyed Company suburban reserves in Motueka and Moutere seems to have been later identified. We were told at the hearing of the

---

174 See below at [497].

175 The potential for resurvey and reorganisation of the tenths was recognised in official government papers as late as 1861 when James Mackay (Assistant Native Secretary) wrote "The whole question of Native Reserves at Motueka and Riwaka requires [readjusting] and I would recommend that certain lands occupied by the Natives, should be given up to them and declared not to be subject to the provisions of the Native Reserves Act; it would then be fairly arranged and the Natives would know which lands they were entitled to occupy, and which lands were held by the Commissioners of Native Reserves."

176 See above at [32].

177 Cited above at [148].

appeal that some ultimately became vested in Maori (there are suggestions that the Crown may have provided compensation to settlers in some cases to clear the title), who continued to share also in the benefits of the tenths reserves. Again, no sufficient information about these occupied lands outside the tenths reserves and their ownership has been provided to the Court such as would permit reconstruction of what happened.

[164] Only the Massacre Bay and western Blind Bay land surveyed in 1847 seem to have identified areas of occupation. Such identification of occupied land was necessary in advance of the selection of the rural sections then in prospect. As a result the occupied lands were surveyed to enable their exclusion.[178] The proprietors of these identified occupied lands were also beneficiaries of the Nelson tenths reserves.

[165] When the Native Reserves Act was enacted in 1856, the occupied lands identified in 1847 in Massacre Bay were included as occupation reserves in the statutory management of the reserves, apparently with the consent of the proprietors (as the Act required).[179] The two types of reserve, tenths and occupation, were separately identified in the schedule to the Native Reserves Act 1873.[180] The separately-identified occupation reserves in the schedules were those surveyed and excluded in 1847 in Massacre Bay and western Blind Bay (especially at Kaiteretere) and did not include the tenths sections selected in 1842.[181] The tenths reserves at Motueka were not identified as occupation reserves but remained Crown land held as tenths reserves, even though a number of sections were occupied in whole or part by Maori. It has been suggested that the occupation reserves were in substitution for the rural reserves. This is discussed further below, where the conclusion I reach is that there is no evidence of such substitution and that any substitution is inherently implausible and lacked legal authority.[182]

---

178 As is further explained below at [199].

179 After the Native Land Court was set up, occupied lands were able to be held by deemed Crown title by Maori under s 14 of the New Zealand Native Reserves Act 1856. Nevertheless, some "occupation reserves" in Te Tau Ihu continued to be held by the Maori Trustee until transferred to Wakatu Incorporation in 1977.

180 As "New Zealand Company's Reserved 'Tenths'" and "New Zealand Company's Reserves" respectively.

181 The terminology of "occupation reserve", used in the hearing to describe the Motueka occupied tenths reserves is misleading. Until later exclusions under the Native Land Court and vesting in the hapu with occupation rights, these occupied lands continued to be Nelson tenths reserves, not occupation reserves under the legislation.

182 See below at [214]–[228].

(vii) Strains in the Nelson settlement

[166] The New Zealand Company's Nelson settlement was under strain throughout the 1840s. The deaths at the Wairau in June 1843 of Captain Arthur Wakefield, Mr Thompson, and others in the clash with Te Rauparaha and Rangihaeata over the Company attempts to include the Wairau Valley in the settlement had caused panic. Until the Crown's purchase of the Wairau in March 1848, there was insufficient suitable land in western Te Tau Ihu to make up the rural sections of the Nelson allotments.[183] By 1847 less than half the allotments available for sale had been acquired by investors. In London, the Imperial Government responded to the Company's financial plight by passing the Loans Act 1847, although the terms of the enactment were not known in New Zealand for several months.[184]

[167] The Company had refused to accept the terms of the 1845 grant and continued to have no title to pass on to settlers. Its efforts to obtain title and the attempts of the local government to meet its concerns in a new grant are described below.[185]

[168] At the same time as a new grant, acceptable to the Company, was in preparation, the Company and the Nelson settlers in 1847 considered it would be sensible to redistribute the town and suburban reserves to permit greater concentration of the sections taken up. In this process, the Superintendent of Nelson, Major Richmond, with the approval of Governor Grey (who had arrived in New Zealand in November 1845), agreed to the town native reserves being reduced by 47 sections. Since it seems that the sections available for sale by the Company remained at the original number it is not clear why a reduction, rather than a redistribution, such as applied to the settler investors, was thought appropriate for the tenths reserves. Nor is it clear on what authority Governor Grey approved the reduction.

[169] The suburban sections were not similarly reduced. Grey seems not to have appreciated that he was also being asked to approve reduction of the number of native reserves in the suburban sections. In the end, however, the local view was that the

---

183 As described above at [15] and [112], each allotment was intended to comprise one town section of one acre, a suburban section of 50 acres and a rural section of 150 acres.

184 The terms of the Loans Act are described below at [193]–[194].

185 See below from [170]–[187].

proposal might antagonise Maori. As it was unlikely to free up the better land (since that was certain to be retained on behalf of Maori in the re-selection because the tenths selection was high in the order established by ballot) it was eventually considered the reduction was not worth pursuing. The suburban tenths reserves therefore remained formally at 100 sections of 50 acres, even if a significant number (perhaps 20–30) were in fact occupied by Maori.

(viii) Background to the 1848 grant

[170] The Company did not accept the 1845 Crown grant made to it in the terms recommended by Spain. It considered that the exclusion of Maori occupied lands in the grant (and a similar exclusion of land claimed by any earlier European purchasers) deprived it of sufficient certainty in finalising its titles, since the extent of the occupations had not been ascertained. Another major source of concern was the fact that the grant excluded the Wairau and so covered 151,000 acres of territory only, significantly less than the 221,000 sought by the Company. While it was in dispute about the terms of its grant, the Company was unable to fulfil its obligations to investors even if it had been able to complete the allotments. Those associated with the Company set their hopes on political solutions in London and in New Zealand. In the meantime, the Colonial Government too was working to meet the Company's concerns with the grant.

[171] The Company was unhappy with the Crown grants for both Port Nicholson and Nelson.[186] Wellington presented more acute problems, but the terms of the Nelson grant were also a matter of complaint. The Company pointed out in a letter asking for the intervention of William Gladstone, then Secretary of State for the Colonies, that it had no means of knowing what European claimants might come forward "without limitation of time" and that the exception created intolerable uncertainty for the

[186] The Company's concerns in relation to Port Nicholson were with the exclusions of native cultivations, pa and burial grounds and with an exception for sections which had been granted by the Crown to private purchasers during the FitzRoy administration. The Company estimated that exclusion of native cultivations would exclude between one-sixth and one-fourth "of the whole of that part of the town of Wellington on which buildings have been erected." New native cultivations in the Hutt Valley and Porirua had been established on land already allocated to settlers, giving rise to conflict. The Company took the view that the exception for Maori pa, cultivations and burial grounds was too uncertain. It commented that its own native reserves had been fixed "in a belief that the whole of the remainder was the Company's property".

settlement, rendering the land "altogether unavailable". It also complained about the uncertainty caused by the exclusion of Maori cultivations and occupied land.

[172] The Company asked the Government to instruct Governor Grey to remedy matters by new grants, free of the objectionable clauses. Gladstone wrote to Grey asking him to investigate whether the complaints were justified and, if so, to take such measures to assist the New Zealand Company as were within his power. In a letter in response to Gladstone of 14 September 1846, Grey reported that, having received a similar letter himself from the Company representatives in New Zealand, he had already taken advice from the law officers of the Crown and had been told that the complaints about the form of the Crown grant were not unreasonable. He outlined the steps he was proposing to "relieve the Company from the difficulties arising from the loose exceptions which have been made in their grants of all Native pas and cultivations, &c".

[173] The legal opinion requested by Grey and referred to in his despatch to Gladstone of 14 September 1846 is contained in a memorandum of January 1847 from the Attorney-General, William Swainson. It addressed the problems with the form of the grants and the deduction of the native reserves and other European purchases from the land granted to the Company. It suggested that the Company's concerns could be met by conveying to the Company only the land required to meet its commitments to the settlers:

> The Original Nelson Deed of Grant purported to convey 151,000 acres to the N.Z. Co. and then excepted the Native Reserves and the Government Reserves - & All Pahs Burial Grounds & Cultivations. The Grant was also made subject to any claims which might be substantiated by any other European Claimants.
>
> It will greatly simplify the Deed of Grant to convey that land only to which the Company was entitled, instead of first including the Reserves and then excepting them: instead therefore of conveying 151,000 acres and then excepting the Native & the Government Reserves the Deed of Grant should convey that quantity deducting the Reserves.[187]
>
> The Grant might contain a statement that the Allotments colored Green on the plan were set apart as Native Reserves and that the Allotments colored = were set apart as Government Reserves.

---

187 James Parker, the Crown's historical researcher, points out that a notation on the document indicated that the full 151,000 acres would be net of both the native reserves and the Government reserves.

> It appears that in some of the Districts the Native Reserves have not yet been chosen: if so, it would be desirable that it should at once be done, and that they should be distinguished on the plan to be endorsed on the Grant = or that the Grant should Comprise those Districts only in which the Reserves have been distinguished.
>
> If there are no Pahs Burial Grounds or Cultivations except such as are Comprised within the Native Reserves any reference to these in the Deed of Grant will be unnecessary and should be omitted.
>
> If no other Claimant has proved a better title to the lands to be Comprised in the Grant all reference to such Claims should also be omitted.

[174] Swainson's proposal was to ensure that the land that could be granted to the New Zealand Company was free of the tenths reserves and areas of occupation. That solution required the tenths reserves to be selected (as had not yet happened with the rural reserves) so that they would not be included in the grant to the Company. It also entailed ensuring that pa, burial grounds and cultivations were not included in the land to be granted to the Company. Again, this required determination of whether there were pa, burial grounds and cultivations on the land to be granted to the New Zealand Company. The suggested approach seems to have been the catalyst for inquiries made at the time to ascertain the existence of cultivations, pa, and urupa on the land to be granted to the Company and for the survey of Massacre Bay and western Blind Bay which identified areas of occupation.[188] In relation to the suburban and town sections which had been selected in 1842, the form of the grant proposed by Swainson required confirmation only that there were no pa, urupa or cultivations within the settler sections surveyed in 1842. In relation to the rural sections to be included in the grant on the unsurveyed lands in Massacre Bay and western Blind Bay, it required a survey to identify occupied land so that it would not be included in the grant.

[175] It seems likely that the Swainson proposal for the grant prompted two investigations: the reports sought from Donald Sinclair in 1846–1847 and the 1847 survey of the occupied land in Massacre Bay and western Blind Bay. The first was necessary to ensure that the land proposed to be granted to the Company for its purposes was clear of Maori occupations (in itself an acknowledgement that the 1842 survey had not identified all such land). The second was necessary to enable the identification of the land available to be granted and used for the rural settler sections.

---

188 See below from [177].

[176] For the purposes of the grant to the Company on the basis suggested by Swainson (free of other interests), it did not matter if pa, burial grounds or cultivations were situated on any of the tenths reserves in the suburban and town sections because they were not to be included in the grant to the Company (a position to be contrasted with the 1845 grant where tenths reserves as well as pa, burial grounds, and cultivations had been included in the grant, on the basis that they would later be excluded by the Company). This focus seems to explain the limited inquiries made between December 1846 and February 1847 by which Major Richmond, the Superintendent of Nelson, asked Donald Sinclair, the Police Magistrate (and agent for the Crown in the administration of the reserves) for reports as to whether there were any pa, urupa or cultivations which would interfere with the issue of a Crown grant to the Company. The timing of these inquiries suggests that they were prompted by Swainson's proposals to leave the tenths reserves and occupied lands out of the land granted to the Company.

[177] Richmond wrote at the direction of the Lieutenant-Governor to Donald Sinclair on 29 December 1846 asking Sinclair to advise "if there are any native cultivations *on the Sections of the Settlers* within the Boundaries of the Land awarded by Mr Commissioner Spain to the New Zealand Company in the Nelson Districts which would interfere with an issue of a Crown grant in favour of that Body".[189] A further query was made by Richmond of Sinclair on 9 January 1847 in relation to native pa and yet another (although the letter does not seem to be in the material supplied to the Court) relating to the exchanged native reserve sections, native burial grounds, and tenths reserve sections in Massacre Bay (inquiries known by the terms of Sinclair's response of 9 February 1847).

[178] Although the second letter, in relation to pa, did not refer to the "Sections of the Settlers" it was accompanied by a duplicate of the earlier letter on native cultivations, which was exclusively concerned with cultivations "on the sections of the settlers".[190] By reference to the earlier letter, Richmond asked Sinclair to "have the goodness *likewise to report* with as little delay as possible if there are any Native 'Pas' included in those Boundaries which would interfere with the issue of a Crown

---

189 Emphasis added.
190 As the portion emphasised above at [177] shows.

Grant to the Company".[191] The third letter written by Richmond concerned urupa, as indicated by Sinclair's answer. It too seems to have been concerned only to ensure that urupa were not included within the lands granted to the company in the new grant being prepared. For the approach suggested by Swainson, it was necessary to know only whether there were such lands to be excluded or reserved from the sections to be granted to the Company.

[179] Sinclair's responses were limited to the restricted inquiry made of him. In his response of 13 January 1847 to the first letter, Sinclair advised that "there are no Native cultivations in the Sections of the Settlers within the boundaries of the Land awarded by Mr Commissioner Spain to the New Zealand Company in the Town District which can interfere with the issue of a Crown Grant in favour of that Body". Sinclair's response of 15 January 1847 confirmed that there were no native pa which would similarly interfere with a grant to the Company "except of course those Pas &c. as in his report are specially reserved for the Natives". It is I think properly understood as a response in relation to the "Sections of the Settlers". That is indicated by the sequence of correspondence and by the Swainson proposal. The third letter of response (in relation to one of 25 January) also does not refer to the "sections of the settlers". But the context provided by the first letter and the proposed new grant similarly suggests that the third letter sought information only in connection with the settler suburban and town sections. The response made by Sinclair was similarly confined to the existing settler and tenths reserve suburban and town sections when he confirmed that there were no urupa which could interfere with the Crown grant to the Company "Except such burial Grounds as are by [Spain's] Report specially Excepted and reserved to the Natives". Sinclair specifically reported that no native reserves had yet been made in Massacre Bay (because no lands had yet been given out by the Company there) and his report accordingly does not deal with urupa, cultivations or pa in that area or in the parts of Motueka and western Blind Bay that had not been fully surveyed.

[180] Swainson's memorandum for Grey was accompanied by a draft grant indicating that the land granted to the Company in the districts of Wakatu, Wairau,

---

[191] Emphasis added.

Moutere, Motueka and Massacre Bay would be delineated on attached maps with the acreage to be supplied. The native and Government reserves would be similarly identified on attached plans but were not, in the terms of the draft, the subject of grant.

[181] The draft grant was supplied to William Wakefield for comment. In response on 21 January 1847 he noted that while the grant in the form proposed "would be entirely satisfactory if the New Zealand Company were in a position to supply the precise amount of acreage to be inserted in the several blanks, and if the Rural Sections had been selected on behalf of the Natives", it was not in a position to supply the further information. The surveys of Massacre Bay and the unsurveyed parts of the Motueka districts were not yet complete and, until that was done, the tenths rural sections and Maori occupied land could not be excluded from land to be granted to the Company.

[182] Wakefield was, however, anxious to obtain some security of tenure for the Nelson settlement. He pressed for an immediate grant in order to check "the practice of squatting" and so that settlers could receive some assurance that the Company would receive a grant from which to provide them with title. He proposed that grants to the Company of lands in both Blind Bay and Massacre Bay should be issued "forthwith" on the basis that the Company would "reconvey to Government such portions as shall not be allotted by it to purchasers under the Nelson scheme before the 1st January 1849, and [on the basis of] a covenant by the Company to convey to the Crown or its appointees such Lands as may hereafter be selected as Native Reserves in conformity with the Prospectus of the Nelson Settlement". The native reserves already selected in Blind Bay and the Government Reserves would be excluded in the manner proposed by Swainson.

[183] In advocating this course, Wakefield invoked the precedent of the Otakou (Otago) purchase (entered into by the Company directly with the Imperial Government), where the obligation to reconvey to the Crown land not needed for the settlement "does not appear on the face of the Grant, but was effected by a separate document". Wakefield suggested that the same course of using a side agreement to contain the obligation to reconvey the reserves and the excess lands not required for the obligations to settlers (rather than making the grant itself conditional)

was necessary “to prevent any objection being taken to the conditional form of the Grant”.[192] The unconditional form of the grant was therefore to provide sufficient assurance to those investing in the settler allotments.

[184] It seems to me that this proposal explains the form eventually taken by the 1848 Crown grant. It suggests the new grant was to exclude the tenths reserves already identified, surveyed and selected in the suburban and town sections. Sinclair’s inquiries may have provided some assurance that there were no pa, urupa or cultivations within the sections to go to settlers. Although it was known and acknowledged by the Company that the rural tenths reserves remained to be identified and excluded, it seems to have been envisaged that the grant to the Company would include all the unsurveyed land in Massacre Bay and western Blind Bay on the Company’s undertaking (not apparent from the face of the grant) to reconvey to the Crown or its nominee “such Lands as may hereafter be selected as Native Reserves in conformity with the Prospectus of the Nelson Settlement”. The reference to the reserves yet to be identified can only have been a reference to the 10,000 acres of rural reserves, which Wakefield appreciated remained to be provided.

[185] In March 1847 it became clear that the purchase of the Wairau was secure and that the Company could select rural sections in that district. The Company was advised by Grey that it would receive grants once the surveys and selections were made. The Governor was prepared either to grant the whole block on the condition that any portion not required would be reconveyed, or that the Company could identify by survey the precise portions it required (as Swainson had proposed).[193] As James Parker, the Crown historical researcher, notes in his evidence to the High Court, the Company preferred to take the wider grant with agreement to reconvey the excess, as long as the obligation was not apparent on the face of the grant.

---

192 The arrangements in respect of the proposed settlement at Otago had been recorded in a letter by Lord Stanley to the Company of 7 August 1845. An unconditional grant of 400,000 acres, excluding the land reserved to the natives, was proposed on the basis that the Company separately engaged to select the 150,000 acres (and more, if required) which the Government was prepared to convey to it within a limited period and to reconvey the remainder to the Crown.

193 As recorded in a letter from Fox to Wakefield of 3 April 1847 regarding the proposed new grant.

The Company expressed confidence that the surveying and selection required before the reconveyance would take a few months only.[194]

[186] The course of granting more land than was needed for the settlements, with an agreement (not apparent on the face of the grant) that the excess would be returned on the basis earlier arranged in respect of Otakou seems to have been the course adopted in the 1848 grant. The same general approach is to be seen in the terms of the Loans Act 1847.[195] It seems likely that the 1847 Act made it unnecessary for there to be a separate agreement to reconvey the surplus land, as Wakefield had originally proposed.

[187] Swainson's proposal of granting the Company only the lands required for the settler sections was therefore not adopted. As a result, the tenths reserves and any occupied land would be included in the grant to the extent that they had not already been identified and excluded (as the suburban and town tenths reserves were) but would be reconveyed to the Crown later. The limited inquiries made of Sinclair in relation to the settler town and suburban blocks had not attempted to identify occupied land outside the settler suburban and town sections, as was consistent with the Swainson proposal. They were therefore inadequate to provide assurance that there were no occupied lands within the wider grant undertaken in 1848 and proceeded on the basis that inclusion of occupied land in the tenths reserves was not of concern in relation to the grant then proposed. But the form of the grant and the plans attached to it seem to have been prepared on the basis of an obligation by the Company to reconvey to the Crown the portions not allocated to settlers and, in particular the tenths reserves still to be provided, as Wakefield had proposed.

(ix) 1848 grant

[188] The 1848 Crown grant signed by Governor Grey was based on Spain's award both as a matter of inference in its own terms (although the award is not directly

---

194 That confidence seems to have been borne out because the settlers completed their allotments by selecting their rural sections in late March 1848, principally in the Wairau and in Massacre Bay, meaning that the surveys of Massacre Bay and the Wairau had been completed by then (entailing survey and exclusion of the lands occupied by Maori in Massacre Bay). Such survey to exclude occupied land was not necessary in the Wairau where the Kaituna Reserve was provided in the purchase from the Crown for the Ngati Toa vendors.

195 As is explained below at [195].

mentioned in the grant) and, as importantly, because the award was the basis on which the Crown obtained the land cleared of native title which enabled its grant. The grant recited that the Company was "entitled" to a grant. The only basis for such entitlement was the 1845 Spain award.[196]

[189] The deed of grant was dated 1 August 1848. It recited "Whereas the New Zealand Company is entitled to receive a grant, within the territory of New Zealand, of land hereinafter particularly mentioned and described". The territory described was extensive (far more than was necessary for the purposes of the Nelson settlement) and included the land in the Crown's Wairau purchase. The blocks were said to be "delineated on the plan numbered 1 (one), and its accompanying schedules annexed hereto, and thereon coloured red":

> … saving and always excepting and reserving all those pieces or parcels of land which have been set apart as Government reserves for public purposes, and which are more particularly delineated and described upon the plans numbered 3 (three), 4 (four), 5 (five) and 6 (six), and the schedules respectively attached to each of these plans annexed hereto, and coloured yellow. And also excepting and reserving all the pahs, burial places, and Native reserves situated within the said block of land hereby granted to the New Zealand Company as aforesaid, which are more particularly delineated and described upon the plans annexed hereto, numbered 2 (two), 3 (three), 4 (four), 5 (five), 6 (six), and 7 (seven) and the schedules respectively attached to each of these plans, and coloured green; together with all and every the rights and appurtenances whatsoever thereto belonging, to hold unto the New Zealand Company, their successors and assigns, for ever.

[190] With the exception of the completed survey plans for Massacre Bay and western Blind Bay, undertaken in 1847, the plans of the reserves in the remaining Nelson districts which were attached to the 1848 grant seem to have been the 1842 plans attached to the 1845 grant (being the town and suburban tenths reserves already surveyed), with the adjustments reported by Sinclair for the 1844 exchanges (which had not been corrected in the maps attached to the 1845 grant). Since one of the Company's concerns with the 1845 grant was that the extent of the cultivations, urupa, and pa was not known, the tenths reserves marked up in 1845 do not seem to have been understood to include all such areas. In any event, the occupied land was required

---

196 Set out above at [153]. Compare William Young J below at [891], where he says that the source of the entitlement is the Loans Act. In my view the preamble to the Loans Act and the terms of s 14 (which assume a pre-existing entitlement) are inconsistent with that view. The Loans Act gave the Company the option of accepting the 1845 grant (within 6 months) or seeking a new grant (the option it took).

in the Spain determination to have been excluded entirely and to have been distinct from the tenths reserves, consistently with acceptance of FitzRoy's insistence on the point in 1844 when the investigation seemed at impasse. With the exception of the Massacre Bay/western Blind Bay occupied land surveyed in 1847, the plans attached to the grant originally prepared in 1842 did not identify the occupied lands.[197]

[191] As Wakefield's letter of 21 January 1847 rejecting Swainson's proposals for the new grant makes clear, the rural tenths reserves had not been identified at that stage. They were not shown in the plans attached to the 1845 grant or otherwise later identified for the purposes of the 1848 grant. Wakefield's proposal that the Company would agree to reconvey to the Crown or to its nominee land to complete the tenths reserves can only have been in reference to the rural reserves, since the identified suburban and town reserves were to be excluded from the grant in his proposal (as indeed they were excluded in the 1848 grant). The omission of the rural tenths reserves, against the Spain award and the acknowledgements in 1847 that they remained to be made, makes it clear that the plans attached to the 1848 grant to the Company cannot be treated as defining the Maori tenths interests.

[192] Nor was there identification in the grant or in the plans attached to it of the occupied lands that should, on the basis of Spain's award and the Crown's engagements to Maori, have been excluded entirely, except in the surveys obtained in 1847 for Massacre Bay and western Blind Bay. Those surveys to identify areas of occupation had been necessary to ensure that the settler rural sections were free of occupation. No such exercise was undertaken in relation to the land in the remaining districts which had been earlier surveyed, before Spain's award made it clear that areas of occupation had to be excluded in addition to the tenths reserves identified in the suburban and town sections. As has been indicated, Sinclair's limited confirmation in 1847 that there were no occupations located on the settler sections (an opinion that may or may not have been accurate in 1847[198]) was an inadequate basis for any assumption that there were no areas of occupation to be identified and excluded in the

---

197 The lack of identification of the occupied lands was one of the reasons why Wakefield had rejected the 1845 grant, as has already been discussed at [170].

198 As noted below at [266], by 1849 there were "considerable cultivations" on at least five Motueka settler sections, which led the Board of Management to arrange a swap of six settler sections for six tenths sections.

town and suburban tenths reserves or in the districts outside the town and suburban sections. Urupa, pa and cultivations were excluded from the approved purchase by the terms of the Spain award. The Governor lacked power to grant such land, as the 1840 Charter and the statements of the Secretary of State make clear.[199] Again, the plans attached to the 1848 grant cannot be treated as defining the occupied lands because on their face they do not purport to do so.

(x) The New Zealand Company Loans Act 1847

[193] The Loans Act suspended the Royal Instructions relating to the restrictions on disposing of the waste lands belonging to the Crown until July 1850.[200] It provided that the Crown lands within New Munster (including the South Island) were to be vested in the Company on trust for the Crown for the period of the suspension, to enable the Company to act as the Crown's agent in selling land for the purposes of settlement.[201] Sales were subject to the restriction that no land could be conveyed without consideration or for consideration of less than 20 shillings per acre.[202] By s 14 of the Act the Governor retained power to make absolute grants to the Company of land to which it "now is or may … become entitled".

[194] The Act provided for a loan from the Imperial Treasury to the Company and permitted it to use part of the revenue expected to be generated from land sales in establishing the settlements envisaged.[203] The loan was secured under the Act over the lands owned by the Company or to possession of which it was entitled. The Act provided that the directors of the Company, if unable to continue with the Company's projects, were to surrender its charter to the Queen, together with all claim or title to the lands granted or awarded to the Company.[204] In that case the lands were to "revert

---

199 Referred to at [116].
200 New Zealand Company Loans Act 1847, s 1. Although the Loans Act suspended ch 13 of the Royal Instructions (28 December 1846), relating to disposal of the waste lands of the Crown, an express reservation preserved those provisions in so far as they related to "the Registration of Titles to Land, the Means of ascertaining the Demesne Lands of the Crown, the Claims of the aboriginal Inhabitants to Land, and the Restrictions on the Conveyance of Lands belonging to any of the aboriginal Natives, unless to Her Majesty, Her Heirs and Successors", although the system of registration of titles to land was not established.
201 New Zealand Company Loans Act 1847, s 2.
202 Section 3.
203 Sections 5 and 6.
204 Section 19.

to and become vested in Her Majesty as Part of the Demesne Lands of the Crown in New Zealand", subject to subsisting contracts.

[195] As had been the case with the Otakou purchase (earlier suggested as a precedent by Wakefield), the legislation transferred more land than the Company was eligible to receive itself, to be held on trust for the Crown and from which settlements could be established on compliance with the conditions as to price in the legislation. The Company did not become beneficially entitled to the lands, except through any Crown grant made specifically to it. Only land required for settlement would be granted to the Company under the legislative arrangements and on proof of entitlement.

[196] The Nelson settlement lands, however, were lands to which the Company was already entitled to a grant by virtue of the Spain award. This was the relationship between the 1848 Crown grant and the legislation, a connection that seemed to Clifford J to be unexplained.[205] What seems to have been treated as unnecessary following the Loans Act was any formal side agreement, such as had earlier been proposed by Wakefield, by which the Company agreed to reconvey to the Crown the land not required by it to fulfil its obligations to the settlers. That seems to have been because under the Act all land held by the Company in New Munster surplus to the settlements was held on trust for the Crown and was to be returned to the Crown to the extent that it was not required for the settlement allotments.[206]

[197] The effect of the Loans Act made the Company agent of the Governor for the purpose of accessing the waste land belonging to the Crown (that is to say, land cleared of native title by purchase on behalf of the Crown or approved under the Land Claims

---

205 *Proprietors of Wakatu Inc v Attorney-General* [2012] NZHC 1461 at [160]. Under the legislation the Company had the option of accepting any offered grant within 6 months. That did not preclude a fresh grant. The Company did not take the 1845 grant and instead received the 1848 grant.

206 It may be noted that similar restrictions of the Governor's powers of disposition of land to the waste lands belonging to the Crown continued to bind the Governor under the 1846 Instructions, as they had under those issued in 1840. The 1846 Royal Instructions were issued following the passage of the New Zealand Government Act 1846 (Imp) 9 & 10 Vict c 103, which was intended to implement responsible government in the colony. Governor Grey persuaded the Imperial Government to pass the New Zealand Government Act 1848 (Imp) 11 & 12 Vict c 5, which suspended the 1846 Act and Instructions for five years in so far as they established responsible government, and revived the corresponding provisions in the 1840 Charter and Instructions. This did not affect the provisions in the 1846 Instructions relating to land.

Ordinance) for the purpose of settlement.[207] This accords with the understanding of Lieutenant-Governor Eyre who, in a letter of 30 July 1849 to Alfred Domett[208] concerning administration of the tenths reserves, said that the Crown assumed that the native reserves (the town and suburban sections which had been excepted from the Company's 1848 grant) vested in the Crown alone. He took the view that ownership had not been affected by the Loans Act as "it never could be contemplated by the act of Parliament transferring the Crown's right over the Demesne lands to the N.Z. Company to include any but the waste lands".[209]

[198] In the end, the Company failed before it conveyed title to the investors in the settlements. In July 1850 the Company, by then bankrupt, surrendered its charter. Under the provisions of the Loans Act, its property and obligations devolved on the Crown. The Company's lands reverted to being Crown land under s 19 of the Loans Act, which provided:

> … all the Lands, Tenements, and Hereditaments of the said Company shall thereupon revert to and become vested in Her Majesty as Part of the Demesne Lands of the Crown in *New Zealand*, subject nevertheless to any Contracts which shall be then subsisting in regard to any of the said Lands, and upon the Condition of satisfying any Liabilities to which the said Company may then be liable under their existing Engagements with reference to the Settlement at *Nelson*, or any Liabilities of the said Company …

The Company's settlers were forced to look to the government to secure title to their land, almost a decade after the selections of town and suburban sections had been made. The Crown set about tidying up the titles of the settlers. The machinery for doing so was contained in the New Zealand Company Land Claims Ordinance 1851.[210]

---

207 I do not agree with the view expressed by William Young J at [888] that the Act contemplated the Crown lands provided to the Company as being other than the waste lands belonging to the Crown. That was not the understanding of officials such as Eyre at the time. The authority of s 6 was required to allow any unpaid or additional compensation (similar to the additional moneys paid to the Massacre Bay Maori in 1846) to be paid by the Company. The authority to pay compensation, "if any" to Maori does not seem to me to have been authority to make purchases of unceded land because the Crown continued to maintain its exclusive right of pre-emption, which was not devolved to the Company. (The legislation itself does not delegate the right of pre-emption and the Charter and Instructions of 1846 continued to maintain the Crown's right of pre-emption, see above at n 200.)

208 Colonial Secretary for New Munster.

209 It should be noted that the typed transcript of this letter provided in the evidence renders this as "to *withhold* any but the waste lands". In the original copperplate it is clear that the right word is "include". "Withhold" also makes no sense.

210 New Zealand Company Land Claims Ordinance 1851 15 Vict 15.

(xi) The Wairau purchase and surveys in Massacre Bay

Grey and occupation reserves

[199] Massacre Bay had not been fully surveyed in 1842 and the surveys of the area seem to have been put on hold until the additional payments held for Massacre Bay were accepted and while the Company sought a Crown grant more acceptable than the 1845 grant. With purchase by the Crown of the Wairau, survey of Massacre Bay became urgent so that the rural sections to complete the settler allotments could be available. No suburban sections had been offered in Massacre Bay, probably because it was too far distant from the township to be suitable for such sections, but also because the area had not been fully surveyed. The terms of the Spain award made it important to identify excluded occupied land in Massacre Bay before the rural sections were surveyed.

[200] The surveyor, Charles Whybrow Ligar, had already partly identified areas of pa and cultivations in Massacre Bay. But Governor Grey had formed a more general view that presently occupied lands were insufficient for the future needs of Maori.[211] He considered that occupation reserves needed to be sufficient for the future needs of Maori and that the reservation of existing occupied land was insufficient for that purpose. There was advantage in such future-proofing in providing more certainty to settlers by avoiding the "cultivation creep" that had plagued the Port Nicholson settlement and was becoming troublesome in Motueka. This preference was acted on by Grey in the purchase of the Wairau, where land required for the present and future needs of Ngati Toa was excluded from the purchases in the large Kaituna reserve for their occupation.[212]

---

211 As Grey seems to have understood, assumptions that cultivations were fixed did not accord with the reality that Maori moved their cultivations to new ground when fertility declined and may have had no developed system of crop rotation.

212 It should be noted that the increased emphasis under Grey on sufficient occupation reserves did not displace the inclusion of endowment reserves as part of the purchase price, as can be seen in Donald McLean's subsequent West Coast purchases where both occupation reserves and endowment reserves were part of the purchase terms. See Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 1 at 492–493; and GA Phillipson *The Northern South Island* (Rangahaua Whanui District 13, Waitangi Tribunal, 1995) at 193.

[201] In a memorandum of 14 September 1846 sent by Governor Grey to William Gladstone, then Secretary of State for the Colonies, Grey acknowledged that Maori were most reluctant to take up occupation in territories of other tribes and were understandably reluctant to leave their villages and cultivated lands. He had recommended to Colonel McCleverty,[213] that for the future he should not sanction the purchase of any large district of country without ensuring that the cultivated grounds and sufficient adjacent land for future cultivations were reserved for Maori.[214]

[202] Grey's memorandum indicates the priority he placed on identifying occupation reserves which were sufficient to ensure that Maori existing and foreseeable needs for support could be met and providing the certainty to allow surplus land, not required by the Crown, to be disposed of. Such approach required an assessment of the population dependent on the lands for support. Grey had therefore directed McCleverty to make assessment of the numbers of Ngati Toa likely to relocate to the reserves in the Wairau from Porirua before settling the area of those reserves. In the surveys of Massacre Bay, similarly, the surveyors had reported the number of Maori living in the occupied land, as is discussed in relation to the August 1847 surveys.[215]

[203] The Kaituna reserve from the Wairau purchase from Ngati Toa was not available for the Maori of Massacre Bay. Grey made this clear to Wakefield. Wakefield reported to Fox, the Resident Agent for the Company at Nelson, on 21 June 1847 that Grey was of the view that the Massacre Bay natives did not share in the Wairau purchase reserves and that therefore "in fairness" they were entitled to have land in Massacre Bay reserved for their use. Since Grey's view that additional allowance had to be made for future needs was known, the Company seems to have feared that it might have to provide a tenth of the 30,000 acres thought to be available in Massacre Bay for these purposes. Grey was reported by Wakefield in correspondence with Fox as saying that he thought 3,000 acres was much more than

[213] The Crown's agent for land purchases, sent out by the Colonial Office to help tidy up the Company's land claims.

[214] Grey recommended too that where portions of land were to be assigned to "particular bodies of Natives", they should be given accurate plans and descriptions of the land, perhaps in the form of "descriptive grants", registered with the Survey Office. Such a system of registered "descriptive grants" would also facilitate identification of land that "might be regarded as waste lands belonging to the Crown", available for settlement.

[215] The surveys are described below from [210].

needed to be allotted to the Massacre Bay Maori "independently of the reserves marked off for them by Mr Ligar as pahs and cultivations".[216]

[204] The Governor was reported as having directed that "an Officer of the Government should, in conjunction with an Agent named by you [Fox], define the limits of a portion of land of perhaps 500 acres, to be reserved without consulting the natives as to the spot, but adapted to supply their future wants". (It will be recalled that the Crown had reserved to itself the right to make further provisions for Maori in the 1840 agreement with the Company, although the reservation was not specifically referred to by Grey.[217]) In terms of the direction, these occupation reserves would not require selection by Maori and were to exclude land on which deposits of coal had been discovered recently.[218]

Provision of part of Nelson rural sections in the Wairau

[205] After conclusion of the Wairau and Porirua purchases, the Superintendent of Nelson, on behalf of the Governor, advised the New Zealand Company in March 1847 that it could fulfil its obligations for the rural sections in the Nelson settlement from the Wairau, on reimbursing the Government for a proportionate share of the cost of purchase. Richmond's letter offered to sell to the Company such lands as it required.

[206] It had long been the object of the Company to look to the Wairau to make up the shortfall in the rural sections in the Nelson districts. In Te Tau Ihu, the maximum number of rural sections available had been put by the surveyors at around 583 (instead of the 1,000 required), and some of the sections comprised very poor land. It is to be noted that Richmond's letter provides no basis for thinking that the commitment to reserve 10,000 acres for Maori in western Te Tau Ihu did not need to be fulfilled.

[207] The letter advised the Company that it was unnecessary for it to provide reserves in respect of the Wairau land:

---

216 The source of this quote being Wakefield, some caution in accepting its accuracy is perhaps warranted.

217 See above at [111].

218 The land containing the coal deposits was, not surprisingly, among the first selected for rural sections by settlers according to the order settled by lot.

> Ample reserves having been made by the Government at the "Wairau" and in the "Porirua" district for the natives, as they were only willing upon these terms to alienate their lands, the Local Government do not think it necessary to request the New Zealand Company to make any further Reserves in either district … .

[208] These reserves in the Wairau and Porirua were occupation reserves for Ngati Toa in those districts. As already mentioned, Grey had instructed McCleverty to ascertain the numbers of Ngati Toa likely to take up occupation on the Kaituna reserve. Because these were clearly intended as occupation reserves, there was no question of their being available to Maori from other districts. (Grey had made it clear in his memorandum on the 1845 grants that he was well aware that the provision of occupation reserves out of their districts was not acceptable to Maori). The letter says nothing to suggest that provision of the rural sections to complete the Nelson tenths reserves under the terms of the Spain award was thought to be unnecessary.

[209] Although the letter may indicate that the Government was not looking to the Company to maintain its tenths policy by making "further Reserves" in relation to new land acquired by the Crown (and likely to be subject to more generous occupation reservations for the native vendors), the letter says nothing about the tenths reserves which had already been created or to which the Company was committed in relation to its earlier purchases in the Nelson District.

The surveys in August 1847

[210] On 28 August 1847 Wakefield engaged Charles Heaphy to go with Sinclair to Massacre Bay "for the purpose of watching over the Interests of the Company in reference to the Selection of Native Reserves to be made on the part of Govern[ment]". Wakefield's instructions to Heaphy followed Grey's direction:[219]

> Your duty will be to see that no excessive quantity of Land is reserved. It appears to me that if in addition to the actual cultivations already reserved, about 500 acres more [are] appropriated for the Natives, abundant provision would exist for the present & future wants of all who reside in that district. You will also be careful to see that no coal district, or other land which may offer peculiar advantages either from situation or otherwise for the exercise of European industry & capital is reserved further.

---

219 Described at [204].

[211] Sinclair wrote to Superintendent Richmond on 30 August 1847 to inform him that he planned to leave the next day with Heaphy and a surveyor. He noted:

> I now clearly understand that such selection is to be without reference to Mr Commissioner Spain's Award [that is to say in respect of the rural tenths reserves][220] and that I am in addition to their present cultivations [&etc] to choose so much additional Land as I shall consider sufficient for the present and future wants of the Natives of the District. I have obtained tracings of those cultivations etc and shall have their extent computed before I arrive at Massacre Bay.

[212] Sinclair had originally been instructed in April 1846 to undertake work in preparation for selecting the rural tenths reserves in Massacre Bay. By June 1847 he was set a different task – that of identifying Maori occupied land in Massacre Bay and sufficient additional allowance to provide some cushion for the future. This task, as Wakefield indicated in his letter of 28 August 1847, was a selection "on the part of Government" of reserves for occupation. Sinclair may not have understood at first that the focus had shifted. In a letter of 30 August he indicated that he appreciated that his job was now to identify the existing occupied lands and add to them sufficient additional land to meet the future expected needs of the Maori occupiers. He was not required to continue with the task of completing the survey of the rural sections (it seems because the form of the new grant as proposed removed urgency in identification of the rural reserves while making exclusion of occupied lands the priority). It had taken some hurried correspondence between Wakefield, Fox, Richmond and Sinclair before Sinclair reached the understanding referred to in his letter of 30 August that his immediate task was concerned with identification of land to be excluded for occupation purposes.

[213] In the end, 626 acres[221] was added by Sinclair and Heaphy to the areas of pa and cultivations identified by Ligar and became the "occupation reserves" created by the Crown in Massacre Bay. They were distinct from the Nelson tenths but were later administered with them, apparently with the consent of Maori interested in them (as the Native Reserves Act 1856 required of land in which native title had not been extinguished).[222] The provision of these occupation reserves for use by particular

---

220 As further explained at [203].

221 Grey had referred in his letter to an area of "perhaps 500 acres". Heaphy recorded having set aside 626 acres in addition to the areas identified by Ligar.

222 Native Reserves Act 1856, s 14.

families had no necessary effect on the obligation to complete the tenths allotments through provision of the rural reserve lands. There is no evidence that Grey considered there was any such impact. And such result was inherently implausible, as is explained below.[223] The occupation reserves, unlike the tenths reserves which were part of the consideration for the sale, were of benefit only to the occupiers, not the proprietors of the district who were the beneficiaries of the tenths reserves. It is possible that some confusion may subsequently have arisen. Domett's later inquiry in 1848 as to the authority for the "exchanges" made in Massacre Bay and the reference made to their being "in lieu" of the rural sections,[224] suggests some such confusion, while raising questions about the legitimacy of any such approach.

The obligation to fulfil the rural tenths reserves

[214] At a meeting of 30 June 1847 in Nelson between the settlers and the Company to discuss the provision of the rural sections from the Wairau purchase, there was discussion of reduction of the size of the settlement, to reflect the disappointing sales of the allotments. The meeting proposed that the Governor should be asked to reduce the allocated Maori town and suburban reserves to one-tenth of the land actually sold (to conform with the reduction in the settlement overall). As has been described,[225] the Governor subsequently agreed to reduce the reserved town sections by 47, to 53 instead of the 100 originally selected. He did not however reduce the suburban sections reserved for Maori.

[215] At that meeting, the Company indicated that it believed that the Governor, by making large reserves for Maori in the Wairau, had released the Company from its obligations to lay out and choose the 100 rural sections for native reserves. These statements, if made in reliance on the effect of the Wairau purchase, seem well astray, since the occupation reserves made in the Wairau and Porirua can only have been for the Ngati Toa vendors, as indeed appears from Richmond's letter of March 1874.

---

223 See below at [214]–[227].
224 See below at [255].
225 See above at [168]–[169].

[216] As discussed above,[226] the context of Richmond's letter was a new purchase of land in districts outside the purchases made for the Nelson and Port Nicholson settlements. The indication that the Company need not provide "any further Reserves in either district" (the Wairau or Porirua) was a reference to the Company's policy of providing tenths reserves for Maori vendors in its purchases. Richmond advised that the local government considered there was no need to provide further reserves in Wairau or Porirua for Ngati Toa, the vendors to the Crown, because they had themselves stipulated for and been provided with "[a]mple reserves" (in context, clearly a reference to occupation reserves) as a condition of agreeing to the sales. (This was an apparent reference to the large reserve of some 117,000 acres at Kaituna.) It is impossible to read Richmond's letter as suggesting that the Company and the government were absolved from providing the 10,000 acres of rural land the Company had engaged to provide and the Spain award had required as tenths reserves for the vendors of the lands in the Nelson settlement. It concerns a distinct transaction on very different terms than the purchase approved under the Land Claims Ordinance by Spain.

[217] Grey's instruction that the Massacre Bay Maori were not entitled to share in the Kaituna reserve is inconsistent with any view that the tenths obligations in western Te Tau Ihu had been discharged with the Wairau arrangements. There is no suggestion that the beneficiaries of the Nelson reserves received any benefit from the reserves made by Grey from the Wairau and Porirua purchases. The Kaituna reserve was for occupation, not endowment (as the tenths reserves were), and a relatively full price seems to have been paid by the Crown for the land acquired in the Wairau by comparison with the "gifts" made by Captain Wakefield in western Te Tau Ihu.[227] The western Te Tau Ihu hapu did not share in the Wairau purchase price. For them, a principal consideration for the original sale was the endowment (tenths) reserves which were a condition of the Spain award and which were in addition to their retention of their occupied lands.

---

226 Above at [207].

227 At a cost of £3,000 and £2,000 respectively, prices that may be contrasted with the much smaller monetary value provided to the vendors in western Te Tau Ihu (where however the tenths reserves were an important part of the consideration): see above at [129]–[130].

[218] The opinion of James Parker, the Crown historical researcher, was that "[t]he Company then proceeded to act as if the Kaituna reserve fulfilled its obligations to provide the rural tenths reserves". He speculates that "[t]he fact that the Governor did not step in to correct the Company, could imply he agreed with that action", although he acknowledges that "[t]here is … no evidence that he explicitly instructed them to use that reserve as one large rural reserve". Mr Parker also questions whether Grey's intervention to make it clear that the Massacre Bay Maori reserves were not affected by the reserves in respect of the Wairau purchase[228] was an indication that other Maori vendors in respect of the Nelson settlement were thought by him to be entitled to participate in the occupation reserve at Kaituna which was excluded from the Wairau purchase. This speculation strikes me as implausible.

[219] First, Grey's advice (passed on by William Wakefield) about the Massacre Bay vendors was almost certainly prompted by the letter of 3 April 1847 from William Fox, the Company's Nelson agent, to Wakefield. Fox, in reaction to the Richmond advice of the Wairau opportunity, had suggested that, although the Massacre Bay proprietors might otherwise have been entitled to "a proportionate part" of the 30,000 acres surveyed in Massacre Bay, since "[t]he Natives resident in Massacre Bay are I believe of the same tribe for whom the reserves are made in the Wairau", "in fairness the Natives having got their full quantity in the Wairau should have none elsewhere". Grey's reaction that the Massacre Bay Maori had not been included in the Wairau arrangements, relayed by Wakefield to Fox,[229] was in response to the Fox suggestion. Given that only the Massacre Bay vendors had been suggested by Fox to have been provided for in the Kaituna Reserve (on the suggestion that they were of the same tribe as the Wairau vendors), it is not surprising that the interests of Maori in the other districts of the Nelson settlement were not referred to by Grey.

[220] Secondly, in the Nelson settlement the tenths reserves promised were not occupation reserves but consideration for the purchase by way of endowments for the future benefit of the owners of the land according to custom across the district. Cultivations and pa occupied by particular hapu and families were to be excluded from the sale and set apart in addition to the tenths reserves, as has already been described.

---

228 See above at [203].
229 See above at [203].

[221] When the Crown's purchase of the Wairau meant that there was sufficient land available to the Company to complete any shortfall in the rural sections, the lands in Massacre Bay and western Blind Bay which were only partly surveyed to that point had to be fully surveyed to enable rural sections in that locality to be available for settler selection. To do that, it was necessary to identify the excluded occupied lands and also to add to them land that Grey indicated was necessary to provide a cushion for future occupation needs.[230]

[222] As the correspondence indicates and as was mentioned in Swainson's memorandum to Grey,[231] it was appreciated that the cultivations, urupa and pa in Massacre Bay had not yet been taken out, although it appears that there had been some identification of lands in actual occupation by Ligar. To them, Grey suggested should be added lands sufficient for the future needs of the occupiers. Wakefield suggested such allowance would be amply provided for by an additional 500 acres.

[223] Occupation reserves in Massacre Bay benefited only those entitled to occupation. They were no substitute for the district-wide benefit of the tenths. The suggestion that 500 acres of additional occupation reserves, of benefit to Massacre Bay Maori only, could be substituted for 10,000 acres of rural reserves intended to benefit the vendors of the whole district and part of the purchase price on which Spain had approved the sale does not seem credible. Nor is there any indication of a legal basis for such adjustment of property. The provision of additional occupation reserves to meet Maori needs from the waste lands belonging to the Crown was, however, within the Governor's powers under the 1840 Charter and Instructions and the discretion to do so was specifically reserved in the 1840 agreement with the Company.

[224] I do not therefore agree with Clifford J that "Grey subsequently agreed that the reservations in the Wairau obviated the need for reservations of rural sections in western Te Tau Ihu".[232] The evidence does not support that conclusion, as Mr Parker acknowledges in substance. It is inherently improbable, for the reasons I have given.

---

230 See above at [200]–[202].
231 See above at [173]–[182] and [210].
232 *Proprietors of Wakatu Inc v Attorney-General* [2012] NZHC 1461 at [157].

It is the case that Grey considered the Company's tenths scheme to have been flawed[233] and did not generally adopt it in respect of the Crown's own purchases at the Wairau and subsequently (although the later West Coast purchases made provision for tenths reserves as well as occupation reserves[234]). But there is nothing to suggest that Grey countenanced the abandonment of commitments entered into as consideration for the purchase approved by the Commissioner under the 1841 Land Claims Ordinance as fair in large measure because of the tenths reserves. And the history of the administration of the existing reserves shows that there was no question of their being brushed aside in like manner; they were retained for the benefit of the owners according to custom of the wider district.

[225] Alexander Mackay, in an 1877 memorandum laid before the House of Representatives, suggested that the failure to set aside the rural reserves was a result of "misunderstanding" as to the effect of the Kaituna reserve.[235] A paper prepared for the Waitangi Tribunal expressed the view that that the failure to set aside the rural sections for the tenths may have arisen through "oversight rather than a deliberate omission".[236] If so, an explanation may lie in the sequence of events.

[226] First, the 1848 Crown grant removed any urgency in setting aside the rural tenths reserves by securing for the Company adequate land from which to complete the allocation of the allotments to its investors, leaving the tenths rural reserves and the remaining unidentified occupied Maori land to be set aside by the Crown after return of the surplus lands to it. Secondly, the breadth of the area of land in the grant (originally proposed to have been subject to an express undertaking to return the excess to the Crown) was expanded by the effect of the 1847 Loans Act, which appointed the Company agent and trustee for the Crown within the whole of New Munster until 1850 or until it earlier surrendered its charter. With the Company acting as its agent in the South Island in relation to land, the local government may

---

233 In a memorandum sent to WE Gladstone, then Secretary of State for the Colonies, on 14 September 1846, Grey said "I think it proper to observe generally, that the system of Native reserves as laid down by the New Zealand Company, although an admirable means of providing for the future wants of the aborigines, is in some respects insufficient for their present wants, and ill adapted for their existing notions."

234 See above at n 212.

235 Alexander Mackay "Native Reserves, Nelson and Greymouth" [1877] II AJHR G3a at 1.

236 GA Phillipson *The Northern South Island* (Waitangi Tribunal, Rangahaua Whanui District 13, June 1995) at 122.

have lost focus on what remained undone in relation to the Nelson tenths reserves.[237] The administration of the identified tenths reserves was at a low ebb and required sorting out.[238] If the Company was quick to batten on to the opportunistic view that the Wairau reserve obviated the need for the rural tenths to be provided, that however seems to me a tactic that was highly optimistic, for the reasons given. And, for the reasons to be given in what follows, I do not think it affects the responsibilities of the Crown.

[227] The historical evidence provided to us does not suggest a deliberate government decision not to fulfil the tenths reserves by providing the rural sections. Wakefield himself in January 1847 had acknowledged to the local administration that the tenths rural reserves were still to be selected.[239] In March 1847, William Fox, the Company's agent, when writing to the Surveyor General, Charles Ligar, enclosing a list of "the whole of the town and suburban sections to which the natives are entitled", said that "[t]he rural sections as already explained remain to be selected in rotation with the purchasers under the scheme". In his February 1847 letter advising Richmond that there were no burial grounds which could interfere with the issue of a Crown grant to the Company ("Except such Burial Grounds as are by [Spain's] Report specially Excepted and reserved to the Natives"), Sinclair also advised Richmond that he had not selected native reserves in Massacre Bay "Agreeably to the Authority given to me for that purpose", because, at that date "no lands [had] yet been given out by the New Zealand Company in Massacre Bay". This can only have been a reference to the rural sections, since the full town and suburban sections had been identified and only the rural sections remained to be surveyed and distributed.

[228] The selection of the rural sections for settlers took place in March 1848, after surveys of the Wairau had been completed. It was, as the Nelson Examiner noted, six years since the selection of the town sections. No selection of rural sections for the Maori tenths reserves was however made then or at any time subsequently. This failure to include 10,000 acres of land is a principal claim in the present litigation.

---

237 This may be an explanation why the Ordinance of 1849 which provided a process for identification of occupied land (referred to at [157]) applied only to New Ulster.
238 As is described below at [251]–[253].
239 See above at [181] and [184].

(xii) No “waste lands” policy applied

[229] It was suggested in submissions that provision of the rural tenths reserves was overtaken by a shift in Crown policy towards the view, influenced by the ideas of Dr Thomas Arnold, that Maori were not proprietors of lands unoccupied or uncultivated by them, and that the Crown was free to treat all unoccupied land as its demesne lands (Crown land) able to be granted by it.

[230] This thinking may perhaps have been influential in the 1846 Instructions.[240] They suggested a system of clearance of native interests after opportunity for registration to separate the native lands from the demesne lands of the Crown. Governor Grey considered that an attempt to force such a system upon Maori would provoke war. He pointed out that the assertion of any such right to unoccupied or uncultivated lands would also be unfair:

> The natives do not support themselves solely by cultivation, but from fern-root, –from fishing,–from eel ponds, –from taking ducks, –from hunting wild pigs, for which they require extensive runs, –and by such like pursuits. To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is in fact, to cut off from them some of their most important means of subsistence, and they cannot be readily and abruptly forced into becoming a solely agricultural people. Such an attempt would be unjust, and it must, for the present, fail, because the natives would not submit to it: indeed they could not do so, for they are not yet, to a sufficient extent, provided even with the most simple agricultural implements; nor have they been instructed in the use of these. To attempt to force suddenly such a system upon them must plunge the country again into distress and war; and there seems to be no sufficient reason why such an attempt should be made, as the natives are now generally very willing to sell to the Government their waste lands at a price, which, whilst it bears no proportion to the amount for which the Government can resell the land, affords the natives (if paid under a judicious system) the means of rendering their position permanently far more comfortable than it was previously, when they had the use of their waste lands, and thus renders them a useful and contented class of citizens, and one which will yearly become more attached to the Government.

---

[240] In his letter of 23 December 1846 accompanying the new Royal Instructions and New Zealand Government Act 1846, Earl Grey endorsed the views of Dr Thomas Arnold and remarked “though I am well aware that in point of fact” they could not now be implemented in New Zealand so long after colonisation had begun, and “although in many respects you may be compelled to depart from them, still you are to look to them as the foundation of the policy which, so far as it in your power, you are to pursue”. Following the protests described below, Earl Grey clarified in a letter of 30 November 1847 that this was not meant to be a repudiation of the Crown’s prior recognition of Maori rights to land, noting: “it is one thing to deny the general theory on which a certain supposed right is founded, and another thing to endeavour to set aside rights which have been formally recognized, because they are founded on a theory conceived to be erroneous”.

[231] The 1846 proposals of Earl Grey, then Colonial Secretary, were highly controversial.[241] Both Bishop Selwyn and Chief Justice Martin opposed them. Martin published a pamphlet claiming that the proposals were contrary to the Treaty and the Crown's engagements to recognise Maori property.[242] The Colonial Office hurriedly explained that the 1846 Instructions were not intended to disturb recognised wider Maori interests in land. In any event, the idea was overtaken by the extensive programme of Crown land purchases made by Governor Grey in the 1850s.[243]

[232] There was no question of such a policy being imposed upon land which had been excluded by an award under the Land Claims Ordinance. Grey made clear that he considered any such action by him, as urged by the Company in seeking a grant to the land at Porirua, would be unlawful.[244] As Governor, Grey accepted that he was bound by the award made by Commissioner Spain. Contrary to arguments being made by the New Zealand Company that the 1845 grant would take land away from the Company by excluding its claim to the land at Porirua, Grey took the view that he had no legal authority to interfere with the award and that a grant to the Company of lands excluded by the award would be putting it in possession of lands to which it had no legitimate claim.

[233] The same reasoning seems to me to apply to the conditions imposed by Spain in the Nelson award. The Governor was obliged to observe its terms. That seems to me to be a conclusion which is inevitable. But it also gains support from the reasons of the Privy Council in *R v Clarke*.[245]

---

241 As Viscount Howick before acceding to the title, Earl Grey had supported the New Zealand Company in the 1844 Select Committee report to the House of Commons (which was opposed by the Colonial Office and the then-Government): see *Report from the Select Committee on New Zealand Together with the Minutes of Evidence, Appendix and Index* (House of Commons, 29 July 1844) at 16–30.

242 William Martin *England and the New Zealanders: Remarks upon a Despatch from the Right Hon Earl Grey to Governor Grey dated Dec 23 1846* (Bishop's Auckland Press, Auckland, 1847).

243 In 1872, the Court of Appeal took the view that "Native proprietary right" to the full extent recognised by "established native custom" had to be fully recognised by the Crown as a matter of both "the common law of England and its own solemn engagements": *In re the Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41 at 49. The Privy Council came to a similar conclusion in *Nireaha Tamaki v Baker* (1901) NZPCC 371 at 382. In *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA) at 340 Stout CJ described how from the beginning of the Colony "it has 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."

244 Letter from Governor Grey to Earl Grey regarding the Company's claim in Porirua (7 April 1847).

245 *R v Clarke* (1851) NZPCC 516; discussed below at [298].

(xiii) Management of the native reserves

1841–1842

[234] In October 1840 the New Zealand Company appointed Edmund Halswell, "of the Middle Temple, Barrister-at-Law", as Commissioner for the management of the native reserves in their settlements. Governor Hobson, however, took the view that the management of the reserves was his responsibility. His position is justified under both the 1840 agreement with the Company and his Instructions.[246] Shortly after Halswell arrived in New Zealand, Hobson appointed him in July 1841 as "Protector of Aborigines in the Southern District of this Island, and Commissioner for the Management of the Native Reserves", as well as Chairman of the Courts of Quarter Sessions and Requests for the District of Port Nicholson.[247] Halswell, in a letter to Wakefield, referred to the management of the reserves being "taken out of my hands by the Government". In his capacity as Commissioner for the Management of the Native Reserves in the Southern District, Halswell selected the native reserve sections in the Manawatu district (leading to the Governor's correction of his selection of occupied lands as part of the reserves[248]).

[235] George Clarke Senior, the Chief Protector of Aborigines, sent Halswell general instructions about the management of the native reserves in Port Nicholson in a letter of 28 September 1841. Subsequently, Halswell began reporting regularly to Governor Hobson on progress regarding the leasing of reserves. Additional instructions to Halswell as to the advertisement of land to be put up for lease by tender and for the terms and administration of leases was provided in a letter of 24 December 1841 by the Colonial Secretary on behalf of the Governor.[249] The letter directed that

246 The Colonial Office took the same view, as appears from a letter from Lord Stanley to Governor FitzRoy of 18 April 1844.

247 The appointment for the "Southern district" covered the Company's settlement at Port Nicholson. At the same time, Hobson appointed George Clarke Senior as "Chief Protector of Aborigines of the Territory of New Zealand".

248 As described at [147].

249 In Mackay's *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) at 11; and the *British Parliamentary Papers: Colonies: New Zealand* (Irish University Press, Shannon (Ireland), 1968) vol 2 at 675 this letter is dated 1842. Halswell in subsequent letters however refers to it as having been written in December 1841, and that date fits what is known about his assumption of responsibility and the changes to the arrangements made in July 1842 to introduce the Bishop, Chief Justice, and Chief Protector of Aborigines as those responsible.

leases of the reserves in Port Nicholson were to be let by tender for periods of no longer than seven years and were to be approved by a committee "already appointed for the purpose" comprising "the Police Magistrate, Mr. Hanson, the Crown Prosecutor, and yourself". The earlier instructions from Clarke said no allotment was to be offered for lease if "disputed by the Natives". The funds realised from the reserves were to be applied for the purposes of educating Maori and for assistance of the sick.

1842–1844

[236] Shortly after the arrival of Bishop Selwyn in 1842, Hobson transferred the management of the reserves from Halswell to a board comprising Bishop Selwyn, Chief Justice William Martin, and the Chief Protector of Aborigines. In correspondence from the Colonial Secretary they were asked to take over the management of the existing reserves in Port Nicholson and those being created as part of the second settlement in Nelson from "[t]he gentlemen who have hitherto had the management of the reserves".

[237] In letters of 26 July 1842 to the Chief Justice, the Bishop and the Chief Protector of Aborigines, Shortland explained Hobson's plans for the reserves:

> With a view to the most efficient administration of this property for the benefit of the native race, it appears desirable that all the reserves so made, or to be made, by the New Zealand Company, and any monies which may prove from time to time to be disposable out of funds so to be set apart, after paying the expenses of the protector's department, should be vested in one set of trustees, possessing the confidence of the Government and the New Zealand Company. I am therefore commanded by the Governor to acquaint you, that His Excellency proposes when the reserves made by the Company shall have become legally vested in the Crown, to submit to the Legislative Council a Bill for vesting them, and the surplus fund from time to time to arise from land sales in three trustees namely, the Bishop, Chief Justice, and Chief Protector of the Aborigines for the time being, to be applied by them in the establishment of schools for the education of youth among the aborigines, and in furtherance of such other measures as may be most conducive to the spiritual care of the native race, and to their advancement in the scale of social and political existence.

[238] The letter advised that the funds arising from the reserves were to be expended to promote these objects "in the settlement or district from which they may respectively arise" and be applied under "a Board of Management so constituted", a

course which was thought to be likely to meet with "general approval". Until those objects could be carried into effect under the authority of a legislative enactment (once "the reserves … shall have become legally vested in the Crown"), the Governor asked the Bishop to use his periodic visits to the settlements "to direct from time to time the disposal of any funds that may have arisen from the reserves and to collect any information respecting them that may be desirable with reference to the proposed enactments". The letter concluded by saying that "[t]he gentlemen who have hitherto had the management of the reserves at Port Nicholson will be directed to give up the trusts into your hands, and they will, His Excellency feels assured, give you all the aid and information in their power with a view to its efficient execution".

[239] Hobson wrote on 27 July 1842 to the "Trustees of the Native Reserves at Port Nicholson" (Halswell and the Chief Protector of Aborigines) advising them of the new arrangements with those "to whom [they] will perceive it is designed hereafter to intrust the funds arising from the native reserves and other sources for the benefit of the aboriginal race". He requested the documents relating to "the important trust that has heretofore been confided to you" to be handed over.

[240] Halswell appears to have been reluctant to give up his administration of the reserves and seems to have still been in control of them in August 1842, when he wrote to William Wakefield expressing disappointment at being required to "relinquish the management of the reserves" or to be subject to the control of the Chief Protector of Aborigines. But by September 1842 Bishop Selwyn had taken over the direction of the reserves in both Port Nicholson and Nelson (where by now the town and suburban reserve sections had been identified).

[241] In Port Nicholson, the Bishop continued to use Halswell as agent for the board in the administration of the reserves. In correspondence of September 1842, Wakefield indicated that Mr Halswell was to "remain in sole charge of the reserves [at Port Nicholson], as agent of the trust vested in the Bishop, the Chief Justice and the Chief Native Protector".

[242] In Nelson, the Bishop appointed Henry Thompson as agent for himself and the other members of the management board appointed by Hobson. Thompson, the Police

Magistrate and Sub-Protector of Aborigines, had already selected the town and suburban tenths reserves.[250] Following Thompson's death in the Wairau in July 1843, Alexander McDonald, the Nelson branch manager of the Union Bank of Australia, was appointed by Bishop Selwyn as agent for the board.

[243] Bishop Selwyn wrote to Thompson about the general principles he was to apply in "continu[ing] to act on behalf of the Natives, as the local representative of the Board". The Native reserves were to be let to generate income to be applied for the benefit of Maori of the district. Thompson was given full authority to enter into agreements with those wishing to rent any portion of the reserves. And the Bishop gave a personal guarantee that "leases shall be granted in conformity with the above-mentioned stipulations, so soon as the Board of Trustees shall have been formally constituted". Instructions were given as to the appropriation of revenues – including for the erection of a chapel and hostels for the use of Maori when they came to Nelson for purposes of trade. The letter advises of advances made by the Company and the Bishop, for these purposes "upon the credit of the Native reserves". The Bishop expressed himself anxious to see the immediate establishment of a small hospital for Maori, and a boarding school for Maori children. These were both to be "upon a small scale, and with no unnecessary expense". In September 1842 the Bishop wrote to his mother that the native reserves in Nelson were "very valuable: having already buildings of a considerable value upon them, – and yielding a rental from £300 to £400 [per annum]".

[244] The New Zealand Company offered to advance £5,000, secured by mortgage against the reserves, to be used for education, but the Bishop, after being consulted about the proposal by Shortland, objected to the power of sale this would entail.[251] He pointed out that no such power could be granted over lands "which are by their very nature inalienable" and advised that he could not concur with the proposal. Shortland also agreed and informed the Secretary of State of the conclusion on 29 December 1842. In the despatch to Lord Stanley, Shortland referred to his discussion with the

---

[250] It is not clear in what capacity he acted in selecting the reserves. It is not shown on the evidence when Thompson became Sub-Protector of Aborigines. James Parker, the Crown historian, considers it is likely that it may well have been when he was appointed Police Magistrate in February 1842.

[251] Letter from Bishop Selwyn to Captain Arthur Wakefield (23 May 1843).

Bishop "who is one of the trustees of the native reserves of the colony". Their view also met with the approval of the new Governor, Robert FitzRoy. He thought it would not be right to mortgage and risk alienation of the reserve lands from the beneficial use of the aborigines.

[245] The Chief Justice resigned formally on 18 July 1843, apparently because he feared a conflict of interest. It seems he had already raised informally his intention to resign over some months. Bishop Selwyn, in a letter of 23 May 1843, explained that the Chief Justice had "found his duties as trustee incompatible with his judicial duties, as, in the event of the trustees being engaged in any lawsuit, he would be both judge and party in the suit at the same time". The Chief Justice's formal letter of resignation refers to his having been asked by Hobson "to act as one of the Trustees of the Lands reserved by the [New Zealand Company] for the benefit of the Native population and of the Fund appropriated or to be appropriated out of the proceeds of Government Land Sales for the same purpose":

> By an Answer dated August 1842 I accepted the Trust. Shortly afterwards on my visit to the South I discovered that, under existing circumstances, I could not reasonably hope to make the discharge of the functions of a Trustee of Native property compatible with the satisfactory fulfilment of my especial & peculiar duties as a Judge. I therefore took several opportunities of conveying to His Excellency the Officer administrating the Government my conviction of the impossibility of continuing in the Trust. I find however that I have never made to His Excellency any official intimation to that effect.
>
> I have the honour therefore to request that you will allow me to resign through you into the hands of His Excellency all the powers conferred upon me by the letter of 26 July 1842.

[246] On the resignation of the Chief Justice, one of Attorney-General Swainson's staff asked him whether the resignation would affect the "operation of the trust" and whether he should hold off advising the other trustees until a successor was appointed. In answer, Swainson indicated that the operation of the trust would not be affected, and noted that it was "only a proposed trust as yet it has not been legally formed". Shortland instructed that other trustees should be informed that "a successor is at present unnecessary".

[247] As the original letter to the Bishop asking him to undertake the management of the reserves makes clear, the interim arrangements involving the Bishop, the

Chief Justice and the Chief Protector of Aborigines were to continue until the reserves became "legally vested in the Crown", when it was proposed to vest the reserves in them as trustees under legislation. Preparation of a legislative vehicle appears to have been underway. Hobson's death in September 1842 intervened and the Native Trust Ordinance was not enacted until 1844, after the arrival of Hobson's successor as Governor, Robert FitzRoy, at the end of December 1843. In the interim, while Willoughby Shortland was Acting Governor, the Nelson settlement was rocked by the deaths of Arthur Wakefield, Henry Thompson and others as a result of the provocation offered by the Company in surveying the Wairau for the purposes of providing rural sections for the Nelson settlement.

[248] The Native Trust Ordinance was passed by the Legislative Council in June 1844. It provided for the Governor, the Attorney-General, the Bishop, William Spain (as Commissioner of Land Claims) and the Chief Protector of Aborigines to be trustees for property to be set apart for the education and advancement of members of the Native race. The trusts looked to by the Ordinance were for the benefit of Maori throughout New Zealand. It is not entirely clear from the historical record provided whether it was envisaged that the tenths trusts arising out of the Company's purchases would be put in this statutory trust, although that appears likely. Although the Ordinance was approved in London, it was not brought into effect. It appears there were concerns in New Zealand that the involvement of the Bishop as trustee would give a sectarian flavour to the trust.[252] That may explain why the Ordinance was not used, although the immediate obvious impediment to its use remained the fact that the Crown had not yet obtained title to the land. After the Spain award, the national trust envisaged by the Ordinance was not easily reconciled with the district benefit on which the clearance of native title was granted in the award.

[249] Bishop Selwyn resigned his position under the interim arrangements on 27 February 1844, because Governor FitzRoy said that "he did not recognise any trustees of the Native Reserves". At that stage the land claim had not yet been determined, and so the title to the reserves remained unresolved.

---

252 The Secretary of State for the Colonies, Lord Stanley, advising that the Ordinance had been approved (in a letter of 13 August 1845), noted that any such sectarian controversy would be most unfortunate in New Zealand where the aim should be to benefit all Maori, not just those in communion with the Church of England.

1844–1848

[250] Governor FitzRoy resumed direct control of the management of the reserves in January 1845, when he asked the Bishop to pass over the papers relating to the reserves to the Police Magistrates in Wellington and Nelson (being officials who seem to have been treated as having general authority to represent the Government in those districts[253]). In Nelson at that stage the Police Magistrate and Government representative in Nelson was Donald Sinclair.

[251] The administration of the reserves languished in the years 1844–1848. Rents were often not collected and the hostels that had been constructed for the use of Maori were not kept in repair. The Spain award in March 1845 cleared native title and constituted the land Crown land. There was no longer an impediment to vesting the town and suburban tenth sections in trustees. But the Company's reluctance to accept the grant of 1845 and the difficulties it was experiencing in the Nelson settlement may have distracted attention from the administration of the reserves.

[252] In October 1846 Sinclair wrote to the Colonial Secretary to advise that £77.13.8 "now stands in the Nelson Branch of the Union Bank of Australia to the credit of the Trustees of Native Reserves". Further sums of £103 were said to be due for arrears of rent. The manager of the Union Bank (and former agent of the Bishop in respect of the reserves) corresponded with the Bishop about claims made against "the Native Trust" by the estate of Henry Thompson for services in selecting the reserves in 1842. The Bishop responded that, although the bank balance had been collected under his authority as trustee, he had passed authority over when he "resigned all the Papers, by Captain FitzRoy's direction into the hands of the Police Magistrates in January 1845".[254]

[253] Lieutenant-Governor Eyre on 23 June 1848 reported the poor condition of the Wellington reserves and the need for the government to retain in its hands all control over them. In Nelson, management of the reserves was not put on a proper basis until

---

253 The notice in the *New Zealand Gazette* that Donald Sinclair had been appointed Chief Police Magistrate in Nelson (8 March 1844) specified that "Mr Sinclair will act as the Representative of Government at Nelson" subordinate to the Superintendant of the Southern Division.

254 Letter from Bishop Selwyn to the Colonial Secretary (20 March 1848).

1848, following the completion of the Massacre Bay surveys and the 1848 Crown grant. By then George Grey had succeeded FitzRoy as Governor. Grey wrote in March 1848 asking for his thanks to be passed on to the Bishop for the trouble he had taken in relation to "the native trust at Nelson, and for the judicious arrangements he made during that time the affairs of the trust were in his hands".

1848–1853

[254] On 27 March 1848 the Lieutenant-Governor of New Munster,[255] Edward Eyre, directed the Colonial Secretary of the Province, Alfred Domett, to ask the Superintendent of Nelson, Richmond, for "much more detailed and particular information upon the reserves in question". Domett sought a report "on the arrangements and exchanges effected by the late Police Magistrate, Mr. Donald Sinclair, in Massacre Bay". This seems to refer to identification by Heaphy and Sinclair in 1847 of "occupation reserves" in the further surveys undertaken in Massacre Bay and western Blind Bay. Domett asked by what authority the exchanges had been made and whether Maori considered the lands to be reserved for "their own benefit solely, or for that of Natives in other parts of the settlement as well". The Superintendent was asked "how much of these lands the Natives require for their own use for a certain time, and how much they can be expected to cultivate properly".[256]

[255] The report was also to contain information about the letting of the tenths town and suburban sections. With respect to suburban reserved or exchanged blocks, "it should show in whose occupation they actually are; and particularly which of them, if any, are rented by Europeans or Natives, what rents are paid, and give the names of the Natives and Europeans concerned". Recommendations were sought as to how best the tenths reserves should be managed for the future. Inquiry was made about "the quantity of land taken in lieu of rural sections".

---

255 As earlier noted, between 1848 and 1853, New Zealand was divided into the provinces of New Munster and New Ulster. Each province had a Legislative Council, House of Representatives, Lieutenant-Governor and Executive, including a Colonial Secretary.

256 This reference to the occupation reserves being "for a certain time" has parallels in suggestions made by Mackay (see at n 159) that occupations of the exchanged lands were originally acquiesced in only for the life of the persons in occupation. Mackay also expressed the view that Spain had exceeded his authority in permitting these occupations.

[256] Among the inquiries to be made was information about "the unauthorised occupation or possession by Natives of some of the reserves at Motueka".[257] Richmond was instructed that it would be his responsibility "to secure to the Natives possession of sufficient land for their own requirements and to act with respect to the residue upon the advice of the Board upon the principles and under the limitations above laid down". Domett asked Richmond to provide periodical reports about the reserves and said that all proceeds obtained from them were to be paid into the local treasury under the head of "Native Reserve Fund" and kept distinct from the ordinary revenue. Richmond was to set up a Board to make the inquiries but their recommendations were not to be carried out until approved by the Superintendent since the members of the Board were not "the responsible parties". An annexed memorandum of 23 June 1848 to Domett's later letter of 5 July 1848 indicated the poor state of the reserves. It was clearly necessary "that the Government should at once take the matter in hand, and endeavour to turn the reserves to some profitable account".

[257] Richmond, the Superintendent, then appointed John Poynter (the Registrar of Deeds), Stephen Carkeek (described as "Sub Collector") and John Tinline (described as Sheriff) as a "Board of Management" of the native reserves at Nelson. Their appointments were gazetted in June 1848 (at the same time other such boards were appointed for other New Zealand Company settlements). Their first task was to report on the circumstances of the reserves.

[258] The report of the Nelson Board was made on 10 January 1849 to Eyre. It did not address all questions raised by Domett (particularly those relating to the occupation reserves at Massacre Bay) but, rather, concentrated on the use of the town and suburban sections reserved for the Trust and provided a statement of its bank balance and rent due and liabilities. The liabilities of £496.93 (to the Bishop for the purchase of buildings, to the estate of Henry Thompson for services in selecting the reserves, and to Mr Wilson, for medical services) exceeded the balance of money held at the Union Bank and the rent due of £198.13.8.

---

[257] This was conveyed in a subsequent letter of 21 June 1848 from Domett to the Superintendent.

[259] The Board advised that it had found some excessive rents being charged for the town reserve sections. On other parts of the town reserves it found “persons in occupation who had squatted and consequently had entered into no terms whatever”. The Board was obliged to advertise for those occupying “land belonging to the Trust” to provide details of the quantity of land occupied, the annual rental they were paying, and the term of the lease, indicating that proper records had not been maintained. The Board gave similar notice to squatters to make application for rental of the lands they wished to retain. As a result of the information obtained, the Board adjusted the rents of those who held under contracts “contracted with persons authorised by the old Trust” and entered into contracts to let other sections “at rents equivalent to those received for land of like situation and quality.”

[260] The Board reported that it had also received applications to lease land within the Motueka District. Those who made the application had “some time previously entered into agreements with Native Chiefs on the spot, [and] claimed to be still intitled to the land”. “These several persons” were reported to have “actually paid in many instances money considerations as well as annual rents for their clearings”. In the circumstances, the Board had postponed any decision on letting the lands “with a view of preventing our being thrown into collision with the Native Chiefs”, while giving notice to those in occupation that “we could not recognize any claim of these Chiefs to the land in question and recommended that no further rent should be paid to them”. At the same time, the Board had “endeavoured to enter into an arrangement with the Chiefs, by proposing that they should place at the entire disposal of the Board the land so occupied by the Europeans as before mentioned, as well as a portion of other Native reserves which we required for laying out a village, and that we should obtain for them as an equivalent certain wood Sections belonging to private parties on which they (the Chiefs) had made partial clearings”.

[261] The Board noted that in effecting these arrangements some exchanges would be necessary. Such exchanges were said to be not only “beneficial for the Trust estate” but “the means of preventing collision with private persons entitled to Sections (adjoining Native Reserves) already trespassed upon and over which the Natives have no right or title”. Arrangements for the negotiation of the exchanges had been set on foot with the Resident agent of the New Zealand Company and the agents for the

absentee European owners. They expected that the negotiations would be able to be concluded shortly and the exchanges made "provided they meet with your Honour's concurrence".

[262] The Board concluded its report by making a recommendation that legislation be obtained to give authority to grant leases of the Native reserves:

> We beg to submit to your Honor that some legislative enactment should be obtained to enable your Honor as Superintendent, or for the Superintendent for the time being, or some other public officer, to grant leases of Native Reserves, for until a power of that kind is given, parties will be unwilling to invest capital on the Trust estate either, in building or otherwise, the present tenure being, uncertain and insecure.

[263] Eyre responded to the report of the Board on 30 July 1849, approving the proposals made. He asked Domett to impress upon the Board the need for it to repay the debts of the Reserves before undertaking further improvements.

[264] Eyre took the view (in response to the suggestion that some legislative authority should be obtained for the leasing of the native reserves) that no further authority for the proposed leases was necessary other than the approval of their terms by the Lieutenant-Governor and his signature. That was because title to the native reserves was vested in the Crown:

> The Crown assumes that the Reserves vest in it – as no title has been passed from it to any other party, in fact upon disposing of all the surrounding country by a Crown grant to the NZ Company the Native Reserves were specifically excepted & therefore still vest in the Crown alone – as it never could be contemplated by the act of Parliament transferring the Crown's right over the Demesne lands to the N.Z. Company [a reference to the Loans Act 1847] to include any but the waste lands.[258]

[265] The approval of the Lieutenant-Governor and the instruction contained in his letter were in turn relayed by Domett to Richmond. Domett repeated the view that the signature of the Lieutenant-Governor was all that was necessary for valid leases, since the land was vested in the Crown. In a postscript to the letter Domett advised "[i]t may be advisable to inform your Honor that the question referred to in the latter part of the foregoing letter (viz – the ownership of native reserves) is now in litigation

---

[258] See above at n 209.

before the Supreme Court, and some decision therefore may be expected". It seems that if this litigation was indeed filed, it was not proceeded with. There is reference in the record to contemporary suggestions that ventilating such questions in the Supreme Court might stir up matters better left alone.[259]

[266] Later in 1849, the Board made the further alterations to the Motueka tenths which had already been foreshadowed and approved by Eyre. Six tenths suburban sections were exchanged for a further six on the edge of the Big Wood. According to Alexander Mackay, there were "considerable cultivations" on five of the six sections brought into the tenths and "it would have been next to an impossibility for the European owners to have wrested possession of the land so encroached upon by the Natives, from the numerous occupants".[260] As discussed above,[261] these occupations seem to have been the "unauthorised" occupations about which Domett had inquired in June 1848.

[267] The position of the tenths reserves improved under the Board of Management. It reported in 1852 that the rent from the lands was supporting two schools – one for European children and another for native adults.[262]

1853–1856 and the Crown grant to the Bishop

[268] The Board managed the reserves until 1853 when the Crown Lands Commissioner, Major Richmond, was appointed manager.

---

259 In a letter to Lord Stanley of 24 January 1843, Joseph Somes (Governor of the New Zealand Company) said of "irritating litigation, from which no satisfactory decision can ever result": "As New Zealand is to be colonized, can any thing compensate the natives for the interruption of the prosperity of the settlements, and the destruction of that harmony between the two races, which is the only real security for the future well-being of the weaker?". On 17 June 1845, in the British House of Commons, Mr Charles Buller on behalf of the Company again warned against "litigation, which would excite the most deplorable feelings, and throw back the progress of the settlements": (17 June 1845) 81 GBPD (3rd series) HC 710 .

260 Alexander Mackay "Memorandum on the origination and management of Native Reserves in the Southern Island" in Alexander Mackay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 263 at 265.

261 See above at [256].

262 Samuel Stephens, the former Company surveyor, recorded in his journal in March 1852 that: "There is at present a good English school and another for Native Adults ... The establishment itself is supported principally from the rents derived from Native lands under the management of Trustees of the Native Reserves, which are becoming valuable and now bring in about £200 per annum."

[269] In July and August 1853, Governor Grey issued two grants of land to the Bishop of New Zealand for an industrial school at Whakarewa (for Europeans and Maori), within the Motueka district. 918 acres of the total 1,078 acres included in the two grants were tenths reserves.[263] Of the 918 acres some 489 acres were tenths that had been the subject of earlier exchanges,[264] at least in part because they were land occupied by Maori. The background to the grants is not fully covered in the evidence. The Crown historical researcher, James Parker, suggests that the grants may have been Grey's decision alone as he was able to locate no information showing any input from officials. The grants are explained by Alexander Mackay in 1870 as having been made "about the time the Board of Management ceased to exist, and immediately before the writs for our constitutional Government were returned, and just on the expiration of the Governor's power to make them".[265] This seems to be a reference to the beginning of responsible government in 1853, and to point out that under the New Zealand Constitution Act 1852 (Imp) the Governor's authority to make grants of Crown waste lands passed to the responsible Minister (although under s 72 of the Act the Queen retained the right to give directions as to exercise of the power until legislation was enacted).[266]

[270] What is not explained is what lawful basis Grey could have had to grant land which was clearly not "waste lands of the Crown" since it was included in the tenths reserves and was also, at least in part, occupied. Some of the settlers in the Nelson settlement clearly thought the disposal of the lands in this way was unlawful and in breach of the trust on which they were held, as was reported at the time in the *Nelson Examiner*.[267] The Nelson Provincial Council objected. It addressed a memorial to the House of Representatives "protesting against the allocation of part of the Native Reserves Estate at Motueka, as an endowment for an industrial school for the education of children of both Races". It had two concerns: first, that the benefit provided to Europeans and indigenous peoples from throughout the Pacific Islands

---

263 Motueka section numbers 6, 22, 137, 138, 145, 146, 147, 157, 159, 160, 161, 162, 163, 164, 181, 218, 219, 220, 221, 222, 223, 240, 241, 242 and 243.

264 Motueka section numbers 157, 159, 160, 161, 162, 163, 164, 181, 218, 219, 220, 241, 242 and 243.

265 Alexander Mackay "Memorandum on Native reserves dated January 3rd, 1870" in Alexander Mackay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 300 at 301.

266 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72, s 72.

267 "Minutes of the Provincial Council: Friday, December 9" *Nelson Examiner* (Nelson, 17 December 1853).

was "a violation of the contract in virtue of which the settlement was founded". The second objection taken was that the grant to the Church of England was "a blow … to religious equality".[268]

[271] There are indications in a subsequent report obtained by the House of Representatives,[269] that some Maori complained at the time to the Nelson Provincial Council because they were obliged to move from land occupied by them (although it seems that they were subsequently allotted for occupation reserves part of four sections, the other parts of which had been granted to the Bishop). Others, however, including the chief Ngapiko, treated the Motueka land as theirs to dispose of and consented to its vesting in the Bishop (substantiating the views expressed by Brunner that in the Motueka exchanges the Maori who occupied the land did not treat it as tenths reserves but as land to which they were entitled,[270] perhaps as a result of the plans of the reserves provided to them at the time of the Spain inquiry[271]). Even so, in their letter, the ten Motueka Maori who supported the school stressed that the tenths reserves in the Nelson township were "quite another arrangement" and that the income from those properties was for general endowment purposes in the district, in which they expected to share.

New Zealand Native Reserves Act 1856

[272] With the assumption of representative government, the New Zealand Native Reserves Act was enacted in 1856 to provide "an effective system of management" for native reserves. The Act provided a framework under which the reserves were administered by Commissioners appointed under that Act. The 1856 Act was not constitutive of trusts; it was a system of management of native reserves under Commissioners. The Act applied to lands within the District that had been or were to be "reserved or set apart for the benefit of the said aboriginal inhabitants over which

---

268 Alexander Mackay "Memorandum on the origination and management of Native Reserves in the Southern Island" in Alexander Mackay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 287 at 287–288.

269 Referred to below at [277].

270 See below at [278].

271 In a letter of 18 February 1848 to the Colonial Secretary, Richmond wrote "[t]he Natives at Motueka have unfortunately had plans given them of the whole of the reserves in that district, and consequently consider them their property, although they comprise a much greater extent of land than they are entitled to, or even can make use of. This has already led to irregularity in the leasing, without any authority, of portions of the super-abundant land to Europeans."

lands the Native title shall have been extinguished”.[272] Lands could also be managed under its provisions where set aside for special purposes by Maori even if the land remained in native title (as long as the consent of the native proprietors was obtained).[273]

[273] Where native title had been extinguished, the Commissioners were given in respect of the reserve lands “full power of management and disposition, subject to the provisions of this Act”.[274] They were able to “exchange absolutely, sell lease or otherwise dispose of such lands in such manner as they in their discretion shall think fit, with a view to the benefit of the aboriginal inhabitants for whom the same may have been set apart”,[275] provided that no sale exchange or lease “except a lease not exceeding twenty-one years in possession” was to be valid “without the assent in writing of the Governor first obtained for every such purpose”.[276] The Commissioners, with the Governor’s assent, were empowered to set apart lands for special endowments for “schools hospitals or other eleemosynary institutions for the benefit of the said aboriginal inhabitants”, and were able to transfer the lands to persons or bodies corporate “as Trustees of such endowments”.[277]

[274] By s 15 of the Act, the Commissioners were permitted to convey or lease lands within the limits of their jurisdiction to any of the aboriginal inhabitants for whose benefit they had been reserved or excepted, “either for or without valuable consideration, and either absolutely or subject to such conditions as the said Commissioners may think fit”, subject to the approval of the Governor for dispositions of more than 21 years. With the approval of the Governor, s 16 permitted grants for special endowments for schools, hospitals and other projects, with the assent of the aboriginal inhabitants who had set them aside for that purpose.

[275] Nothing in the Act however had “the effect of removing any invalidity or curing any defect in any grant or other conveyance made or issued before the passing of this Act, under which any lands may have been granted or assured to any person or

---

272 Native Reserves Act 1856, s 6.
273 Section 14.
274 Section 6.
275 Section 6.
276 Section 7.
277 Section 8.

persons for religious charitable or educational purposes for the benefit of the aboriginal inhabitants".[278] Nor was anything in the Act taken to validate any "appropriation or setting aside of any lands" if such would contravene any terms of purchase or contracts affecting the land. Any invalidity of the Crown grant to the Bishop was therefore not cured by the legislation. Nor was prior appropriation of the land if it was contrary to any terms of purchase. The power under the legislation to dispose of reserve lands seems therefore to have been prospective, not retrospectively validating of earlier transactions.

[276] Three Commissioners of Native Reserves were appointed to the Nelson District in 1856 under the provisions of the Native Reserves Act 1856. They were Alfred Domett, John Poynter and Thomas Brunner. By that time, substantial rental income was being received from the Nelson native reserves.

[277] On 13 April 1858, the House of Representatives sought a report from the Commissioners of Native Reserves about the grants made by Grey to the Bishop. In their report of 2 June 1858, the Commissioners referred to consideration given to testing the legality of the grants by litigation. The question raised by a special Committee of the Nelson Provincial Council had been "simply whether the grant was a breach of the equitable Trusts upon which the Lands were originally reserved, owing to the extension of the Educational Trusts to the Natives of Polynesia". The Commissioners however queried whether the suit would be worthwhile since, even if the grants were upset in the Supreme Court, the Bishop might still have sought a proportion of the income derived from the land to be expended on the same educational purposes. The Commissioners concluded:

> Whether it would be worth while for the sake of the difference between what his Lordship now receives from these lands, and what he would then probably receive, to commence a suit in the Supreme Court to get the grants annulled, is a question the General Government is perhaps in as good a position to decide as ourselves.

[278] In the inquiry before the Committee of the House of Representatives, Thomas Brunner, one of the Commissioners, opposed the grant both on the basis that the lands were too valuable and that the granted lands (which excluded native

---

[278] Section 16.

cultivations) rightly belonged "to the whole of the Natives concerned with the Nelson settlement, as they represented the tenths of lands in other districts".[279] In addition, he opposed the grants both because he believed they were "injurious to the Natives" and also because he considered Motueka was not the proper site for such a school: "Being in the centre of the Natives, too much jealousy was caused by the feeling that others shared the rents or use of properties belonging to the Motueka Natives only".

[279] In June 1858 the Commissioners of Native Reserves reported the steps they had taken to investigate the occupied lands at Motueka and the surveys they had commissioned for the purpose. That seems to have led in December to a deed of exchange, by which 90 acres of land held by Charles Thorpe was exchanged for sections 142 and 143 of the native reserve suburban sections.[280] There was a delay in endorsing the deed because Governor Gore Brown queried whether the consent of the beneficial owners had been obtained. The Commissioners' position was that this was not required under the Native Reserves Act 1856 because native title had been cleared. The Governor accepted this and endorsed the deed on 28 June 1859.

[280] In 1864 there were a number of exchanges of native reserve sections approved by the Governor.[281] One of these exchanges, in Massacre Bay, made at the instance of Maori at Motupipi, had been under discussion for two years. It was the source of disagreement between the Commissioners and the Native Minister which led to the enactment of the Native Reserves Amendment Act 1862, reasserting the power of the Governor and Executive Council over the tenths reserves.

[281] The Native Minister had expressed his support for an exchange of land in Motueka, leased by Charles Thorpe, for Section 9 (Takaka) in Massacre Bay, owned by Thorpe and which the Maori of Motupipi in Massacre Bay wanted. The Commissioners would not agree to the exchange, considering that it was not beneficial

---

279 Recorded in Alexander Mackay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 289 at 304.

280 Although this exchange was described in the evidence of Mr Parker, it was not included in the appellant's third amended statement of claim as an example of diminution of the tenths reserves.

281 Parts of Section 344 (Nelson) were sold to two private individuals who had been leasing the land for £50 and £30. These sales were endorsed by the Governor and Executive Council on 21 July 1864 and the funds were used to purchase section 58 Picton (a suburban section containing approximately 46 acres). In Motueka sections 139, 140 and 141 (Motueka) were exchanged for 150 acres of section 9 (Takaka).

to the tenths reserves. As a result of the stand-off between the Commissioner and the Minister, the Amendment Act was enacted. It gave the Governor power to dismiss the Commissioners and provided power to the Governor and Executive Council to exercise any power vested in the Commissioners. After it came into force, James Mackay, acting under delegated authority, entered into the deed of exchange which was endorsed by the Governor and Executive Council on 21 July 1864. The land in Massacre Bay appears to have been land the Motupipi Maori were partially occupying. After legislative amendment in 1896 permitted subdivision and vesting of land in individual title,[282] it seems that much of Section 9 became vested in individual Maori and was lost to the tenths reserves.

[282] Alexander Mackay succeeded his cousin as Commissioner of Native Reserves for the South Island in September 1864. In December of that year, the Governor endorsed conveyance to the Central Board of Education of one acre, part of native reserve section 161 in Motueka.

[283] The return under the Native Reserves Act made in August 1867 lists the Crown as the owner of all the reserves in the Nelson District, apart from the occupation reserves at Massacre Bay. The return indicates that all income derived from the reserves was for the benefit of the Native Reserves Fund (held for the benefit of those entitled under the tenths reserves). The Nelson position as at 1867 may be contrasted with that at Port Nicholson. In Port Nicholson, a number of occupation reserves, additional to tenths reserves, were shown as still in native ownership. Any income from land not used by the proprietors went to the owners, not into the Native Reserves Fund.

[284] Although all the reserves listed in Nelson Province (with the exception only of the Massacre Bay occupation reserves) were tenths reserves shown as owned by the Crown, two sections (one a town section, the other a suburban section in Moutere) are described as “reserved for natives”. In addition, 22 suburban sections in Moutere and Motueka are described as “occupied by natives” or “part-occupied by natives”, even

---

282 Section 41 of the Native Land Laws Amendment Act 1896 permitted the District Land Registrar to issue certificates of title in relation to “Subsections Numbers One to Twelve inclusive of Section Nine, Takaka Reserve” to those found to be entitled to that land by the Native Land Court.

though tenths reserve sections. Most of these appear to be accounted for by the sections obtained by exchange in 1845, 1849 and the allocations made in 1862.

[285] There was a further exchange of an acre and a half of one of the Nelson town native reserve sections in 1870 and sale of the tenths reserve section 205 to the Nelson Provincial Government for a school in 1874. In 1870 parts of sections 145 and 146 at Motueka were removed from the tenths reserves to be used for a cemetery and the land was permanently reserved for that purpose by gazette notice in 1879.

[286] In 1882 the tenths reserves were vested in the Public Trustee under s 8 of the Native Reserves Act 1882. In 1892 the Public Trustee applied under s 16 of the Native Reserves Act 1882 to ascertain those beneficially interested in lands described as the New Zealand Company's tenths in Nelson, Moutere and Motueka, leading to the identification of the beneficiaries of the tenths by the Native Land Court in 1892 and 1893.

(xiv) Significance of the Crown's management of the reserves

[287] There are a number of points that emerge from this review of the history of the management of the native reserves and which are of significance for the arguments raised by the appeal, bearing on the character in law of the Crown's dealings with the reserves.

[288] First is the extent to which those having the management of the reserves are referred to and refer to themselves as trustees and deal throughout with the reserves as land held on trust. While such characterisation is not conclusive and while formal vesting could not take place until the land had been cleared of native title through the Land Claims process (so that strictly speaking the descriptions before 1845 were premature), there was a trust in substance, as the Chief Justice and the Bishop recognised. In the case of the income derived from the land there was no impediment to immediate trust arising before 1845. As described below,[283] I consider the Crown's actions constituted it as a fiduciary in respect of the lands it took into its hands. Once the formal impediment was removed and the tenths land became Crown land, the

---

[283] See below at [410]–[416].

Crown in my view held the lands for the benefit of the former Maori proprietors as trustee. So, the Committee of the Nelson Provincial Council in 1858 had no doubt that the land was held by the Crown on "equitable Trusts".[284] Equity gives effect to that substance, which affects the conscience of the Crown.[285]

[289] The second point to be made concerns the direct control exercised over the tenths reserves by the Governor throughout the period of Crown Colony government. Although for much of the time acting through agents, the Governor, with the support of the Colonial Office, took responsibility until management was devolved by legislation to Commissioners acting for the Crown and later to the Governor again, under the legislation. As is further discussed below,[286] I do not accept that the Governor was acting in a "governmental" capacity in relation to the land. Throughout, the land was held for the benefit of the Maori proprietors in the purchase approved by Spain. That the Crown had no beneficial entitlement to the land itself is shown by the way the land was managed, including under the management of independent persons of standing in the period between 1842 and 1848. It is also shown in the need for legislation to empower the disposal of land, enacted in 1856. Before then, the land was treated as inalienable,[287] as it would not have been if it was land in which the Crown had beneficial as well as legal ownership.

[290] Thirdly, although there was an expectation at the beginning that statutory trusts would be established, the reserves were administered for 40 years without such support. While the Crown had no title to the lands in the Nelson District before the Spain award in 1845, there was no further impediment to a formal settlement after the lands became Crown land. It may have been realised that the 1844 Ordinance was not an appropriate vehicle because it did not require the benefit of the reserves to be applied in the districts in which they were situated, as was required by the terms of the Spain award (and which was the reason for the controversy relating to the grant to the Bishop[288]).

---

284 See above at [277].
285 As is described at [402]–[409].
286 See below at [379]–[391].
287 As is described above at [244].
288 Referred to above at [278].

[291] Importantly, it is clear that the tenths reserves were understood at the time to have been in Crown ownership. Officials expressed the view that the Crown required no legislative authority to grant leases, as "the Reserves vest in it".[289] The Native Reserves Act 1856 was premised on Crown ownership of native reserves, as demonstrated by the fact that it did not affect the land's pre-existing legal status. And the 1867 returns under the Act explicitly identified the tenths reserves as being owned by the Crown and held for the benefit of the native proprietors and their descendants (which can be contrasted with the description of the Massacre Bay and Port Nicholson occupation reserves as remaining in Maori ownership).[290]

[292] It is clear that the tenths reserves were never understood to be land to which the Crown was beneficially entitled after it was cleared of native title, but rather land which it held to the benefit of the Maori who had been the customary owners. That is shown in the arrangement for management of the lands first put in place by Hobson, in the proposals to set up a trust under statute, by the way in which the land was managed, in the contemporary records which acknowledge that it was held on trust, and in its eventual vesting in the Public Trustee. The position at 1867 (when the reserves were listed in the schedule to the Native Reserves Act) and in 1882 (before the lands were vested in the Public Trustee by legislation) was no different than the position at 1845. And even if the arrangements made in 1842 anticipated the vesting of the legal estate in the Crown, they were essentially the same and are only explicable as an assumption of responsibility by the Crown on behalf of the Maori proprietors in respect of their beneficial interests.

[293] This is of significance for the conclusion reached in the Courts below that the claims of trust and fiduciary obligation fail because the intention to create a trust and an assumption of responsibility constituting the Crown a fiduciary are not shown. In *Tito v Waddell*, Megarry VC considered that intention to constitute a trust needs to be looked at in the whole context, including what happens afterwards.[291] The treatment of the town and suburban tenths reserves throughout their history in my view demonstrates intention to hold the tenths reserves for the benefit of those indicated by

---

289 See above at [264].
290 See above at [283].
291 *Tito v Waddell (No 2)* [1977] 1 Ch 106 (Ch).

Spain's award to be the customary owners. That is the way the land was treated by those acting for the Crown. Bank accounts were operated for it. The income derived from its property was directed by the Colonial Secretary to be held apart from the revenue of the Crown. There was no statutory authority for trust because there was no need for it.[292] The Crown actions in dealing with the land are evidence of its assumption of responsibility, recognisable in equity.

Legal context for the claims of equitable obligation

[294] Before addressing the legal arguments that the Crown could not be under fiduciary obligations or act as trustee in relation to the Nelson tenths, I address three preliminary matters of legal context. They are: the New Zealand legal order and the powers of the Governor (to support the conclusion that the Governor had no lawful authority to act inconsistently with Maori interests); the 1872 decision of the Full Court in *Regina v Fitzherbert,* which held that the Crown was not a trustee in relation to the tenths reserves vested in it in Wellington (to indicate why I consider it to have been wrongly decided and not determinative of the present controversy);[293] and the general circumstances in which the Crown may be liable in equity as trustee or fiduciary (to indicate why I consider the Courts below were wrong to accept the Crown's submission that the Crown's obligations were political and not enforceable in a court of equity).

(i) The New Zealand legal order

[295] From the establishment of Crown Colony government and the setting up of the machinery of justice, British common law and statutes were applied in New Zealand so far as consistent with the circumstances of New Zealand.

[296] By the Charter of 1840, adopted under the provisions of Imperial legislation authorising the creation of a separate colony or colony from the dependencies of New South Wales,[294] the Queen constituted New Zealand a separate colony and made provision for its administration through a Governor and Legislative Council. That

---

292 As explained further in relation to the Crown as trustee at [331]–[339], and in relation to general trust principles at [392]–[416].
293 *Regina v Fitzherbert* (1872) 2 NZCAR 143.
294 New South Wales and Van Diemen's Land Act 1840 (Imp) 3 & 4 Vict c 62, s 3.

legislation, which is recited in the Charter, provided that any such Legislative Council would have powers "to make and ordain all such Laws and Ordinances as may be required for the Peace, Order and good Government of any such colony as aforesaid".[295] In the making of laws, the Legislative Council was required by the legislation to "conform to and observe all such Instructions as Her Majesty, with the Advice of Her Privy Council, shall from Time to Time make for their guidance therein". These powers were "[p]rovided always, that no such Instructions, and that no such Laws or Ordinances as aforesaid, shall be repugnant to the law of *England*, but consistent therewith, so far as the Circumstances of any such Colony may admit".[296] The Charter authorised the governor to appoint judges "for the due and impartial administration of justice, and for putting the laws into execution … and for the clearing of truth in judicial matters".

[297] The Charter gave the Governor "full power and authority, in our name and on our behalf, but subject nevertheless to such provisions as may be in that respect contained in any instructions which may from time to time be addressed to him by us for that purpose" and it explicitly withheld from the governor power to affect Maori rights of occupation and succession to land:

> … to make and execute, in our name and on our behalf, under the public seal of our said colony, grants of waste land, to us belonging within the same, to private persons, for their own use and benefit, or to any persons, bodies politic or corporate, in trust for the public uses of our subjects there resident, or any of them.
>
> Provided always, that nothing in these our letters patent contained shall affect or be construed to affect the rights of any aboriginal natives of the said colony of New Zealand, to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony now actually occupied or enjoyed by such natives.

[298] It should be noted that the conferral on the Governor of Crown prerogative powers is limited by the Charter and the Instructions. In connection with Crown grants it is confined to grants made from the waste lands "belonging" to the Crown and was subject to regulation, including as to price, contained in the Royal Instructions. There seems no scope for an expansive view of a power to make grants under the prerogative,

---

[295] Section 3.
[296] The Royal Instructions followed this form and mandated the same restrictions.

such as that taken in the Supreme Court in *The Queen v Clarke.*[297] In any event, as the Privy Council held in the appeal in that case,[298] the prerogative could not be resorted to in cases where the grant in issue was based on the report of a Commissioner made under the Land Claims Ordinance. In *Clarke*, the Privy Council held that a grant which failed to observe the limits on the extent of any grant imposed by the Land Claims Ordinance was void, overturning the decision of the Supreme Court. In the judgment of the Board, delivered by Sir Thomas Pemberton Leigh,[299] it was said that "whatever the authority of the Governor might be, this is not a grant professing or intended to be made, as a matter of bounty or grace, from the Crown, but it is only intended as a confirmation of that report, which was made under the authority of the Ordinance":[300]

> The grant is founded upon the report, and the report is founded upon the Ordinance. It is clearly contrary to the terms of the ordinance, and, therefore, the grant must fall, and the judgment upon the *scire facias* must be for the Crown.

[299] In the present case, the award by Spain was made under the Land Claims Ordinance and, except through that procedure, the Crown did not have the land to grant (as Lord Stanley affirmed in rejecting the Company's attempt to avoid the need for investigation of its title[301]). The same legal effect was authoritatively recognised in *R v Symonds* in 1847.[302] The Spain award is recited in the 1845 Crown grant. Although the Spain award is not specifically referred to in the 1848 Crown grant, there is no other basis on which the Company could be "entitled" to a grant (as is recited) against the terms of the Land Claims Ordinance. I consider that the reasoning of the Privy Council in *Clarke* applies equally to the Nelson award and grants. All are made on the basis of the Land Claims Ordinance. And if the conditions of the award were not followed in the grant, an inconsistent grant would, in my view, equally be invalid on the reasoning of the Privy Council in *Clarke*.

---

297 *The Queen v Clarke* SC Auckland, 24 June 1848, available at <www.victoria.ac.nz/law/nzlostcases/>.
298 *R v Clarke* (1851) NZPCC 516 at 520.
299 Later Baron Kingsdown.
300 *R v Clarke* (1851) NZPCC 516 at 520.
301 See above at [116].
302 See *R v Symonds* (1847) NZPCC 387; and above at n 10.

[300] The Supreme Court Ordinance 1841 provided that the Supreme Court had "jurisdiction in all cases as fully as Her Majesty's Courts of Queen's Bench Common Pleas and Exchequer at Westminster have in England".[303] The Court "also" had "all such equitable jurisdiction as the Lord High Chancellor of Great Britain hath in England".[304] The Ordinance was later disallowed (in part because it had not provided for judges to hold office at pleasure, as the Colonial Office thought necessary in colonies) but was replaced in terms that are identical as to jurisdiction by the Supreme Court Ordinance 1844, which preserved all proceedings commenced under the disallowed Ordinance.[305]

[301] After responsible government was established, following enactment of the New Zealand Constitution Act 1852, Parliament enacted legislation in 1854 identifying a number of British statutes deemed to be in force in New Zealand.[306] The English Laws Act 1858 later made it clear that all the laws of England existing on 14 January 1840 (the date of proclamation of sovereignty) were deemed to have been in force in New Zealand and were to "continue to be therein applied in the administration of Justice accordingly", "so far as applicable to the circumstances of … New Zealand".[307]

[302] With the jurisdiction established in 1841 came fundamental principles established by ancient Charters and statutes and by the common law. The Crown had only the prerogative powers allowed by law and recognised by the courts.[308] Magna Carta protected property from being taken by the Crown, except by law.[309] This protection was expanded in a statute of 1351 which provided that no one could be "put out of his Freehold, nor of his Franchises, nor free Custom, unless it be by the Law of the Land" and no property could be taken except by "the Course of the Law".[310] Another statute of 1354 provided that "no Man of what Estate or Condition that he be, shall be put out of Land or Tenement … without being brought in Answer by due

---

303 Supreme Court Ordinance 1841 5 Vict 1, s 2.
304 Section 3.
305 Supreme Court Ordinance 1844 7 Vict 1, s 27.
306 English Laws Act 1854.
307 English Laws Act 1858, s 1.
308 *Case of Proclamations* (1611) 12 Co Rep 74, 77 ER 1352 (KB).
309 Magna Carta 1297 (Eng) 25 Edw I c 29.
310 Statute the Fifth Act 1351 (Eng) 25 Edw III c 4, s 4.

Process of the Law”.[311] In New Zealand, the powers conferred upon the Governor, Executive Council and Legislative Council by the 1840 Charter were specifically subject to Maori customary rights of occupation, enjoyment, and inheritance of land.[312]

(ii) Regina v Fitzherbert

[303] *Regina v Fitzherbert* is New Zealand Court of Appeal authority for denying any trust in the tenths reserves at Port Nicholson.[313] Although not greatly stressed by the Crown in argument in this Court, it was relied on by the Crown in the Court of Appeal in support of the view that the local officials in New Zealand lacked the authority to commit the Queen to a trust.[314] The case also seems to be the source of a number of the arguments addressed to us. And the decision in the case may in part be an explanation for the delay in claiming trust in relation to the tenths lands.

Background to the claim

[304] In *Fitzherbert*, Maori for whose benefit tenths reserves had been set apart in Wellington challenged by writ of scire facias a grant made by Governor Grey in 1851 of a section of the tenths reserves to trustees to hold for as an endowment for a hospital for Europeans and Maori. They sought a declaration that the lands granted to the Company and later re-vested in the Crown under the Loans Act as demesne lands of the Crown were subject to a trust in the hands of the Crown for the benefit of Maori beneficially interested in the reserves. They asked that the 1851 grant be set aside as inconsistent with the trust.

[305] The 1851 Crown grant recited first that the land was Native reserve and secondly that it was “expedient” for the “better management of the said reserves” that they be vested in trustee “upon the trusts and with the powers hereinafter mentioned”. The grant settled the block on trustees (the Colonial Secretary, the Colonial Treasurer, the Resident Magistrate in Wellington and their successors in those offices or such

311 Liberty of Subject 1354 (Eng) 28 Edw III c 3, s 3.
312 See above at [100]–[101].
313 *Regina v Fitzherbert* (1872) 2 NZCAR 143.
314 See *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [150].

other persons as the governor of New Munster might appoint) as an endowment to maintain the hospital.

[306] The defendant trustees claimed that the Queen had not executed any document declaring any trust in respect of the tenths reserves for the benefit of Maori. Johnston J, who conducted the hearing into the facts on which the writ was then determined by the Court of Appeal, found that although the 1848 Crown grant had set apart the tenths reserves and had excepted pa, cultivations and burial grounds, it did not declare a trust on behalf of the Queen.[315]

Findings of fact

[307] Since the execution of the 1848 grant was treated as not providing foundation for any assumption of trust by the Crown, the question of fact for the Court was whether there had been other sufficient expression of trust on behalf of the Crown. Johnston J considered that "Her Majesty never expressly declared any such trust in writing, but officers of the Crown and of the Colonial Government had frequently, before the date of the said grant, in the discharge of their official duties, treated the sections in question as having been and being reserved, dedicated and available for the Natives only; and no claim or action of the Crown at variance with the right of the Natives, to the exclusive benefit of such sections, had been made or done, except the erection in 1847, on a portion of one of the sections, of a hospital for the use of all Her Majesty's subjects".[316]

[308] Johnston J found that the Queen had appointed a Commissioner to inquire into the 1839 New Zealand Company purchase, with the result that additional payments were compelled to be made by the Company under the supervision of the officials

[315] Johnston J found that the grant had been made four days after the expiry of the six month period allowed by the New Zealand Company Loans Act: *Regina v Fitzherbert* (1872) 2 NZCAR 143 at 163. But this finding did not appear to have been relied on in the reasons of the Court of Appeal, perhaps because s 14 of the Act provided power to the Crown to make a grant on proof of entitlement notwithstanding expiry of the period during which such proof was not necessary.

[316] At 161–163. Johnston J found, moreover, that although the New Zealand Company tenths scheme had not been fully carried out, "the principal features of it were adopted". There had been no acknowledgement by the executive government of New Zealand that the reserved lands were for Maori occupation and use, but there had been acknowledgements, both locally and by the Secretary of State for the Colonies, "of the setting apart or dedication of the sections in the grant for the benefit of the Natives only".

Willoughby Shortland, William Spain and George Clarke. Apart from the 1839 purchase and the steps taken to approve it, there had never been extinguishment of the native title over the lands in the grant.[317]

[309] Issue 11, which was critical to the subsequent decision by the Court of Appeal on the writ of scire facias was determined by Johnston J as follows:[318]

> 11. Was the purchase of the lands in the declaration mentioned at any time allowed by or on behalf of Her Majesty?—The purchase of the land in the declaration mentioned was not at any time directly allowed according to the terms of the deed of September, 1839, but the transaction between the Company and the Natives professing to grant the said land, under which the Company actually took possession thereof, was taken as the basis of an arrangement between the Crown and the Company, whereby, on condition that the Company should pay further consideration money, and should pay portions thereof to Natives other than those who had joined in the deed, the Crown agreed to give Crown grants to the Company in respect of a certain amount (proportionate to the amount of the consideration) of such of the lands as the Crown should be certified by its officers that the Company had fairly purchased; but that no part of the lands comprised in the said deed on which pas or burial-grounds of the Natives existed, or on which there were cultivations occupied by the Natives at the date of the deed, should be included; and that in such Crown grants no title should be given by the Crown to the Company in respect of Native land already selected and set apart for the Natives by the Company under their covenant in the deed – included in which were the lands included in the Crown grant sought to be repealed.

[310] It may be noted of this finding that it supports the views I take that:

(a) the effect of the Land Claims Ordinance was not to "allow" the Company's purchase, but to set up the basis for (and conditions of) its eligibility to obtain a Crown grant.[319]

---

317 At 163–164. Johnston J also confirmed that the plans annexed to the Crown grant obtained by the Company (which included the surveys of the native reserves), had been signed for the Crown by Colonel McCleverty, an officer "appointed to act on behalf of Her Majesty, to assist the Company, and see that the Natives were fairly dealt with, among other things, with respect to reserves": at 161.

318 At 161.

319 Compare the view taken by Arnold and O'Regan JJ below at [782] and [785]. I am unable to agree with their interpretation of the Land Claims Ordinance process. The Ordinance did not set up a process to approve purchases and allow them to be completed or even to put the Crown in the shoes of the purchaser to "deliver on the deal". It set up the circumstances of eligibility for a Crown grant.

(b) the Crown grant would exclude occupied lands and was not to give the Company title to the tenths reserves, which were to be held by the Crown under the 1840 agreement it had concluded with the Company.

Court of Appeal determination

[311] On these findings of fact by Johnston J, the contentions of the parties were considered by the Court of Appeal, comprising Arney CJ, Johnston and Richmond JJ. The reasons given in the decision may be regarded as obiter, since the Court found that the critical allegations made by the plaintiffs were made in a late amendment which should not be allowed.[320] Nevertheless, because significant findings of fact had been made in connection with the amended grounds, the Court considered it appropriate to give an indication of its views on two questions: whether the Crown at the date of the grant in 1851 held the tenths lands as trustee for the benefit of the Maori beneficiaries of the reserves; and whether the subsequent Crown grant to the trustees of the hospital disposed of lands not ceded to it and therefore still in native title.

[312] It was argued that a trust for the native proprietors had been impressed on the tenths land either by the arrangements with the Company, "subject to which the lands became vested in the Crown" or by the Crown's actions "in adopting the acts of the Company's agents, and itself virtually constituting those lands reserves for the exclusive benefit of the Native owners".[321]

[313] It had been agreed by the parties in argument that it was necessary to prove the allegation "that the purchase of the lands by the Company from the Natives was duly allowed by Her Majesty".[322] The problem identified by the Court with this was that it

---

320 *Regina v Fitzherbert* (1872) 2 NZCAR 143 at 166–167. The first such new allegation was that the Crown had agreed to set apart the lands as native reserves that were to be managed for the benefit of the natives. The Court acknowledged that this was "not indeed inconsistent" with the original pleadings, but considered that "an obligation … to hold lands for the benefit of covenantees, is one thing; the duty to manage Native reserves for the benefit of the Natives in whose favour those reserves were created, is another". There was insufficient evidence before the Court to prove the existence of the more onerous obligation. The second late allegation was that native title had never been validly extinguished over the land in question. The Court held that this was "inconsistent with and repugnant to the claim set up by the declaration [that the land was held on trust]" because the Crown could not hold land on trust if it did not hold the land at all.

321 At 167–168. Although the Court seems to have been doubtful whether a mere equity could be enforced by writ of scire facias, it dealt with the claim based on the Crown's title, obtained through the purchase as approved through the Land Claims Ordinance.

322 At 168.

had been “expressly found ([in the answer to] *Issue No. 11*) that the purchase of these lands was never at any time directly allowed according to the terms of the deed of September, 1839”. The Court accepted that “subsequently, in the arrangements contemplated between the Crown and the Company, the Crown indicated its intention to give grants to the Company out of the lands fairly purchased by the latter from the Natives, proportionate to the amount of the consideration paid by the Company”. It concluded however that it had been “expressly found that in such Crown grants no title was to be given by the Crown to the Company in respect of the very lands which were subsequently included in the grant now sought to be repealed”. As a result, “[t]here is nothing, then, in the findings upon the issues, which amounts to a finding that the purchase of these lands by the Company was duly allowed by Her Majesty”.

[314] The Court next considered whether the land had ever been constituted reserves held by the Crown on trust for the exclusive benefit of the natives.[323] This argument is the one in issue here. The Court of Appeal pointed out that Johnston J had found that the Crown “never expressly declared any such trust in writing”. It was not prepared to accept the submission that the various acts and statements of officers of the Crown pointed to by the plaintiffs amounted to “virtual reservation of the lands in question” for the exclusive benefit of the sellers.

[315] The Court acknowledged that Johnston J in his finding No 23 had accepted that officers of the Crown and the Colonial Government had “frequently, before the date of the grant of 1851, in the discharge of their official duties, treated the sections in question as having been and being reserved, dedicated, or available for the Natives only”.[324] Nor had the Crown made any claim or undertaken any action “at variance with the right of the Natives to the exclusive benefit of such sections”, apart from erecting a hospital “for the use of all Her Majesty’s subjects” on part of one of the sections in 1847.

[316] Notwithstanding this, the Court took the view that in assessing the “legal import of this finding”, it was necessary to bear in mind what powers the Colonial Government and its officers had “gratuitously to reserve and dedicate ad libitum

323 At 168–169.
324 At 168–169.

portions of the lands of the Crown to the exclusive benefit of particular Native families".[325] The Court pointed out that although the 1840 Charter had given the Governor wide powers to make grants of the waste lands of the Crown, the Royal Instructions of 1840 identified the public purposes for which grants could be made. "Gratuitous grants" were allowed only for the public purposes identified. In all other cases, disposal even of the waste lands could be made only through sale by auction (and similar requirements for sale at a set price were also imposed on the Company when the demesne lands of the Crown in New Munster were vested in it under the Loans Act[326]). Although the Australian Land Sales Act 1842 (Imp) (which applied in New Zealand between 1842 and 1846[327]) had specifically exempted from the requirement of sale such dispositions as might be required "for the Use or Benefit of the aboriginal Inhabitants",[328] the Court said this applied "only for a short time" and "it is not pretended that any claim to this scire facias arises out of it".[329] The Court concluded therefore that in the early years of the Colony, the Colonial officers had no power to create native reserves.

[317] The view expressed by the Court of Appeal in *Fitzherbert* that the Governor had no power to reserve land for the benefit of the Maori proprietors is one it is not possible to reconcile with the terms of the 1840 Charter and Royal Instructions and the November 1840 agreement with the Company (not only the indication of intention to hold the reserves for the benefit of Maori but the reservation of the right to make further provision for Maori). Nor can it be squared with the correspondence of successive Colonial Secretaries (including Lord Stanley's indication that use of tenths reserves to compensate for occupied land not excluded would be "breach of trust") or the terms of the Land Claims Ordinance (declaring that the Crown's interests in land

---

[325] At 169–170.

[326] Loans Act 1847, s 3.

[327] Section 22 of the Australian Land Sales Act 1842 (Imp) 5 & 6 Vict c 36 provided that the Act applied in New Zealand. New Zealand was removed from the Act's ambit by s 11 of the Australian Land Sales Amendment Act 1846 (Imp) 9 & 10 Vict c 104.

[328] Section 3 provided: "nothing in this Act contained shall extend or be construed to extend to prevent Her Majesty, or any Person or Persons acting on the Behalf or under the Authority of Her Majesty, from excepting from Sale, and either reserving to Her Majesty … or disposing of in such other Manner as for the public Interest may seem best, such Lands as may be required for … the Use or Benefit of the aboriginal Inhabitants of the Country".

[329] It is not clear why the Australian Land Sales Act 1842 should have been dismissed in this way. It was in force at the time of the Spain award, and it indicates that the Imperial Parliament did not treat the reservation of land for the use of the native populations as falling within the general prohibition on grants at other than the upset price provided in the Instructions.

were "subject … to the rightful and necessary occupation and use thereof by the aboriginal inhabitants" and affirming the Crown's right of pre-emption).[330] Against that background, to characterise as "gratuitous" and beyond the authority of the Governor the setting aside of reserves on the basis of the conditions of surrender imposed by Spain, through the process that cleared the land of native title and constituted it as Crown land able to be granted if surplus to the Crown's needs, is breathtaking.

[318] The Court conceded that the position had changed with subsequent legislation[331] and that there were subsequently sales directly with the Crown where tracts of land were reserved.[332] While "the management of all such lands [remained] with the officers of the Crown until provided for by special legislation", the land in question "belonged to none of these categories". There is no discussion in the judgment of the Crown's liability in equity.

[319] The Court of Appeal rejected the argument that the involvement of the Crown officials, in securing a release of the lands on the additional payment which preceded the making of the Spain award, constituted assumption of responsibility by the Crown for reservation of the land excluded by the terms of the award.[333] It was inclined to think that the Colonial Secretary, in securing the additional payments and the releases, had acted as a "mediator" between the Company and the natives. (A similar characterisation of the Spain award is made by counsel for the Attorney-General in the present appeal.) There is no consideration in the judgment of the fact that the land was treated from the time of the Spain award as Crown land. Nor is there consideration of the basis on which the Crown held the land and became able to grant it.

[320] In *Fitzherbert*, the Court thought that the transaction amounted "at most":[334]

> ... to proof that the Colonial Secretary brought about an arrangement between the Natives and the Company, wherein he was well informed that the Natives claimed certain lands as reserved for their exclusive use, thereby also, it may

330 Land Claims Ordinance 1841, s 2.
331 It is not clear whether this is a reference to the Native Reserves Act 1856.
332 *Regina v Fitzherbert* (1872) 2 NZCAR 143 at 170–171.
333 At 171–172.
334 At 172.

> well be, quieting the possession of the Company, and indirectly providing, by anticipation, for the ultimate quiet possession of the Crown. But neither this nor any other acts found upon the record are shown to have been acts done in pursuance of any statutory power to create Native reserves, or even with the intention of creating them; although such conduct may indicate that the officers of the Crown believed the lands to have been legally set apart for Native purposes, and acted in that belief.

Since the Queen had never expressly declared in writing any trust in the reserves, the Court did not consider it was "at liberty to declare that the acts of the officers of the Crown and Colonial Governments, so far as they are made to appear on these findings, bind the estate of the Crown in those lands, so as to compel the Crown to hold the land impressed with a trust as Native reserves".

[321] The Court then "shortly" disposed of the second point (that the lands had never been ceded to the Crown and native title had not been extinguished). It considered that "[n]o formal act of cession to the Crown was necessary":[335]

> From and after the purchase of these lands by the Company from the Natives, they became, by virtue of the alienation itself, part of the demesne lands of the Crown; insomuch that even if the purchase by the Company had been investigated by Commissioners under the Land Claims Ordinance No.1, and the same had been approved, and the Commissioners had recommended grants or a grant to the Company accordingly,[336] it would have remained at the discretion of the Crown to make or refuse such a grant. This title the Crown has always asserted; and although, after the selection by the officer of the Company of the lands in question, as reserves for the benefit of the Native chiefs, the Crown forbore to interfere with the lands thus selected, it has done no solemn act to encumber, much less to alienate, its estate; but in 1847 the Crown asserted its title by building a hospital on one of the sections,—in 1851 made the grant now impeached,—and has continued to maintain its title till the present time.

[322] Again, in its reasoning the Court of Appeal did not consider the principles acted on by equity. It proceeded on the basis that in the absence of any writing constitutive of trust or specific statutory authority there could be no trust binding on Crown. As is discussed below in considering the questions of trust and fiduciary obligation,[337] I do not consider these premises to be sound. The legal implications of Crown ownership of the surrendered land in circumstances in which "officers of the Crown believed the

---

335 At 172–173.

336 It is not apparent why the Court thought that the Crown grant was not made after investigation of the 1839 agreement by Commissioners. Spain's investigation relating to Port Nicholson is discussed above at [118]–[124].

337 At [396]–[400].

lands to have been legally set apart for Native purposes, and acted in that belief" is not considered. Nor is the relationship between the alienation by Maori (which is treated as constituting the land as demesne land of the Crown) and the Land Claims Ordinance (which treated all such alienations as void until approved by commissioners) adequately explained.

Consideration of Fitzherbert

[323] Alexander Mackay, then Commissioner of Native Reserves, in a lengthy memorandum to the Undersecretary of the Native Department in 1873, collected together a history of the Company's reserve lands in Wellington and Nelson and their status in response to the decision of the Court of Appeal in *Fitzherbert.*[338] The memorandum was presented to both Houses of the General Assembly by the Governor and printed in the Journal of the House of Representatives in the same year. In his covering note Mackay referred to the "doubt [cast] on the legal status of a great deal of valuable property both in Wellington and Nelson" as a result of the decision.[339] He suggested that the material to which he referred "will be found to contain abundant and clear evidence of the intention of these reserves, as also the construction put upon them by the Imperial Government at a time when the affair was fresh in men's minds". Mackay's conclusion, after setting out the history and much of the correspondence and other documents was that, in *Fitzherbert,* "several important matters appear to have been lost sight of":[340]

> No mention is made of Lord John Russell's agreement of November, 1840; Governor FitzRoy's arrangement of January, 1844, relative to Native reserves; Commissioner Spain's award of March, 1845; and the Grant executed in favour of the Company, by Governor FitzRoy in July, 1845; in all of which the reserves are fully recognized.

[324] Mackay considered that "there is sufficient evidence that the Crown, through its officers, did effectually set apart these lands as Native reserves".[341] Although there were instances when land had been appropriated for purposes "foreign to the original intention", the Government had compensated the Native Reserve Fund and had

---

338 Alexander Mackay "Memorandum by Mr A Mackay on Origin of New Zealand Company's 'Tenths' Native Reserves" [1873] III AJHR G2b.
339 At 1.
340 At 17.
341 At 17.

"acknowledged that prior and paramount equities existed which it would be necessary to compensate". Because "the real consideration" for the sales had been "a precise engagement to reserve for the benefit of the Native proprietors a portion equal to one tenth of the quantity ceded, it became the duty of the Commissioner to see that the proportion agreed on was fairly and finally set apart". Mackay considered that the terms of the 1840 agreement with the Company and Lord Stanley's own acknowledgement of 10 January 1843,[342] together with the acknowledgements that the land could not be mortgaged because inalienable,[343] established that the tenths reserves were vested in the Crown for the benefit of the former proprietors.

[325] Nor did Mackay accept the view expressed in *Fitzherbert* that the Governor had no power to set aside reserves. He considered that such powers, which had always been exercised, were to be found in "the general terms of their Commissions, or of the Charters and instructions in force during their respective governments".[344] The instructions given in January 1841 by Lord John Russell contemplated such setting apart of Native reserves, as did the instructions given to those managing the reserves by Hobson and the terms of the 1844 legislation:[345]

> In course of time Boards of Management were appointed to administer the property, and subsequently it was vested in Commissioners under the Act of 1856. In all these dealings with the property the absolute rights of the Natives to the exclusive benefit of these lands was admitted, and no action at variance with these rights was done until the appropriation of the hospital site in the town of Wellington, in 1847. And that was appropriated solely on the ground of expediency, the Government of the day admitting their liability to compensate the Native trust for such appropriations.

[326] In the present case, Clifford J did not deal at any length with *Fitzherbert.* He seems to have considered that the case was distinguishable, on the basis that the Court in *Fitzherbert* had held there was no Crown reservation of the land in Wellington, whereas in the Nelson grants of 1845 and 1848 there were express reservations of the

---

342 See above at [116].

343 See above at [244].

344 Alexander Mackay "Memorandum by Mr A Mackay on Origin of New Zealand Company's 'Tenths' Native Reserves" [1873] III AJHR G2b at 17.

345 At 18.

tenths in the Crown grants.[346] I doubt whether the two cases can be distinguished on that basis, since the Wellington grants were in similar terms to the Nelson grants.

[327] I have dealt at some length with the judgment in *Fitzherbert* because it contains the seeds of much of the argument advanced on the present appeal. In the Court of Appeal, the Attorney-General relied on *Fitzherbert* for the argument that there was "no one in New Zealand with the authority" to declare a trust.[347] And that asserted absence of authority seems to have weighed with the High Court and Court of Appeal in what the Court of Appeal treated as a "factual finding based on [Clifford J's] assessment of the various instruments and the context" in finding that there was no "requisite certainty of intention" to undertake a trust.[348]

[328] The Spain award's finding that the land had been purchased on "equitable terms" meant that it became Crown land. Nevertheless, the Court in *Fitzherbert* held that, in the hands of the Crown, the conditions on which the purchase was approved, as acknowledged on the face of the award, did not "encumber … its estate".[349] Nor did the years when the Crown "forebore to interfere with the lands", in which there were some attempts to administer the Native reserves as endowments for their benefit and officials "believed" the reserves had been "legally set apart for Native purposes, and acted in that belief".[350]

[329] By the award, native title was cleared and the reserve lands vested in the Crown. Despite this, the Court in *Fitzherbert* held that the Crown took without encumbrance as to the reserves identified, because the Crown had not formally entered into a written declaration or undertaking of trust. I am unable to agree with such result, which I think resulted in injustice, as indeed Alexander Mackay said in 1873.[351] I explain why below in considering similar arguments in the present appeal.[352] In short, I consider there was no need for writing or statutory authority to constitute the Crown

---

346 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [205]. Clifford J noted that *Fitzherbert* was not greatly relied on by the respondent.
347 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [150].
348 At [153].
349 At 173.
350 At 172–173.
351 Alexander Mackay "Memorandum by Mr A Mackay on Origin of New Zealand Company's 'Tenths' Native Reserves" [1873] III AJHR G2b at 17–18.
352 At [396]–[400].

a trustee or a fiduciary for the former owners. The Governor had authority to take ownership for the Crown as trustee. I do not consider the reasons for disregarding the many indications of trust in the historical record are convincing.

[330] The starting point for the correct legal analysis must be the Land Claims Ordinance, by which the tenths reserves became vested in the Crown. It is not clear why it was not the starting point in *Fitzherbert.*[353] It seems to me that the arguments in the present case have been unnecessarily complicated by an emphasis (which may follow that in *Fitzherbert*) on the Crown grants of 1845 and 1848 (and questions of their validity) when the key consideration is the award by which the Crown obtained legal authority to hold the land or to make grants at all.

(iii) The Crown as trustee or fiduciary

[331] There is no prerogative power in the Crown to interfere with property in times of peace.[354] Interference without lawful authority constitutes the officers of the Crown trespassers. The Crown is also liable in equity on the same basis as a citizen for breach of trust or other equitable duty, including those to which it may be subject as a fiduciary. In *Pawlett v Attorney-General*, decided in 1668, the principle of Crown liability in equity was explained by Atkyns B on the basis that since the King was "the fountain and head of justice and equity", "it shall not be presumed, that he will be defective in either":[355]

> And it would derogate from the King's honour to imagine, that what is equity against a common person, should not be equity against him.

[332] In the legal order inherited in New Zealand in 1840, petitions of right could be brought in the High Court to enforce the Crown's obligations where it assumed the

---

353 *Fitzherbert* was decided shortly before *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) and well before *Nireaha Tamaki v Baker* (1901) NZPCC 371. It was therefore during a period when New Zealand law had taken the view that Maori property interests were not able to be recognised in New Zealand courts. In *Nireaha Tamaki v Baker* the Privy Council corrected this view but at the time *Fitzherbert* was decided, the climate was not receptive to notions of Maori property.

354 *Entick v Carrington* (1765) 19 State Tr 1030, 95 ER 807 (KB).

355 *Pawlett v Attorney-General* (1678) Hard 465, 145 ER 550 (Exch) at 552. In that case, where the Crown had obtained by forfeiture the interest of a mortgagee, it was required to afford to the mortgagor the equity of redemption.

responsibilities of agent or trustee in relation to land.[356] Proceedings could also be brought in the Court of Exchequer against the Attorney-General to obtain equitable relief against the Crown.[357] This was jurisdiction obtained by the Supreme Court in New Zealand under the Supreme Court Ordinance.

[333] Courts have sometimes been reluctant to find that the Crown has assumed equitable responsibility by implication rather than by deliberate assumption, because of the sovereign responsibilities of the Crown. So, in *Rustomjee v The Queen*, where a peace treaty concluded between Queen Victoria and the Emperor of China provided for payment of 3 million dollars "on account of debts" of "very large sums of money" owed to British subjects, it was held that the Crown was not an agent for the claimant.[358] Lush J (whose judgment was said by Lord Buckmaster in the later case of *Civilian War Claimants Assoc, Ltd v The King* to be "the most simple and the most accurate form" of those delivered at first instance[359]) said that "[n]o doubt a duty arose" when the money was received to distribute it to those who had suffered loss, but this was "not the act of an agent accounting to a principal, but the act of the Sovereign in dispensing justice to her subjects".[360]

[334] The Court of Appeal in *Rustomjee* gave two reasons for dismissing the appeal.[361] First, the terms of the treaty were not specific as to the sums or as to the class of claimants so that it was impossible to say, as the petitioner did, that the money was paid to the Queen "for the purpose of paying his claim".[362] Secondly, "higher and wider considerations" were that the treaty was made in the Queen's "sovereign character" and was not enforceable by her subjects, but only by the Emperor.[363] Lord Coleridge CJ, delivering the judgment of the Court of Appeal, stressed that the determination was not that the Crown could not be a trustee but that, in the making of the peace treaty, the Crown was neither a trustee nor an agent.

---

356 The Statute of Limitations did not apply to a petition of right: *Rustomjee v The Queen* (1876) 1 QBD 487 (QB); aff'd (1876) 2 QBD 69 (CA).

357 *Pawlett v Attorney-General* (1678) Hard 465, 145 ER 550 (Exch); and see William Holdsworth *A History of English Law* (Sweet and Maxwell, London, 2003) vol 9 at 30–32.

358 *Rustomjee v The Queen* (1876) 1 QBD 487 (QB).

359 *Civilian War Claimants Assoc, Ltd v The King* [1932] AC 14 (HL) at 25.

360 *Rustomjee v The Queen* (1876) 1 QBD 487 (QB) at 497.

361 *Rustomjee v The Queen* (1876) 2 QBD 69 (CA).

362 At 73.

363 At 73–74.

[335] A similar claim came before the House of Lords in *Civilian War Claimants*, arising out of money received by the Crown for compensation for damage to "the civilian population" of the allied powers under the Treaty of Versailles.[364] In applying the approach taken in *Rustomjee*, Lord Atkin, in a concurring judgment, considered that in conducting negotiations with another Sovereign, the Crown would not be acting as agent for its nationals, "unless indeed the Crown chooses expressly to declare that it is acting as agent".[365] He observed that there "is nothing, so far as I know, to prevent the Crown acting as agent or trustee if it chooses deliberately to do so". In the circumstances of the case, however:[366]

> … there appears to me to be nothing which indicates that the Crown expressly assumed the position of agent or trustee, and I think the circumstances negative the idea that the Crown ever did intend to occupy that position and negative any circumstance from which the law might impose upon it the position either of agent or trustee.

[336] The Attorney-General in the present case invoked *Kinloch v The Secretary of State for India in Council*.[367] There, the language of "trust" was used in a grant by the Queen of war booty to the Secretary of State for India in Council for the purpose of distribution. Lord Selborne LC was of the opinion that the grant to someone by identification of office went "not a small way to shew, that it could not have been the intention of the Crown in these documents to constitute a trust in the manner insisted upon".[368] The documents themselves confirmed that impression. In their terms they were "not a grant" but "an announcement, from which the Crown was not likely to depart, of an intention to make a grant". Ascertainment of those able to make a claim (by judgment of the Court of Admiralty) was still in respect of "claims anticipatory of a grant" and identified "simply who were the persons entitled to share, and in what proportions they were to share, in whatever might be the subject of grant". The basis of distribution among those classes entitled remained for the Queen to determine. In these circumstances, the warrant that the Secretary of State was to hold the booty "in trust for the use of" the persons appointed, did not establish a trust enforceable by someone within the class.[369]

---

364 *Civilian War Claimants Association, Limited v The King* [1932] AC 14 (HL).
365 At 26–27.
366 At 27.
367 *Kinloch v The Secretary of State for India in Council* (1882) 7 App Cas 619 (HL).
368 At 623–624.
369 At 625.

[337] In reaching a conclusion which seems inescapable on the facts, Lord Selborne made some general remarks about trusts in the equitable jurisdiction and trusts in relation to "higher matters" which are reflected in the arguments of the Attorney-General in the present case about references to trust:[370]

> Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust—a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and its nature and effect.

[338] In a concurring judgment, Lord Blackburn pointed out that the Queen might have "handed a fund over to a trustee, to hold in trust for those to whom she had given a special interest in it," leaving the trustee to determine who they were. On that basis, "any one of those persons whom she had made cestuis que trust could have brought the whole fund into Chancery, and have had the whole matter there investigated".[371] That was not what had been done. Instead, on proper construction of the warrant: "the Secretary of State for India in Council was made an agent of the Queen, subject to Her Majesty's control and power, to pay away the moneys when quite satisfied that the claims were right, but he was by no means made a trustee subject to the power and control of the Court of Chancery".[372]

[339] These authorities arise out of circumstances very different to the present case. As is discussed below in considering the case law on fiduciary obligations to indigenous people, their reasoning has been distinguished in cases where there is an existing indigenous interest in land.[373] I consider they are distinguishable on the point for which they were cited in argument to us (to suggest that the Crown was acting in a governmental capacity in dealing with the tenths reserves and was not subject to equitable duties to the Maori proprietors). Even so, the authorities indicate that the Crown can constitute itself trustee or agent by undertaking that role either expressly

---

370 At 625–626.
371 At 631–632.
372 At 633.
373 See below at [345]–[346].

or in circumstances where it is clear it has chosen to do so and is not, rather, acting as sovereign in dispensing justice or allocating benefit. If the Crown does choose deliberately to act as trustee or agent, it is answerable in the courts for any equitable wrongs committed, in the same manner as anyone else.

Fiduciary duties in Crown dealings with indigenous people

[340] The nature of the Crown's obligations in relation to indigenous property has been explored in recent years in the context of the former colonial possessions of the United Kingdom: Canada, Australia and New Zealand. There are differences in the legal character of aboriginal rights to land in these different jurisdictions which require some care when considering the case law. But it seems to me that the reasoning adopted in Canada and in Australia applies a fortiori to Maori interests in land. From the start, they were treated as pre-existing rights of property which were exclusive and inalienable and able to descend according to Maori custom.[374] Most importantly, in New Zealand the Crown disclaimed any title to land not cleared of Maori customary title either by sale to it or by approval of pre-1840 sale by an award under the provisions of the Land Claims Ordinance.

[341] The position in North America may not have been as simple. The view that came to apply was that the Crown's title (obtained by discovery, not cession) was burdened by a "personal and usufructuary right"[375] of the native occupiers of reserve lands.[376] The land did not become unencumbered Crown property however until the native interest was surrendered or extinguished by law. Extinguishment could be accomplished by statute, if clear. Surrender of land (for sale or lease) following the

---

374 As is made clear by the terms of the 1840 Charter and as is discussed above at [96]–[101].

375 The nature of the right is determined by native custom. The Privy Council pointed out in *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399 at 409–410 that such a right may be "so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference". Such rights, being legal, cannot be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation: *Amodu Tijani* at 410; and see *Calder v Attorney-General of British Columbia* [1973] SCR 313 at 401–402 per Hall, Spence and Laskin JJ (dissenting).

376 *St Catherine's Milling & Lumber Company v The Queen* (1888) 14 App Cas 46 (PC); *Attorney-General for the Province of Quebec v Attorney-General for the Dominion of Canada* [1921] 1 AC 401 (PC). More recent scholarship has challenged the historical and legal assumptions underpinning those decisions: see Stuart Banner *How the Indians Lost Their Land: Law and Power on the Frontier* (Harvard University Press, Cambridge (Mass), 2005) at ch 5; and Kent McNeil *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989) at ch 7.

Royal Proclamation 1763 (which applied to the British territories in North America outside the established colonies and the territories of the four governments established following the Treaty of Paris), could be to the Crown only.[377] Land was otherwise inalienable by the native American bands. The Crown's exclusive right to accept surrender of land either for on-sale or for lease was continued in legislation, including in s 18(1) of the Indian Act 1952,[378] the provision under which the lease in issue in *Guerin* was made.[379]

[342] The pre-surrender native right of user in land was not treated as an estate in land, but was "a pre-existing legal right not created by the Royal Proclamation, by s 18(1) of the *Indian Act*, or by any other executive order or legislative provision", as Dickson J made clear in *Guerin*.[380] In her concurring opinion in *Guerin*, Wilson J (delivering judgment also on behalf of Ritchie and McIntyre JJ) said that it would "fly in the face of the clear wording of [s 18(1)] to treat that interest as terminable at will by the Crown without recourse by the Band".[381]

[343] In *Guerin*, Dickson J (for himself and Beetz, Chouinard and Lamer JJ) pointed out that in some cases statutes creating reserves had conferred beneficial ownership on the Band occupying the reserve.[382] And there are suggestions that, in any event, a band might have a beneficial interest in a reserve which is recognised in law.[383] In other cases there have been suggestions that the characterisation of the Indian interest in reserves as "personal and usufructuary" may not be helpful.[384] There are

---

377 See *St Catherine's Milling & Lumber Company v The Queen* (1888) 14 App Cas 46 (PC) at 53–54.

378 Indian Act RSC 1952 c 149, s 18(1) provided: "Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band."

379 *Guerin v The Queen* [1984] 2 SCR 335.

380 At 379. See also *Calder v Attorney-General of British Columbia* [1973] SCR 313.

381 At 352.

382 At 381; citing *Attorney-General for Canada v Giroux* (1916) 53 SCR 172.

383 See *Cardinal v The Attorney General of Alberta* [1974] SCR 695 at 715–716 per Hall, Spence and Laskin JJ (dissenting); *Western Industrial Contractors Ltd v Sarcee Developments Ltd* (1979) 15 AR 309 (ABCA); and *Miller v The King* [1950] SCR 168 per Kellock and Taschereau JJ.

384 In *Guerin v The Queen* [1984] 2 SCR 335 at 380–381, Dickson J expressed the view that the Privy Council's emphasis on the personal nature of aboriginal title stemmed in part from the constitutional arrangements peculiar to Canada whereby at that time (but not since 1938 when title to all Indian reserves in British Columbia was transferred to the Crown in right of Canada) upon surrender, the land vested in the Province. See also *Calder v Attorney-General of British Columbia* [1973] SCR 313 at 328 per Judson J.

suggestions too that the independent aboriginal title which pre-existed and was recognised in the Royal Proclamation might be an enforceable interest,[385] in application of the doctrine developed by the Supreme Court of the United States in *Johnson v M'Intosh*,[386] and *Worcester v The State of Georgia.*[387]

[344] It is not necessary for the purposes of this case to consider further the nature of the legal interest in property recognised in the North American cases or its application in New Zealand circumstances. Although Chapman J in *R v Symonds* thought the North American position was more directly comparable to the New Zealand position, Martin CJ in the same case thought that Maori property interests in land had been more fully recognised by the Treaty of Waitangi and the 1840 Charter and Instructions.[388] Lord Stanley and the Colonial Office rejected application of the US Supreme Court doctrine about the nature of Indian land to Maori land when it was invoked by the New Zealand Company.[389] And in *Nireaha Tamaki v Baker* the Privy Council was cool about the applicability of North American doctrine in the circumstances of New Zealand, affirming that the nature of Maori property interests were determined by Maori custom and were as ample as that custom allowed.[390] Modern scholarship is also cautious about the use of North American doctrine in New Zealand conditions.[391] It is arguable that full property interests according to Maori custom were recognised in New Zealand law, at least until the revision undertaken in *Wi Parata v Bishop of*

---

385 *Guerin v The Queen* [1984] 2 SCR 335 at 377–379 per Dickson J.

386 *Johnson v M'Intosh* 21 US 543 (1823).

387 *Worcester v The State of Georgia* 31 US 515 (1832).

388 *R v Symonds* (1847) NZPCC 387 (SC) at 390–391 per Chapman J and at 393–395 per Martin CJ.

389 In a minute of 28 July 1840, the Colonial Office's permanent undersecretary, James Stephen, rejected the applicability of American jurisprudence to New Zealand. See also the 1845 debates in Parliament on the "waste lands" theory. Lord Stanley reiterated in the debates that "so far as native title is proved" according to Maori custom, the Crown was "bound in honour to maintain" it, "be the land waste or occupied—barren or enjoyed": (10 July 1845) 82 GBPD HL (3rd series) 319. Other members of Parliament pointed out that the circumstances of Maori were very different from the North American Indians because New Zealand's independence had been recognised by the British Crown prior to the Treaty of Waitangi: *A Corrected Report of the Debate in the House of Commons on the 17th, 18th, and 19th of June on the State of New Zealand and the Case of the New Zealand Company* (John Murray, London, 1845) at 90. The same view had earlier been expressed by Lord Stanley in the 1843 correspondence with the Company referred to above at [116]. See also the discussion in Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at ch 4.

390 *Nireaha Tamaki v Baker* (1901) NZPCC 371 at 384–385.

391 See for example, Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at 49–50; and Mark Hickford "Vague Native Rights to Land: British Imperial Policy on Native Title and Custom in New Zealand 1837–53" (2010) 38 J Imp Commw Hist 175 at 182–186.

Wellington.[392] But since this is not a claim based on native title and the parties rely on the title obtained by the Crown following the Land Claims Ordinance procedure as the foundation of the equitable duties claimed, it is unnecessary to say more on the subject.

[345] What is of relevance to the present case is the view taken in *Guerin* that the native interest was a pre-existing legal interest which was not created by Crown actions and could not be taken away except by lawful procedure.[393] Relevant too is the rejection in *Guerin* of the concept of "political trust" in the context of Crown dealings with the interests of Indian bands under s 18(1) of the Indian Act.

[346] Dickson J distinguished *Kinloch* and *Tito v Waddell*:[394]

> The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust dependent entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive order or legislative provision.

[347] Binnie J, delivering the opinion of the Supreme Court in *Wewaykum Indian Band v Canada* described "[t]he enduring contribution of *Guerin*" as having been to recognise that "the concept of political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and aboriginal people":[395]

> A quasi-property interest (e.g., reserve land) could not be put on the same footing as a government benefits program. The latter will generally give rise to public law remedies only. The former raises considerations "in the nature of a private law duty". Put another way, the existence of a public law duty does not exclude the possibility that the Crown undertook, in the discharge of that public law duty, obligations "in the nature of a private law duty" towards aboriginal peoples.

392 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

393 *Guerin v The Queen* [1984] 2 SCR 335 at 378, where Dickson J invokes *Amodu Tijani* as supporting "the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it".

394 At 379.

395 *Wewaykum Indian Banda v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [74] (citations omitted).

[348] In *Guerin*, Dickson J did not rely on the Indian band's interest in the reserve land as constituting the Crown a trustee. It did not, he thought, "strictly speaking" amount to beneficial ownership (although he considered "neither [was] its nature completely exhausted by the concept of a personal right").[396] But because the nature of the interest was inalienable, except upon surrender to the Crown, so that any sale or lease to a third party could be carried out only "after a surrender has taken place, with the Crown then acting on the Band's behalf", fiduciary obligations attached in the surrender. It was in "the surrender requirement, and the responsibility it entails", that the Supreme Court found "the source of a distinct fiduciary obligation owed by the Crown to the Indians".[397] The purpose of the requirement of surrender before alienation was to prevent exploitation. And the Crown had discretion to decide for itself where the best interests of the Indian Band lay.

[349] Dickson J in *Guerin* cited Professor Ernest Weinrib's view that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion".[398] Dickson J considered that it was unnecessary to say whether the description covers all fiduciary obligations. It was enough if, whether "by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power". Then the party empowered becomes a fiduciary, subject to the fiduciary's "strict standard of conduct".

[350] It was emphasised in *Guerin* that the categories of fiduciary obligation are not closed.[399] They depend on "the nature of the relationship, not the specific category of actor involved". Although "[p]ublic law duties" do not "typically" give rise to a fiduciary relationship, as exemplified by the "'political trust' cases", "[t]he mere fact … that it is the Crown which is obligated to act on the Indian's behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle":[400]

> As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that

---

396 *Guerin v The Queen* [1984] 2 SCR 335 at 382.
397 At 376.
398 At 384; quoting Ernest Weinrib "The Fiduciary Obligation" (1975) 25 UTLJ 1 at 7.
399 At 384.
400 At 385.

> interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.

[351] In *Guerin*, Dickson J concluded that the Band's surrender had been on terms well known to the Crown (even though they were not contained in the surrender document). Those terms had not been observed by the Crown in letting valuable land for a golf course. In letting the land otherwise than on the terms of the surrender, the Crown had breached its fiduciary duties to the Band and was liable on the same basis as a trustee or other fiduciary.[401]

[352] The three judges of the Court for whom Wilson J wrote would have gone further. Wilson J considered that the effect of the surrender was to free the land of the Band's interests. Before the surrender, the Crown had title to the land subject to the Indian interest. With the surrender to the Crown, "the Band's interest merged in the fee".[402] In those circumstances, Wilson J agreed with the trial Judge who found that the surrender itself had constituted the Crown a trustee for the Band. The "fiduciary duty which existed at large under the section to hold the land in the reserve for the use and benefit of the Band crystallized upon the surrender into an express trust of specific land for a specific purpose":[403]

> There is no magic to the creation of a trust. A trust arises, as I understand it, whenever a person is compelled in equity to hold property over which he has control for the benefit of others (the beneficiaries) in such a way that the benefit of the property accrues not to the trustee, but to the beneficiaries. I think that in the circumstances of this case as found by the learned trial judge the Crown was compelled in equity upon the surrender to hold the surrendered land in trust for the purpose of the lease which the Band members had approved as being for their benefit. The Crown was no longer free to decide that a lease on some other terms would do. Its hands were tied.

As indicated below,[404] I would adopt this approach in connection with the comparable surrender entailed in the Spain award. I consider that the Crown's hands were tied by its terms.

---

401 At 388–389.
402 At 353–354.
403 At 355.
404 At [395].

[353] In subsequent cases, the Supreme Court of Canada has made it clear that, although in *Guerin* the fiduciary duty arose in the context of surrender under s 18(1) of the Indian Act, a breach of fiduciary duty could arise "equally" in the case of expropriation of an existing legal reserve.[405] In such a case the Band had acquired something in the nature of legal interest. For the reasons later explained, I consider that the former Maori proprietors had existing beneficial interests in the tenths reserves and occupation lands to which the Crown as legal owner was bound in equity to give effect.

[354] The Supreme Court of Canada has continued to accept the distinction applied in *Guerin* between the fiduciary responsibilities of the Crown when acting on behalf of Indian bands in dealings with land in which they have interests and its governmental responsibilities when pre-existing interests are not involved. But it has not been rigid in its approach. As Binnie J said in his judgment for the Court in *Wewayukum:*[406]

> I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty" ….

[355] In *Wewaykum*, the case did not involve pre-existing native land and the circumstances of its acquisition from the Band. Rather, it was concerned with the creation of a new reserve from lands in which there was no traditional native property interest. The functions being exercised in creating the reserve were largely governmental, requiring consideration of competing interests (including of other bands for whom reserves were to be provided under the programme), and in respect of which the principal remedies lay in public law. Even so, the Supreme Court considered that fiduciary obligations tailored to the circumstances were not entirely excluded. In relation to the creation of the reserve, the fiduciary obligations of the Crown were held to be "obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the

---

405 As Binnie J for the Court made clear in *Wewaykum Indian Banda v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [98], following *Osoyoos Indian Band v Oliver (Town)* 2001 SCC 85, [2001] 3 SCR 746.

406 At [85].

best interest of the beneficiary".[407] Once the reserves were created, the Supreme Court considered that the content of the Crown's fiduciary responsibilities changed to become more onerous.[408] It was recognised, too, that they would be different in content if, in the future, disposition of the Band's interests after creation of the reserve were to be undertaken.[409]

[356] In *Manitoba Métis Federation v Canada (Attorney General)* the claim concerned not specific property of the Métis but fulfilment of a promise to provide them with land.[410] The Court's conclusion that the Métis had no "specific or cognizable Aboriginal Interest" in the land in issue meant that there was no fiduciary duty.[411] In selecting and making available land to fulfil the promise made, the Crown could not have intended to commit itself to act in the best interest of the Métis, in priority to other legitimate interests. The case was an example of the "higher trust" political obligations illustrated (although in a different context) by the prize money and war compensation cases already referred to and by the provision of benefits in issue in *Alberta v Elder Advocates of Alberta Society*.[412] Nevertheless, in *Manitoba Métis*, the Supreme Court of Canada recognised, applying the principles discussed in its decision in *Elder Advocates of Alberta Society*, that a fiduciary duty may arise through Crown undertaking of responsibility (including by unilateral assumption, as accepted by Dickson J in *Guerin*) in relation to a substantial interest (usually a property interest or something akin to one), in circumstances giving rise to an exclusive duty to act for the benefit of the person whose interests are affected.[413]

[357] In Canada, sufficient Crown undertaking in respect of the legal interests of native Americans was said in *Elder Advocates of Alberta Society* to be met by "clear government commitments" from the Royal Proclamation of 1763 to the Constitution

---

407 At [94]–[96].
408 At [98].
409 At [99].
410 *Manitoba Métis Federation v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623. The Métis are a people of mixed Native American and (French-speaking) European ancestry from what is now southern Manitoba. Their Federation brought a claim against the Crown in right of Canada based on events following the annexation of their land by Canada. The Crown had promised that 1.4 million acres of land would be granted to Métis children. Legislation was enacted to give effect to this undertaking, but it was never properly fulfilled.
411 At [53]–[59].
412 *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261.
413 *Manitoba Métis Federation v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623 at [49]–[50].

Act 1982[414] and by "considerations akin to those found in the private sphere" where "a fiduciary duty has been recognized" that goes beyond "a general obligation to the public or sectors of the public".[415] Similar reasoning attaches to the explicit commitments undertaken by the Crown in New Zealand from the Treaty onwards as well as to the clearance of native title to the benefit of the Crown.

[358] The Crown has been held in Canada to be in breach of fiduciary duties both where it did not prevent exploitive bargains between third parties and native bands concerning interests in land and in cases where the Crown was itself a party to an exploitive bargain.[416] In cases where the Crown has authority to approve transactions (as was the position in New Zealand in respect of grants under the Land Claims Ordinance), the fiduciary obligation of the Crown recognised in Canada has been said to require the Crown "to *withhold its own consent* to surrender where the transaction is exploitative".[417]

[359] In Australia, there has not to date been acceptance that the Crown owes fiduciary duties to the indigenous peoples of Australia arising out of the customary interests in land recognised in *Mabo*.[418] In *Mabo* itself, the only judges who considered fiduciary duties of the Crown were Dawson and Toohey JJ.

[360] Dawson J took the view that any fiduciary obligation could arise only out of a particular interest in land (as had been required by the Canadian authorities).[419] No such particular interest was, he considered, made out in *Mabo*.

[361] Toohey J was the only member of the Court to find that the Crown owed fiduciary duties to the Meriam people not to impair or destroy their traditional rights and interests in land.[420] Referring to *Guerin*'s reliance on the statutory scheme for alienation, Toohey J made the point that inalienability, except by surrender to the Crown, was "arguably an attribute of traditional title independent of statute in any

---

414 Found in sch B to the Canada Act 1982 (UK).
415 *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 at [48].
416 See *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [99]–[100].
417 *Semiahmoo Indian Band v Canada* (1998) 148 DLR (4th) 523 (FCA) at 538 (emphasis in original).
418 *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1.
419 At 163–167.
420 At 199–205.

case".[421] He considered that that the power of the Crown to grant leases of the land burdened by the traditional interests and the corresponding vulnerability of the Meriam people to destruction of their interests, imposed fiduciary duties on the Crown:[422]

> … if the Crown in right of Queensland has the power to alienate land the subject of the Meriam people's traditional rights and interests and the result of that alienation is the loss of traditional title, and if the Meriam people's power to deal with their title is restricted in so far as it is inalienable, except to the Crown, then this power and corresponding vulnerability give rise to a fiduciary obligation on the part of the Crown. The power to destroy or impair a people's interests in this way is extraordinary and is sufficient to attract regulation by Equity to ensure that the position is not abused. The fiduciary relationship arises, therefore out of the *power* of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power.

[362] In addition, Toohey J considered that the course of dealings between the Queensland Government and the Meriam people was itself sufficient to impose on the Crown fiduciary duties:[423]

> Moreover if, contrary to the view I have expressed, the relationship between the Crown and the Meriam people with respect to traditional title alone were insufficient to give rise to a fiduciary obligation, both the course of dealings by the Queensland Government with respect to the Islands since annexation—for example the creation of reserves in 1882 and 1912 and the appointment of trustees in 1939—and the exercise of control over or regulation of the Islanders themselves by welfare legislation – such as the *Native Labourers' Protection Act* 1884 (Q.), the *Torres Strait Islanders Act* 1939 (Q.) under which an Island Court was established and a form of "local government" instituted, and the *Community Services (Aborigines) Act* 1984 (Q.)—would certainly create such an obligation.

[363] In *Wik Peoples v The State of Queensland*, the High Court of Australia held that the pastoral leases there granted did not necessarily extinguish native title.[424] Whether they did depended on investigation of the interests and the terms of the leases. Brennan CJ dissented from this decision.[425] He also expressed disagreement with the argument (which it had been unnecessary for the majority to resolve) that the Crown owed a fiduciary duty to the holders of native title in the exercise of the statutory power

[421] At 203.
[422] At 203 (emphasis in original).
[423] At 203 (emphasis in original).
[424] *Wik Peoples v The State of Queensland* (1996) 187 CLR 1.
[425] As did Dawson and McHugh JJ.

to alienate land, because their interests were vulnerable. The Chief Justice observed that "[t]he exercise of statutory powers characteristically affects the rights or interests of individuals for better or worse".[426] In the case of the power of alienation conferred on the Crown by the 1910 legislation under which the leases were granted, he considered that any such fiduciary obligation or constructive trust was precluded by the terms of the legislation. It was, he considered, "inherently inconsistent with the notion that it should be exercised as agent for or on behalf of the indigenous inhabitants of the land to be alienated".

[364] Despite his view that a fiduciary duty was excluded by the terms of the legislation in issue, Brennan CJ nevertheless allowed that the position was different where discretionary power, "whether statutory or not", is conferred "for exercise on behalf of, or for the benefit of, another or others".[427] In such a case, as he thought was illustrated by *Guerin* in Canada and by *United States v University of New Mexico*[428] in the United States (in application of comparable legislation to the Indian Act in Canada), the power "might well have to be exercised by the repository in the manner expected of a fiduciary". If so, Brennan CJ considered that there could be a basis for imposition of a constructive trust, on established equitable principles or by analogy.[429]

[365] It may be commented here that, whether or not a wider principle of attachment of fiduciary obligation in the circumstances of power and corresponding vulnerability as was suggested by Toohey J in *Mabo* is accepted, the approach taken by Brennan CJ in *Wik* is consistent with the approach taken in *Guerin.* It makes it clear that a fiduciary duty may arise in a particular case where the Crown is exercising discretionary powers, whether conferred by statute or not, on behalf of or for the benefit of others.

[366] As explained below,[430] I consider the *Guerin* approach and that indicated by Brennan CJ in *Wik* is sufficient in the circumstances of the present case to constitute the Crown a fiduciary in the dealings with the tenths reserves and occupied lands. The alienation to the Crown of existing Maori property through the Land Claims Ordinance

---

426 At 96–97.
427 At 96.
428 *United States v University of New Mexico* 731 F 2d 703 (10th Cir 1984).
429 *Wik Peoples v The State of Queensland* (1996) 187 CLR 1 at 97; citing the view expressed by Deane J in *Muschinski v Dodds* (1985) 160 CLR 583 at 614–615.
430 See below at [382]–[390].

process was on terms which could only be fulfilled by the Crown. The Crown's acceptance of the alienation to it on the terms of the award entailed assumption of responsibility to act in the interests of Maori whose interests were surrendered. The Crown's assumption of responsibility in respect of the tenths reserves also constituted it a fiduciary of those whose property interests were surrendered and opened the way to recognition of constructive trust on established equitable principles and by analogy with them. In addition, and as Toohey J thought provided further basis for equitable obligations, the Crown's dealings in managing the tenths reserves constituted it as a fiduciary.[431]

Inapplicability of the "political trust" cases

[367] The prize and compensation cases, in which the difference between a "higher" or political trust (not enforceable by the courts) and a true trust (enforceable in courts of equity against the Crown) was developed, were applied in *Tito v Waddell* in circumstances concerning a claim by indigenous Banaban (Ocean Island) landowners.[432] The Attorney-General invokes the reasoning in *Tito v Waddell* and, although *Tito v Waddell* was not treated as determinative in the lower Courts, it was referred to by both the High Court and Court of Appeal in reaching the conclusion that the claimed trust in respect of the Nelson tenths reserves was a governmental obligation, not one enforceable in courts of equity.[433]

[368] *Tito v Waddell* involved a number of different claims. Those relevant for present purposes related to mining royalties payable under a series of transactions beginning with an agreement entered into in 1913 between Banaban proprietors of land and a British mining company. The arrangement provided for royalties to be paid into "the Banaban Fund", which was to be used partially "for the benefit of the existing Banaban community" and partially to provide an annuity to those whose lands were being worked by the company. The Crown was not a party to this agreement, although the British resident commissioner witnessed it and was to receive the royalties when

[431] As is further discussed at [411].
[432] *Tito v Waddell (No 2)* [1977] Ch 106 (Ch).
[433] See *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [210]–[217] and [235]; and *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [151]–[153].

paid into the Fund. The Crown later bought the assets of the company. Following this, the 1913 arrangements were modified by the enactment of legislation empowering the resident commissioner to compulsorily acquire land for mining and prescribe the rate of royalties payable. The consideration paid for the arrangements (which eventually destroyed most of the inhabitable land on Ocean Island) was grossly inadequate. Provisions in the legislation governing how the royalties were to be applied were often ignored.

[369] The Vice-Chancellor rejected the argument that the arrangement for payment of the royalties to the British resident commissioner for the "general benefit" of the Banaban people (as it was put in later instruments) constituted the Crown a trustee of the royalties and imposed on it a duty to ensure a proper rate of return.[434] Nor did he accept that a reference in one of the later ordinances to the royalties being held "in trust" and other references to trust in government documents changed the position. He held that these terms were used in the higher sense in which "trust" was used by Lord Selbourne in *Kinloch.*

[370] Megarry VC considered that the circumstances "of what was said and written" (which he accepted properly included consideration of what happened after the alleged creation of the trust) did not disclose, on their true construction, manifestation of "a sufficient intention to create a true trust".[435] This was, then "a trust in the higher sense, or government obligation", not enforceable in the courts, although the Vice-Chancellor considered "many other means are available of persuading the Crown to honour its governmental obligations, should it fail to do so ex mero motu.[436]

[371] The claim also failed because of insufficient connection between the Banabans' interest in the land and the claimed fiduciary duty in respect of the setting of the rate of the mining royalties:[437]

> [The] subject matter is the royalties and other payments which will become payable in the future. What is to be held in trust is the fruits of the transaction

---

434 It was claimed that, instead, the Crown had acquiesced in a low rate of return, because of the benefits obtained by farmers in other colonies, including Australia and New Zealand. This was said to constitute self-dealing, contrary to its fiduciary obligations.

435 *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) at 211.

436 At 217, in apparent reference to political relief.

437 At 227–228.

> in question. What the plaintiffs are claiming is that because (on their argument) the Crown will hold these fruits in trust, therefore the Crown is in a fiduciary position in relation to the transaction which in due time will produce those fruits. This ... cannot be right. A trust of a tree may impose a fiduciary duty in relation to the fruit of that tree: but it would be remarkable if a trust of the gathered fruit of the tree were to impose a fiduciary duty in relation to the tree itself.

[372] As Wilson J pointed out in *Guerin*, it is implicit in the reasons given by Megarry VC in *Tito v Waddell* that a stronger case in favour of trust would have arisen if the Banaban Islanders had been able to show an interest in the royalties themselves.[438] Royalties from mining in different parts of the island, subject to different ownership by the Banabans, were however payable into the same Fund, which was to be applied for the benefit of the entire Banaban community.[439] There was no ability to quantify any individual Banaban islander's entitlement to benefit from the royalty Fund because there was no correlation between the land alienated under the mining agreements by each landowner and a share in the royalty fund.

[373] Megarry VC accepted that the matter might have been different if there had been on the historical record "statements by government officers, before, during and after the 1913 transaction which showed an unequivocal intention that the ... royalty should be held on a true trust, enforceable in the courts, and not merely under a governmental obligation, or trust in the higher sense".[440] His examination of the large quantity of correspondence (not reproduced in the judgment) led him to the view that "looked at against the general background", most of the documents pointed away from the creation of a "true trust".

[374] It is not necessary to express any view as to the correctness of the outcome in *Tito v Waddell* or to consider whether it might be seen differently today under influences such as the Canadian cases on the fiduciary responsibilities of the Crown in relation to aboriginal land.[441] It is not in point in the present case because of the difference in the facts.

---

438 *Guerin v The Queen* [1984] 2 SCR 335 at 352.
439 *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) at 222.
440 At 223.
441 Discussed above at [341]–[358].

[375] First, the Crown in *Tito v Waddell* was not a party to the arrangement for alienation of interests in the land, nor did it receive itself any direct benefit through the transaction, as in the present case was achieved by the Crown through clearance of native title by Spain's award. In the case of the Nelson lands, the Crown obtained legal ownership of the land. I consider it held them subject to the conditions imposed by Spain. Although the Crown also received the income from the tenths reserves on behalf of the beneficiaries, it is not suggested from that circumstance alone that the Crown was a trustee of the property by which the income was obtained, arguing from the fruit to the tree, as Megarry VC put it. Rather, it is said here that the income obtained by the Crown is held on the same trusts as the land from which it is derived and in which the Crown took the legal estate subject to the beneficial interest of the Maori proprietors.

[376] Secondly, the beneficial interests of Maori were settled by the Spain award. They are accordingly sufficiently certain for the purposes of trust, as the High Court and Court of Appeal were agreed.[442] The claim here is in respect of land in which the proprietors according to custom undoubtedly had independent and pre-existing beneficial interests. The present case is therefore distinguishable from *Tito v Waddell* on the same basis on which *Tito v Waddell* was distinguished by Toohey J in *Mabo*, in relation to customary interests in land in Queensland,[443] and by the Supreme Court of Canada in relation to the fiduciary duties held to be owed by the Crown to Indian bands in the surrender of reserve lands.[444]

[377] Thirdly, in the present case, there are many indications that officials and agents of the government were acting throughout on behalf of the beneficiaries of the tenths reserves. These have already been discussed above in relation both to the actions taken by the Crown in relation to the clearance of native title to the land and in relation to management of the reserves. They are referred to in summary below.[445]

---

442 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [248]; and *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [162]–[163].

443 *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1 at 201–202 per Toohey J.

444 *Guerin v The Queen* [1984] 2 SCR 335 at 352 per Wilson J (for Ritchie and McIntyre JJ) and at 379 per Dickson J (for Beetz, Chouinard and Lamer JJ).

445 At [410]–[416].

[378] Finally, to the extent that the Vice-Chancellor's reasoning was based on the inability of the Crown to be bound by assumptions of responsibility by local officials and the unlikelihood that in "unsophisticated" colonial societies inhabited by "relatively primitive people" a trust would have been intended (because it would have been "ill-comprehended" in such societies"),[446] such reasoning has little application in the circumstance of the colony of New Zealand in the 1840s. The Governors in New Zealand acted to implement decisions of the Imperial Government in the setting up of reservation of the tenths (as the 1840 Agreement with the Company makes clear) and did not deviate from that path. The use of the language of "trust" by officials, including Lord Stanley, is entirely consistent with appreciation of equitable obligations. The circumstances of the early settlements (including the Treaty obligations and the Crown's right of pre-emption) made recourse to trust and agency as a matter of New Zealand law inevitable (as indeed the Canadian cases on aboriginal title discussed above show was common experience in other colonies). The Crown never asserted any beneficial right itself to the tenths reserves. From the beginning its possession was acknowledged by officials to be for the benefit of those identified in the Spain award.

Fiduciary duties arising in the present case

[379] Where the Crown "wears many hats and represents many interests"[447] it may not owe fiduciary duties to individuals or groups but only governmental obligations owed to all. As was accepted in the Canadian cases which have followed *Calder v Attorney-General of British Columbia*[448] that is not the case in respect of Crown dealings with native peoples with whom the Crown has special responsibilities, especially in respect of their pre-existing interests in land, recognised by the Crown. In *Elder Advocates of Alberta Society* the Supreme Court of Canada recognised that the Crown would be subject to fiduciary duties not only arising out of "clear government commitments" from the Royal Proclamation of 1763 onwards and by way of analogy with obligations in the private sphere, but also in the additional circumstances "where the relationship is akin to one where a fiduciary duty has been

---

446 *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) at 223–224.
447 *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [96].
448 *Calder v Attorney-General of British Columbia* [1973] SCR 313; discussed (with the cases following it) above at [341]–[358].

recognized on private actors" and which goes beyond a "general obligation to the public or sectors of the public".[449]

[380] Such assumption of responsibility towards Maori in New Zealand began with the Treaty of Waitangi (a covenant which guaranteed to Maori the "full, exclusive, and undisturbed possession" of their lands and which set up the Crown's right of pre-emption) and the Charter of 1840 (which made it clear that the Maori interest in land was inalienable and that the interests passed to the descendants of the occupiers). These commitments were repeated in the Royal Instructions and official correspondence.[450] They were behind the terms of the Land Claims Ordinance, which provided the process for checking that pre-Treaty purchases were on "equitable terms".

[381] There has been no occasion for New Zealand courts to determine whether the Crown owed fiduciary duties to the owners of land according to Maori custom in respect of any particular transaction. The analogy provided by *Guerin* and the cases which have followed it in Canada has however been the subject of a number of dicta. In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, the Court of Appeal expressed the view that extinguishment of native title "by less than fair conduct or on less than fair terms" was "likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power".[451] In *Te Runanga o Wharekauri Rekohu Inc v Attorney-General,* Cooke P referred again to the recognition of fiduciary duties, now "further strengthened by judgments in the Supreme Court of Canada and the High Court of Australia" (referring to *R v Sparrow*[452] and the opinions of Deane and Gaudron JJ and Toohey J in *Mabo*[453]).[454] Cooke P concluded that "there is now a substantial body of Commonwealth law case law pointing to a fiduciary duty". He pointed out that, in New Zealand, "the Treaty of Waitangi is major support for such a duty".

---

449 *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 at [48].
450 Described above at [100]–[103] and [116].
451 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24.
452 *R v Sparrow* [1990] 1 SCR 1075 at 1108–1110 per Dickson CJ and La Forest J delivering the judgment of the Court.
453 *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1 at 112–113 per Deane and Gaudron JJ and at 203–205 per Toohey J.
454 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 306.

[382] In *Paki v Attorney-General (No 2)* in this Court, McGrath J was of the view that in a case where it arose it would be necessary for New Zealand courts to consider the fiduciary duties recognised to be owed by the Crown to native bands in Canada in cases such as *Guerin, Blueberry River Indian Band v Canada*,[455] and *Wewaykum.*[456] In the same case, William Young J said that the principle that fiduciary responsibility arises where someone has power to act for another 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".[457] Viewed in this light, he considered that "the comments made by Cooke P in *Te Ika Whenua* are easily explicable".

[383] In *Wik* and *Mabo* the findings of unextinguished customary interests made it unnecessary for the majority to resort to the fall-back of breach of fiduciary duty, but the reasoning applied in *Guerin* was not rejected in the Australian cases. Indeed, it is referred to with apparent approval.[458] Brennan CJ considered that the terms of the legislation in issue there precluded any such fiduciary obligation in *Wik*, but allowed that such fiduciary duties could arise on the *Guerin* approach and in application of general equitable principles if discretionary power (whether or not statutory) is conferred for exercise on behalf of or for the benefit of a particular person or group.

[384] There are close parallels between the Land Claims process and the surrender under s 18(1) of the Indian Act in issue in *Guerin*. The Spain award effected a surrender of land just as much as the lease in issue in *Guerin.* The terms of the surrender in the present case were those established by the Spain award to have been "equitable" rather than having been terms set by the Band itself, as in *Guerin.* But observance of those terms by the Crown in both cases was I consider equally an obligation enforceable in equity. In both cases the Crown undertook control of the surrender of existing interests of property it had undertaken to protect and in which it was of necessity acting on behalf of the native owners. Indeed, in the present case,

---

455 *Blueberry River Indian Band v Canada* [1995] 4 SCR 344.
456 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [188].
457 At [281].
458 See discussion above at [363]–[366]. *Guerin* is cited with approval in *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1 at 60 per Brennan J, at 83 per Deane and Gaudron JJ and at 183 and following per Toohey J (though only Toohey J dealt with its reasoning related to fiduciary duties).

the Crown itself obtained the legal ownership of land in which it had no previous interest (a position to be contrasted with the effect of the surrender in *Guerin* and the Crown's interest in the land in issue in *Mabo*).

[385] It follows that I am unable to agree with the view expressed in the Court of Appeal by Harrison and French JJ that *Guerin*, which they accept to be consistent with established principle, is distinguishable.[459] The obligation to act in the interests of the Indian band in *Guerin* is entirely comparable with the obligation which arose through alienation under the Land Claims Ordinance through the terms approved in Spain's award. As in *Guerin*, fiduciary obligations arose because the Crown acted in relation to "independent legal interests" (in *Guerin,* as in the present case, existing property interests) and on behalf of Maori. The Crown's obligations in the present case are, if anything, amplified by the nature and extent of Maori property and its recognition in New Zealand from the first engagements of the Crown in the Treaty of Waitangi. The resulting obligation, as was recognised in *Guerin*, was "in the nature of a private law duty"; in this *"sui generis* relationship" it was "not improper to regard the Crown as a fiduciary".[460]

[386] Nor do I accept the suggestion made by Ellen France J that the possibility of political redress through the Treaty of Waitangi Act 1975 is relevant to determining whether the relationship between the Crown and the Maori owners is properly treated in equity as fiduciary.[461] For the reasons discussed by me in *Paki (No 2)*, I consider that the existence of a potential avenue for political redress cannot affect the claim in equity.[462] That was the view expressed by the Select Committee in considering the Settlement Act, as is discussed below.[463]

[387] The policy of the Land Claims Ordinance was to protect Maori by ensuring that "pretended purchases" from them were on "equitable terms". Land found to have been sold on such terms became Crown land, able to be granted by the Crown or

---

459 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [209] and [212]–[215].
460 *Guerin v The Queen* [1984] 2 SCR 335 at 385 per Dickson J.
461 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [115]; discussed above at [70].
462 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [165].
463 Below at [488].

retained for its own purposes (which, under the Charter and Royal Instructions included the reservation of land occupied by Maori). I am unable to agree with William Young J that the Land Claims process was not essential to the vesting of land in the Crown.[464] The investigation was necessary to establish whether the land had in fact been sold by the proprietors (as the reference to "pretended purchases" indicates) as well as whether the sale was on equitable terms.

[388] Where, as under the Spain award, the "equitable terms" of purchase included reservation of land for the benefit of the former proprietors or exclusion of land intended to be retained in their possession and control according to native custom, the Maori proprietors were dependent on the Crown, in whom the land vested when cleared of native title, to protect their interests and fulfil the terms. The Crown, which had no pre-existing interest in the land or ability to grant it, obtained exclusive authority over the land when it was cleared of native title. Those are circumstances which set up conditions of dependence and obligation in which the Crown was under a duty in equity to act in the interests of the Maori proprietors in observing the terms which made it equitable for their land to be alienated.

[389] There were no competing interests to be considered here by the Crown. Equity gives effect to the obligations arising out of the Crown's own engagements and the dealings undertaken by it on behalf of the native proprietors, for the reasons given by Binnie J in *Wewaykum.*[465] In *Wewaykum* itself, the Court was concerned, not as in *Guerin* with an existing native interests, but with a government programme of creating native reserves in lands that were not part of the "traditional tribal lands".[466]

[390] The present case is quite different. It is concerned with existing property interests which were proprietary and exclusive, including as against the Crown. They were able to be cleared of native title to become Crown land only if the terms of the alienation were found on investigation to be equitable. That was to be established by a Commissioner with the result that the Crown took the land cleared of native title and with exclusive power to fulfil the terms of the award. I consider that the circumstances

---

464 See below at [839]–[841].
465 Referred to above at [354].
466 *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [77].

meant that the Crown was subject to fiduciary duties owed to the Maori proprietors to observe the conditions on which the alienation was approved. Such obligations arise on the principles recognised in *Guerin* and the subsequent Canadian cases and on the basis described by Toohey J in *Mabo* and allowed by Brennan CJ in *Wik*. As Cooke P noted in *Te Runanga o Muriwhenua Inc v Attorney-General*, it is hardly to be supposed that the obligations owed by the Crown to the indigenous people of New Zealand were less onerous.[467]

[391] None of this is to suggest that there is a general fiduciary duty at large owed by the Crown to Maori. It is to say that where there are pre-existing and independent property interests of Maori which can be surrendered only to the Crown (as under the right of pre-emption) a relationship of power and dependency may exist in which fiduciary obligations properly arise.

Existence of a trust over the reserves

[392] The Crown's general engagements to Maori in relation to pre-existing property interests (inalienable except through the Crown) and its assumption of responsibility to act on behalf of the native proprietors (both under the Land Claims Ordinance procedure and in management of the reserves) constituted the Crown a fiduciary on the approach taken in *Guerin*. In *Guerin,* Dickson J was content to say that the Crown's liability as fiduciary in equity was the same as if it had been a trustee.[468] Wilson J considered that the circumstances made the Crown a trustee.[469]

[393] What was the nature of the fiduciary obligations assumed by the Crown in relation to the terms of the Spain award? I consider that they were the obligations of trust.

[394] I reach that view in the present case both for the reasons given by Wilson J in *Guerin* (on the basis of the Crown's role in obtaining the surrender of native title) and through the Crown's direct assumption of responsibility for the Nelson tenths (on a basis that I consider was clearly the assumption of trust). Before explaining further

---

467 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655.
468 *Guerin v The Queen* [1984] 2 SCR 335 at 387.
469 At 355.

why I reach those conclusions, it is necessary to deal with the contention of the Attorney-General that there was insufficient formality to constitute the Crown an express trustee or to justify the inference that the Crown intended to assume the responsibilities of trustee "in a private law sense".

[395] As Wilson J said in *Guerin*, "there is no magic to the creation of a trust".[470] It arises when equity compels a person to hold property over which he has control for the benefit of others so that the benefit accrues not to the trustee, but to the beneficiaries. I agree. I consider the same result attaches to the Crown in respect of the surrender achieved through the Land Claims Ordinance process in Nelson and in respect of its direct assumption of responsibility for both the tenths reserves and the occupied lands.

[396] The Attorney-General submits that no express trust arose because "the necessary certainty of intention to create a (private law) trust was not present". He bases this on "the absence of any sufficiently certain declaration of trust by the Crown, or any transfer of land to the Crown expressed to be a transfer on trust". This echoes the view taken in the Court of Appeal that some formal instrument was necessary to "comprise the necessary undertaking [of trust]".[471] The Court considered it significant that such formal creation had been envisaged in the letters of appointment of the Chief Justice, Bishop and Chief Protector of Aborigines and that there was indication of an intention to enact legislation. Matters were said to have been in "a state of flux" before 1856, because no legislation was enacted, as had been expected.[472] The view taken in the High Court and Court of Appeal was that no trust came into existence because it had been envisaged by Government officials that the reserves in Nelson, and elsewhere, would be made subject to a statutory regime.

[397] No formality was necessary to constitute a trust for the tenths reserves. In particular, it was unnecessary for there to be any written trust instrument, as has long been accepted in equity. So, in *Rochefoucauld v Boustead* it was held that the Statute of Frauds did not prevent a trust being proved by parole evidence because "it is a fraud

---

[470] At 355.
[471] *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [143].
[472] At [146].

on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself.[473]

[398] It was submitted on behalf of the Attorney-General that the appellants had "not identified any statement by a person with the authority to declare a trust on behalf of the Crown to the effect that the Crown was constituting itself as a trustee of the reserves". Since successive Governors dealt with the reserve lands on a basis only explicable in terms of trust, the submission seems to echo the argument accepted in *Fitzherbert* that the Governor did not have the authority to bind the Crown to a trust. I consider any such argument is impossible to reconcile with the terms of the 1840 Charter and Royal Instructions. They empowered and obliged the Governor to safeguard Maori property.[474] The Australian Land Sales Act 1842, which applied to New Zealand at the time of the Spain award, expressly contemplated the setting aside of land for the benefit of Maori.[475] The 1840 agreement between the Company and the Imperial Government had envisaged that the Crown would hold the expected reserves on behalf of the beneficiaries (the former proprietors).[476]

[399] Clifford J described the 1840 agreement by the Imperial Government with the New Zealand Company as "a political compact".[477] It is not necessary to disagree entirely with that assessment to make the point that it is not a sufficient description. Certainly, the New Zealand Company regarded the agreement as an enforceable contract (and indicated that it would seek compensation if it was not observed to secure the grants the Company expected).[478] More importantly for present purposes, the agreement is formal acknowledgement by the highest officers of the Crown of its intention to undertake the responsibility of acting for the Maori beneficiaries of the reserves of lands promised by the Company. The tenths reserves were to be vested in the Crown, for the benefit of the former proprietors.

---

473 *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA) at 206.
474 See above at [100]–[103].
475 See above at [316], n 327 and n 328.
476 See above at [111].
477 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [215] and [230].
478 In a letter from Somes to Lord Stanley of 15 February 1843, Somes described the Crown as in the same position as "any other party contracting with another" who finds itself unable to fulfil its undertakings. He asserted that the Crown was bound to make a grant to fulfil the Crown's engagements to the Company, or else "to make us compensation for the damage done to us by the non-fulfilment of its agreement".

[400] The Attorney-General points to indications in the historical record that there was "only a proposed trust" in 1843 and that it was not necessary to replace the Chief Justice with another trustee when he resigned for that reason. Those statements are explained by the fact that, until the lands became Crown land, cleared of native title, the Crown could not grant the land to independent trustees, as was then proposed. It was not, therefore, necessary for the Chief Justice to be replaced when he resigned as trustee, as Shortland recognised. On the same basis, FitzRoy was earlier correct in the view that the agents the Crown had appointed to look after the reserves had no independent standing as trustees themselves (the point that caused the Bishop to resign in 1843). These circumstances do not affect the character of the Crown's responsibilities in equity, assumed by it in relation to the tenths reserves from the time the town and accommodation sections were selected and when it took title to land which included the identified tenths reserves and the unidentified rural reserves and occupied lands.

[401] When the land vested in the Crown on the terms of the Spain award, I consider it was as trustee for the beneficiaries of the tenths reserves and the occupied lands. In addition I consider there was, in any event, ample evidence of Crown assumption of a trust in relation to the Nelson tenths. I deal with each aspect in turn.

(i) The terms on which the Crown took ownership

[402] In *Guerin* the Crown, on the view taken by Wilson J, was "compelled in equity upon the surrender to hold the surrendered land in trust for the purpose of the lease which the Band members had approved as being for their benefit".[479] In the present case, I consider that the Crown was compelled in equity upon the surrender effected by the Spain award to hold the surrendered land in trust for the proprietors for fulfilment of the conditions, accepted by the Crown, upon which Spain had approved the alienation as being on equitable terms. Those conditions were the exclusion of the occupied lands and the reservation of the tenths.

[403] The fact that it was envisaged that the reserves would be brought under a system of management set up by statute (something not acted on until 1856) is

[479] *Guerin v The Queen* [1984] 2 SCR 335 at 355.

immaterial. It did not preclude the earlier constitution of a trust for the purposes and on the terms identified in the Spain award. While legislation may well have been envisaged, it was not necessary in circumstances where property in which Maori had undoubted beneficial interests was held by the Crown on their behalf.[480] Indeed, although the Native Reserves Act 1856 eventually provided for management of the reserves, it did not itself constitute the trust, which was assumed to have been already created in land subject to the Act. Nor did the subsequent vesting of the reserves in the Public Trustee in 1882 provide further identification of the trust and its terms.[481] That the reserves vested were already held on trust is clear from that circumstance. No further constitutive formality was necessary to establish a trust for the benefit of the former proprietors of the Nelson lands.

[404] It may be accepted that the Native Reserves Act 1856 altered the original basis on which the land was held by the Crown as inalienable. It provided authority to dispose of lands and to devolve land to Maori for whose benefit the lands were reserved, both with the approval of the Governor.[482] Other statutory powers too affected the scope of the obligations such as the power to settle land on separate trustees for specific purposes under the authority of the Governor. Matters of breach were not considered at trial by reference to the legislative powers being exercised from 1856 in particular cases and no findings of fact were made (as would have been necessary if the claims of breach had been specific to use of such powers).[483] On the basis that there were no such legislative powers until 1856, the only transaction claimed as breach which could have been affected in this way was the exchange effected in 1864 between tenths suburban land in Motueka and land in Massacre Bay.[484] For present purposes, however, it is sufficient to make the point that the Act itself did not alter the underlying nature of the Crown's fiduciary responsibilities when dealing with the land.

---

480 See discussion above of the similar views expressed in *Guerin* (at [352]) and by Brennan CJ in *Wik* (at [364]–[365]).
481 Native Reserves Act 1882, s 8.
482 Native Reserves Act 1856, ss 7 and 15.
483 A matter remarked upon by Clifford J: *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [176].
484 Referred to above at [280].

[405] The stipulation by Lord Stanley that occupied lands were not to be included in the tenths reserves, and the agreement of the Company at the January 1844 meeting with FitzRoy that occupied lands were to be excluded from its lands in addition to the tenths reserves, were direct acknowledgments by the Crown of the basis for the surrender. When the Crown received the lands cleared of native title, they were necessarily impressed with trusts to fulfil these conditions of the award.

[406] The respondent submits that it is of significance that the Native Reserves Act 1856 did not use the terms "trust" or "trustee". But it is hard to understand what other legal characterisation of the tenths reserves there could be. When the reserves were vested in the Public Trustee in 1882 they came under the control of statutory trustees. By that time, the reserves had been managed by the Crown since 1842 and the Crown had asserted ownership of them for more than thirty years. There was no attempt in the 1882 vesting to identify or set the terms of the trusts. The land simply continued to be held on the same pre-existing trusts.

[407] The Spain award, accepted by the Governor in the 1845 grant, sets out the terms of the reservation and exclusion of land for the benefit of the former proprietors. The terms of the Crown grants of 1845 and 1848 evidence the intention of the Crown that the tenths reserves and the occupied lands were to be set apart for the beneficiaries. When the land became Crown land, the reserved and excluded lands in the hands of the Crown were necessarily impressed with a trust for those beneficiaries.

[408] The terms of the trust as to its subject-matter are, it seems to me, properly established by the text of the award. The maps annexed to the 1845 grant were not controlling of the extent of the tenths reserves because they are incomplete (as appears from the face of the award) and indeed were inaccurate as to the exchanges supervised by Spain at the Big Wood. The map attached to the 1848 grant was essentially the same map used in the 1845 grant, with correction of the inaccuracies as to the sections exchanged in 1844 and with the addition of the occupation reserves created in Massacre Bay and western Blind Bay in 1847.[485]

---

[485] In the circumstances described above at [210]–[213].

[409] The terms of the grant of 1848 to the Company could not be effective to discharge any pre-existing equitable interest in the Crown lands obtained through Spain's award. Nor were such equitable interests affected by the setting up of the Company as the Crown's agent for sale of land in New Munster and the vesting of the Crown waste lands in it under the Loans Act for that purpose in the period between 1847 and 1850, after which they were resumed by the Crown. The beneficial interests in the land were unaffected. The equitable interests had arisen with the knowledge and acquiescence alike of the Crown and the Company. The subsequent dealings with the land by which the reserves were eventually vested in statutory trustees are entirely consistent with such pre-existing equitable interests.

(ii) Crown conduct demonstrating assumption of trust

[410] In addition to the trust that arose from the circumstances of the Crown's exclusive power to obtain surrender of the property of indigenous peoples (grounded in the fiduciary obligations accepted in *Guerin*), I consider that the Crown in its dealings with the tenths reserves constituted itself a trustee by reason of its own assumption of responsibility in relation to the reserves. Its actions would have constituted a private person a trustee. This is simply application of the ordinary law to the Crown, as established by cases such as *Pawlett.*[486]

[411] In addition to the obligations arising from surrender of native title on the basis of the Spain award, the Crown had already assumed the responsibility of acting for the beneficiaries in relation to the tenths reserves identified in 1842, in the manner Toohey J in *Mabo* and Wilson J in *Guerin* considered would give rise to equitable obligations. The Crown's own actions constituted itself trustee or agent in the management of the identified tenths reserves and in the collection of income from them. These were not funds held by the Crown as government on a "political trust". There was never any doubt that the Crown itself had no beneficial interest in the land or the income from it. Nor was there any doubt that it was the members of the hapu identified by Spain as having customary ownership of the land at the time of the 1839 purchase (and from whom he obtained deeds of release for the payments in respect of their territories) who had the beneficial interest in both land and income received by the Crown.

---

[486] *Pawlett v Attorney-General* (1678) Hard 465, 145 ER 550 (Exch); see above at [331]–[332].

[412] The actions of the Secretaries of State and successive Governors and senior officials in taking control of the reserve lands point to the assumption of a trust. The reserve lands selected in 1842 were managed by the Crown on behalf of Maori until Commissioner Spain's award was accepted and the lands themselves became Crown land.

[413] The Crown from 1842 assumed discretionary control over the tenths reserves. This discretionary control was in circumstances of necessary vulnerability given the embryonic legal order then in place, the ability of Maori to access it and the effective suspension of rights by the Land Claims Ordinance while the sale was investigated. A fiduciary duty arises in such circumstances when the Crown, as here, assumed discretionary control over property.[487]

[414] The Crown conduct entailed the selection of the tenths reserves, acting on behalf of the vendors in the process by which the lands were alienated,[488] exercising discretionary control over the reserves as shown in their management and the receipt of income throughout, and the assertion of legal ownership of the reserves while acknowledging the beneficial interest in the reserves of the former proprietors. The fact that the management arrangements put in place may have been initially "pragmatic" and "interim" (as Clifford J described them),[489] does not affect their nature as constituting assumptions of responsibility by the Crown on behalf of the former Maori proprietors.

[415] No further formal constitutive steps other than receipt of the lands and income, against the demonstrated understanding that the lands were to be held for the benefit of the Maori vendors, were necessary to constitute the Crown a trustee. It was a trustee in respect of the income of the reserve lands from their receipt. It also became a trustee of the identified tenths lands themselves when it took control of them.

[416] I consider that there is overwhelming evidence on the historical record that the Crown throughout intended to and did deal with the reserve land as a trustee. Because

---

487 As was recognised in *Manitoba Métis Federation v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623 at [49].

488 See above at [125] and [132].

489 *Proprietors of Watatu Inc v Attorney-General* [2012] NZHC 1461 at [235].

I have already canvassed the dealings of the Crown with the land at length, I summarise the more significant indications of such intention. It is shown by:

(a) the arrangements for management and control of the reserves from 1842 under the "Board" consisting of Bishop Selwyn, the Chief Justice and the Chief Protector of Aborigines, and the provision to the "trustees" of instructions on how the reserves were to be managed;[490]

(b) the successive appointments by Bishop Selwyn of Halswell, Thompson and then McDonald as agents on behalf of the Board in the Nelson district, with instructions to lease the reserves in order to generate income to be applied for the benefit of Maori;[491]

(c) Selwyn's rejection of the proposal by the Company to advance money secured by mortgage over the reserves on the basis that it would entail a power of sale over lands "which are by their very nature inalienable". This approach had been discussed with Shortland and later approved by the new governor, FitzRoy;[492]

(d) the Governor's appointment of the Police Magistrate in Nelson to manage the reserves and take over the bank accounts in the name of "Trustees of Native Reserves";[493]

(e) Lieutenant-Governor Eyre's 1848 investigation into the state of the native reserves in 1848, resulting in the creation of a new "Board of Management";[494]

(f) the steps taken by the new Board, with the approval of Eyre, to confirm and adjust existing leases and enter into further leases to obtain rentals

490 See above at [236]–[240].
491 See above at [241]–[243].
492 See above at [244].
493 See above at [250]–[252].
494 See above at [253]–[257].

for the trust which had previously been paid, irregularly, to Maori who claimed interest in the reserves, with proposals for exchanges;[495]

(g) Eyre's confirmation when approving the proposals (including the exchanges) that the Crown "assumes that the Reserves vest in it";[496]

(h) the appointment in 1853 of the Crown Lands Commissioner (Major Richmond) to manage the reserves;[497]

(i) the transfer of the reserves to the Commissioners appointed under the Native Reserves Act 1856;[498]

(j) the many references to trust and trustees in connection with the administration of the reserves; and[499]

(k) the direct control exercised by the Governor before the vesting of the reserves under the provisions of the Native Reserves Act 1856[500] and the assumption of Crown title to the lands, which could only have been as trustee,[501] as the Committee of the Nelson Provincial Council in 1858 understood.[502] Even after the reserves were brought under the provisions of the Native Reserves Acts, the Governor retained control, in a way that was consistent with the Crown being a trustee.[503]

---

495 See above at [258]–[261].
496 See above at [264].
497 See above at [268].
498 See above at [272]–[286].
499 See above at [288].
500 See above at [289].
501 See above at [291]–[292].
502 See above at [277].
503 Section 1 of the Native Reserves Act 1856, for example, provided that it was the Governor who appointed and removed the Commissioners. Section 4 gave the Governor the power to "frame and establish rules for the conduct of business" of the Commissioners. Section 7 required the Governor to assent in writing for the "sale exchange lease [exceeding 21 years] or other disposition of such lands". Section 9 directed that money obtained by the Commissioners was to be "applied by the such Commissioners" for the benefit of Maori "in such manner as the Governor … may from time to time direct". Section 15 required the Governor's consent to lease or conveyances to Maori for whose benefit the land had been set aside, as did s 16 (conveying or leasing land for certain public works). The Governor was also in charge of organising a process by which the consent of Maori could be ascertained, and of verifying that consent in accordance with s 17.

Breaches of trust

[417] Through the Spain award, the Crown obtained the land from which the tenths sections and exclusion of occupied land should have been made. Its assumption of the land as Crown land constituted it a trustee for the former proprietors to whom the Crown owed fiduciary responsibilities arising out of its engagements to Maori and the fact that they were "at the mercy of the [Crown's] discretion" in its dealings on their behalf (the hallmark of a fiduciary relationship suggested by Dickson CJ in *Guerin*). Crown officials acted on behalf of the Maori proprietors in the selection and control of the identified reserves and in the Land Claims proceeding (including in respect of the additional payments made during the course of the Spain inquiry). The award which cleared the native title and constituted the land as Crown lands, able to be disposed of by the Crown, was on terms as to reservation of the tenths reserves for the benefit of the former owners and exclusion of the occupied land which was to be retained by them. The Crown constituted itself trustee for the identified tenths reserves in the suburban and town sections and is alleged to have dealt with the trust property other than for the benefit of the trust.

[418] The "paramount obligation" of a trustee is "recovering, securing, and duly applying the trust fund".[504] If the circumstances require it, the trustee must get in the trust assets.[505] The trustee must preserve the assets of the trust, and apply them only for the purposes of the trust.

[419] The breaches complained of comprise the failures to bring in and secure the rural sections,[506] the failure to exclude the occupied lands,[507] the reduction of the established tenths reserves occasioned by the exchanges before 1882 (themselves in large part a consequence of the failure to exclude the occupied lands),[508] the reduction

504 *Re Brodgen, Billing v Brogden* (1888) 38 Ch D 546 (CA) at 571 per Fry LJ.
505 *Low v Bouverie* [1891] 3 Ch 82 (CA) at 99 per Lindley LJ.
506 See above at [214]–[228].
507 See above at [134]–[148] and [146].
508 See above at [158], [266] and [280]. There would have been no need to put occupied land into the tenths (as a way to preserve it for Maori use) if the occupied lands had been fully excluded from the land granted to the Company and on-sold to settlers.

in the town reserve sections approved by Grey in 1847,[509] and the grant to the Bishop of tenths reserve land in 1853.[510]

(i) The failure to set aside the rural reserves

[420] In the High Court and Court of Appeal the claim in respect of failure to get in the trust property in the rural reserve sections failed for uncertainty of subject-matter.[511] Unlike the town and suburban reserves, the rural land to fulfil the tenths obligations was not identified. I do not accept that there was uncertainty which was fatal to the existence of a trust.

[421] In *Re Tuck's Settlement Trusts*, Lord Denning MR drew a distinction between "conceptual uncertainty" (where a court cannot understand what was intended in a trust) and "evidential uncertainty" (where application of what was intended depends on ascertainment of the facts).[512] In his view: "evidential uncertainty never renders the condition meaningless":

> The court never discards it on that account. It applies the condition as best it can on the evidence available.

[422] This approach was adopted in the High Court of New Zealand by Tipping J in *Re Beckbessinger*.[513] That was a case where objects were said to be uncertain. Tipping J held that there was sufficient certainty if the Court is able "to determine with certainty the limits of the class, ie whether a particular person or body is or is not within the class". That was the approach taken, too, by the House of Lords in *McPhail v Dalton*.[514] There it was held that a discretionary trust in which the trustees had discretion as to distribution required only the ability to identify whether a given individual was or was not within the class. Similar thinking led to the rejection in the present case by the High Court and Court of Appeal of arguments that the trust was

[509] See above at [168]–[169].
[510] See above at [269].
[511] *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [246]; and *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [161].
[512] *Re Tuck's Settlement Trusts* [1978] Ch 49 (CA) at 59.
[513] *Re Beckbessinger* [1993] 2 NZLR 362 (HC) at 370.
[514] *McPhail v Doulton* [1971] AC 424 (HL).

bad for uncertainty in relation to identification of the beneficiaries of the tenths reserves.[515]

[423] In the Courts below, the finding of uncertainty of subject-matter in relation to the 10,000 acres of rural reserve sections relied on the reasoning in *Re London Wine Company (Shippers) Ltd*[516] and *Re Goldcorp Exchange Ltd (in rec)*.[517] Those were cases in which findings of constructive trust in non-segregated assets would have had significant implications for priorities on insolvency. I do not consider these cases stand for any rigid rule that a trust can never exist in non-segregated property. They seem to me, rather, to turn on whether trust was in fact intended in the particular cases.

[424] *London Wine* concerned a wine-dealing company which had been placed in receivership. Those who left the wine to be stored by the company were given a certificate purporting to make the purchaser "the sole and beneficial owner" of a certain quantity of a certain vintage of wine. There was no segregation of the wine from the balance of the company's stock. In some cases the company had not itself taken delivery of the wine when the certificates were provided. Oliver J held that legal title did not pass and no trust arose.

[425] Oliver J considered that, if there was a trust, it would have to be of a certain proportion of the entire stock of a particular vintage.[518] He considered that there was no evidence of intention to create such a trust. The assertion that "you are the *sole* and beneficial owners of" 10 cases of a particular wine could not have been intended to mean "you are the owner of such proportion of the total stock of such and such a wine now held by me as 10 bears to the total number of cases comprised in such stock".[519]

[426] In the course of his reasons, Oliver J used the illustration of a farmer who declared himself to be a trustee of two sheep ("without identifying them"),[520] an illustration drawn on by the Court of Appeal in the present case.[521] He considered

---

[515] *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [247]; *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [162]–[163].
[516] *Re London Wine Company (Shippers) Ltd* [1986] PCC 121 (Ch).
[517] *Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* [1994] 3 NZLR 385 (PC).
[518] *Re London Wine Company (Shippers) Ltd* [1986] PCC 121 (Ch) at 136–137.
[519] At 137–138 (emphasis in original).
[520] At 137.
[521] *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [159].

there would be no trust created, whatever the rights conferred as a matter of contract, and that it would be "immaterial that at the time [the farmer] has a flock of sheep out of which he could satisfy the interest". The Judge considered that the matter would be different if the farmer had, "by appropriate words, declare[d] himself to be a trustee of a specified proportion of his whole flock and thus create[d] an equitable tenancy in common between himself and the named beneficiary". In such a case, "a proprietary interest would arise in the beneficiary in an undivided share of all the flock and its produce". Oliver J accepted that a trust could be created if the intent to do so was clearly expressed and if the pool from which the interest was to be obtained was ascertainable at the date of the declaration of trust.

[427] The case is therefore not authority for the proposition that a trust must fail for uncertainty of subject matter where trust property has not been segregated from non-trust property. It makes it clear that there must be clear evidence pointing to such an intention where a trust is said to comprise some chattels of an undifferentiated pool.

[428] *Goldcorp* was comparable to *London Wine Company*. Goldcorp Exchange Ltd sold gold bullion to customers, who could choose either to take delivery of their gold or to leave it "unallocated". Unallocated gold was said to be owned by the customer but would be kept and insured by Goldcorp free of charge, and would be deliverable with seven days' notice and upon payment of small fees for ingoting and delivery. Each customer received a certificate to that effect. The quantity of bullion on hand fluctuated and was never sufficient to meet all the claims of customers. It was stored in bulk and was undifferentiated. When Goldcorp went into liquidation, its receivers applied for directions on whether the legal or beneficial ownership of the unallocated gold had passed to the purchasers.

[429] The Privy Council held that the customers of Goldcorp had no legal or equitable proprietary interests in the undifferentiated mass of bullion. In coming to this conclusion, the Board placed some weight on the difference between what they referred to as "ex-bulk" goods and "generic" goods:[522]

> For present purposes, two species of unascertained goods may be distinguished. First, there are "generic goods". These are sold on terms which

[522] *Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* [1994] 3 NZLR 385 (PC) at 392–393.

> preserve the seller's freedom to decide for himself how and from what source he will obtain goods answering the contractual description. Secondly, there are "goods sold ex-bulk". By this expression Their Lordships denote goods which are by express stipulation to be supplied from a fixed and a predetermined source, from within which the seller may make his own choice (unless the contract requires it to be made in some other way) but outside which he may not go. For example, "I sell you 60 of the 100 sheep now on my farm".

[430] The Board considered that it was possible for a vendor of ex-bulk goods to "effectively declare himself trustee of the bulk in favour of the buyer, so as to confer pro tanto an equitable title".[523] However, it held that the bullion was sold as a "generic" good. That was because:

> The Company cannot have intended to create an interest in its general stock of gold which would have inhibited any dealings with it otherwise than for the purpose of delivery under the non-allocated sale contracts. … To understand the transaction in this way would be to make it a sale of bullion, ex-bulk, which on the documents and findings of fact it plainly was not.

[431] Again, the case should not be taken to stand for a general principle that "unascertained" property cannot form the subject matter of a trust. (Indeed, the Board expressly pointed out how that outcome could be achieved.) Rather, it is authority that legal and equitable title to "generic goods" (that is, those that can be sourced from anywhere by the vendor) cannot pass until the goods are positively identified, because until that point "nobody knows to which goods the title relate".[524]

[432] I confess to some difficulty in seeing that these commercial cases, not involving pre-existing fiduciary obligations and concerned with fungible assets, are helpful in the circumstances of the present case concerning land and the obligations of a fiduciary arising out of the surrender of native title. Even in their own terms, however, they do not answer the claim here which is indeed based on an obligation to provide a "specified proportion" of a certain area of land not at all comparable with "generic goods". Here there was an agreed system of selection of the land (used in relation to the suburban and town sections and, for the settlers, used in relation to selection of the rural sections). The selection was from within an identified geographical area (the land cleared of native title in Te Tau Ihu by the Spain award)

523 At 394.
524 At 395.

which contained sufficient land to fulfil the tenths obligations. This was a beneficial interest in a specific proportion of land from a "fixed and predetermined source". It was intended to "inhibit dealings in the whole quantity" of land. The Board in *Goldcorp* did not doubt that in such circumstances there would be sufficient certainty of subject matter for trust.

[433] Both *Goldcorp* and *London Wine* are cases dealing with the passing of legal and equitable title of chattels. In *Hunter v Moss*, *London Wine* was distinguished, in the context of a sale of shares owned by the person declaring the trust, on the basis that the requirement of certainty of subject-matter in a trust did not necessarily entail segregation of the property to form the subject-matter.[525] There was sufficient certainty even though the particular 50 shares which were the subject of the trust had not been segregated.

[434] In this case, it should be noted, the rural tenths and the occupation reserves were intended under the Spain award to be identified and segregated from the land to be granted to the New Zealand Company as soon as surveying was complete. The lack of differentiation was expected to be temporary. That can be contrasted with the position in *London Wine* and *Goldcorp,* where customers left "their" goods in the custody of the vendor indefinitely and the vendors did not maintain stock levels that would have ensured that they could meet all potential calls for delivery. Nor is this a case where there are competing equities, as applied in the receivership cases.

[435] More importantly, if right in the view that fiduciary and trust obligations were owed by the Crown to Maori in relation to the tenths reserves and occupied lands, I cannot think that equity could countenance the obligation failing for indeterminacy of subject-matter in circumstance where there was clear identification in Spain's award of a fixed proportion of an identified area vested in the Crown on condition that the tenths sections were reserved and the areas of occupation were able to be ascertained. The approach taken by Lord Denning in *Re Tuck's Settlement* seems to me entirely correct in these circumstances too. Any uncertainty at the time was an evidential

---

[525] *Hunter v Moss* [1994] 1 WLR 452 (CA) at 457–458.

uncertainty. As at the time of vesting of the land in the Crown in 1845, the intended trust estate was available to be brought in by the Crown which had the power of grant.

[436] The fact that the rural sections were never provided to the tenths trusts is not challenged. The failure to reserve them has not been justified. As already indicated, I do not accept the explanation that it was a result of a change in government policy to future proof reserves for occupation. But in any event no lawful authority for such executive interference with an interest in property recognised by the Spain award and acknowledged by the Crown at the time it obtained the land cleared of native title has been identified. On its face it is contrary to fundamental principles of law described in ancient charters such as Magna Carta, which applied in New Zealand. Subject to the questions still to be addressed of extinguishment of the claim through lapse of time, the standing of the plaintiffs to bring the claims, and the effect of the Settlement Act, I consider that breach of trust on the part of the Crown is established and that the claim ought to be remitted to the High Court for consideration of remedy.

(ii) The failure to exclude the occupied lands

[437] For similar reasons, I consider that the Crown lands cleared of native title were obtained on the terms of the Spain award to exclude occupied land and that failure to make such exclusions would put the Crown in breach of trust. As already indicated, however, I do not think the Court is in a position to make findings of fact about matters of breach and the extent of loss. The evidence of the exchanges and the comparison with the occupation reserves provided in Massacre Bay suggest some measure of loss to the former owners from the failure to comply with the terms on which the Crown obtained the land from which such exclusions could have been made. But counsel for the appellants at the hearing indicated that there were other occupied lands which are not accounted for by the exchanges. Some of them, we were told, were eventually identified and were vested in the Maori proprietors. There have however been no findings as to breach and the Court of Appeal, while acknowledging that failure by the Crown to exclude the occupied land could amount to breach of the equitable duties pleaded, thought that further consideration was required. In this Court, counsel for the appellants acknowledged that referral back for determinations to be made would be necessary.

(iii) The transactions which diminished the tenths estate

[438] The failure to exclude the occupied lands is linked to the diminution of the tenths reserves occasioned by the exchanges undertaken to meet the difficulties of Maori occupation of land allocated to settlers. The exchanges for occupation purposes deprived the reserves trust of the benefit of use of the land. And, while not directly within the scope of the claim (although it may bear on eventual loss), the problem for the reserves trust was later compounded when the occupied lands became, through the Native Land Court processes, the subject of individual title, further diminishing the extent of the reserves.[526]

[439] Altogether, the exchanges and allocations resulted in the tenths reserves in the town and suburban sections being diminished by some 1,862 acres,[527] although the exact diminution is not clear and was not the subject of findings of fact in the Courts below.[528] The Maori actually in occupation may have benefited (although they do not seem to have obtained any additional benefit since they were entitled to the exclusion of the occupied lands in any case), but it was at the expense of the tenths reserves, both in loss of income for the benefit of all Maori vendors in the districts of the sale and through eventual vesting of much of the occupied land in the individuals in occupation. These exchanges are evidence of the degree of loss to Maori in not having had their pa, cultivations and urupa exempted and retained in their ownership, as the engagements of the Crown and the specific terms of the Spain award and the Crown grants of both 1845 and 1848 required. In the absence of any steps having been taken to survey and exclude such lands equally from the grant and from the Crown lands, it seems to me that good evidence of what was lost to the Motueka owners is the extent

---

526 For an example of this occurring, see above at [281].

527 As pleaded, the exchanges and allocations carried out as a result of the failure to exclude occupied land resulted in a loss to the suburban tenths of 800 acres at the time of the Spain inquiry, 300 acres in 1849, 150 acres in 1864, and 600 acres in 1862. In addition, 12 of the town sections (each of one acre) are alleged to have contained pa or cultivations. See above at [33]–[34].

528 On the analysis of the appellants, there were 34 Motueka/Moutere suburban sections identified as being “occupied tenths” (and an additional three sections that were swapped for occupied land in Takaka) and 12 occupied Nelson town sections. It is not clear to what extent these sections were later taken out of the tenths reserves (including in the transaction relating to the Church school and by vesting by the Native Land Court in 1901) and to what extent they devolved upon Wakatu in 1977. See the further discussion at [36]–[37], [161] and [281].

of the exchanges which effectively diminished the native tenths reserves by some 1,862 acres.

[440] For reasons that have been explained, I do not accept the Crown contention that the tenths reserves were always understood to be available for Maori occupation.[529] That seems to me to fly in the face of the repeated rejections of the view by officials in the years 1842–1845 and Wakefield's eventual acquiescence in January 1844 when it became clear the Land Claims inquiry was at an impasse over the Company's view that it was not obliged to exclude occupied lands because of the provision of the tenths reserves. The notion was scotched by the terms of the Spain award.

[441] The exchanges effected with Spain's approval at the Big Wood may or may not have been to achieve reservation of occupied lands that ought properly to have been excluded. It is hard to know. There is some ambiguity about the basis on which these first exchanges were made (whether because of existing cultivations or because of a preference unrelated to occupation at the time). But even if they were a pragmatic expedient to tidy up problems created by the failure of the 1842 surveys to identify areas of occupation before the settler sections were allocated, they do not suggest any more general abandonment of the obligation to exclude occupied land (an obligation officials considered themselves bound by under the terms of the Charter and Instructions and which Alexander Mackay, giving evidence to a Commissioner in 1870, understood should have happened).[530]

[442] The failure to separate occupied and tenths reserve lands resulted in losses to the suburban reserves. Exchanges in 1844 and 1849 shrank the tenths reserves to accommodate Maori who had been occupying sections allocated to settlers. In 1862 further sections were removed from the tenths reserves and allocated to the Maori

---

529 See above at [156]–[165].

530 The evidence was to an inquiry "respecting the grants to the Church of England out of the Native Reserve Estate at Motueka, Province of Nelson". Mackay testified that "The Golden Bay reserves were intended for the special use and occupation of the resident Natives, and similar reserves for occupation should have been made for the Motueka Natives. It has been to the detriment of the Trust property that they have, owing to the want of such occupation reserves, been allowed to occupy the New Zealand Company's reserves." See Alexander Mackay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 at 300.

occupiers.[531] Similarly, in 1864 suburban tenths reserves in Motueka were exchanged with the settler owner of a rural section in Motupipi whose land was occupied by local Maori.[532]

[443] That securing Maori occupations through recourse to the tenths reserves was in breach of the government's engagements and the terms of the Spain award was appreciated by officials throughout. Lord Stanley had declined the Company's request for a reduction in the tenths reserves fixed as a proportion of the sold lands, on the basis that Maori were entitled to the full amount of the reserves "in addition to the continued enjoyment of such land as belongs to them and they have not sold".[533] He was of the view that to compensate out of the tenths reserves those entitled to have their occupied lands excluded would involve both injustice towards Maori and "a breach of trust" on the part of the Government. In 1858 Thomas Brunner, a Commissioner of Native Reserves, told the House of Representatives inquiry that situating occupation reserves on tenths reserves was inconsistent with the trust on which the tenths were held because their benefit was "to the whole of the Natives concerned with the Nelson settlement, as they represented the tenths of lands in other districts".[534] Similar views were expressed by Alexander MacKay, Commissioner of Native Reserves and later Judge of the Native Land Court,[535] in 1870.[536]

[444] The exchanges on their face are inconsistent with the terms on which the Crown obtained the land as Crown land cleared of native title. They clearly led to loss of income for the tenths and do not seem to have been justifiable on any basis that has been put forward. In connection with the dealings by the Crown with the tenths reserves after enactment of the Native Reserves Act, it may be that some analysis of the actions taken against the provisions of the Act is required, as Clifford J thought[537] (although the powers provided by the legislation would not be determinative of whether the transactions were for the benefit of the trust or properly regarded as in breach of the obligations of trust I consider the Crown was under). Again, however, I

---

531 See above at [144].
532 See above at [280]–[281].
533 See above at [148].
534 See above at [278].
535 Mackay was made a Judge of the Native Land Court in 1884.
536 See above at [145].
537 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [176].

am of the view that findings of breach, not made in the High Court or Court of Appeal and not fully addressed in this Court, ought to be returned for determination in the High Court, at least if not precluded by limitation defences available to the Crown.

[445] Governor Grey's 1853 grant to Bishop Selwyn of 429 acres from the native tenths reserves and a further 489 of tenths land then occupied by Maori (and treated as occupation reserves) for a school at Whakarewa was also inconsistent with the purpose of the reserves.[538] The school was for the benefit of all races within the district. While the use of tenths reserve lands to provide a school partly for the benefit of the Maori proprietors may have been within the objects of the tenths reserves (a matter that would need to be determined), the disposal of land intended to be held as inalienable seems to have been beyond the power of the Crown as trustee. No statutory powers of alienation were conferred until 1856 and even then their exercise required justification as furthering the objects of the trust.[539] As the contemporary criticism of Grey's action suggests, there was no apparent lawful authority for the grant, which was not out of waste lands belonging to the Crown.[540] The 1993 re-vesting of the land[541] still in the ownership of the Church in the descendants of the Ngati Rarua and Te Atiawa individuals identified by Judge Mackay in the 1893 Land Court decision seems acknowledgement of wrong done in 1853. Again, in the absence of findings in the High Court and Court of Appeal, I would remit the question of breach in the actions taken for determination in the High Court.

The effect of the Limitation Act 1950

[446] The application of the periods of limitation prescribed by s 21(2) of the Limitation Act 1950 and its predecessors are a defence to the present claim unless it falls within the exception provided by s 21(1) of the Act. Section 21(1) excludes from the general limitation of six years for actions by beneficiaries for recovery of trust property or in respect of breach of trust (imposed by s 21(2)), claims based on fraudulent breaches of trust to which the trustee was a party or for recovery of trust

538 See above at [269].
539 See above at [109] and [244].
540 As is described above [270]–[271].
541 Described above at n 171.

property either in the possession of the trustee or received by the trustee and converted to his use:

> **21 Limitation of actions in respect of trust property**
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.
>
> (3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

[447] The effect of s 21(1) is that actions to recover trust property from a trustee or property or proceeds of trust property converted by a trustee to his own use are not subject to any period of limitation under the Act.[542] The reference in s 21 to trusts includes implied trusts and constructive trusts.[543]

[448] In *Soar v Ashwell*, Bowen LJ considered the extended sense in which trusts have been understood when dealing with limitations.[544] Of them he said:[545]

> It is not necessary in the present appeal to discuss the somewhat fluctuating expressions that can be discovered in equity authorities on the subject of constructive trusts. One thing seems clear. It has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary

---

542 Whether equitable compensation is available was not fully argued before us and will need to be considered without constraint by the High Court.

543 In s 2 of the Trustee Acts of 1883, 1908 and 1956, "trust" was defined to include implied and constructive trusts. See *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [295].

544 *Soar v Ashwell* [1893] 2 QB 390 (CA).

545 At 397.

> relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence: *Chalmer v Bradley*,[546] *Marquis of Cholmondeley v Lord Clinton*;[547] and this confidence or trust imposes on him the liability of an express or direct trustee.

[449] Someone who, without being appointed as a trustee, takes possession of the trust property and acts as a trustee, is liable as a "de facto trustee" and is treated as an actual trustee, subject to all the liabilities of an express trustee.[548] In *Soar v Ashwell*, while Lord Esher MR and Bowen LJ considered that an agent of the trustee was himself an express trustee, Kay LJ dealt with him as a de facto trustee because, although a stranger to the trust, he had acted as a trustee.

[450] As Bowen LJ indicated, the term "constructive trust" is used in different senses.[549] In *Paragon Finance plc v DB Thakerar & Co*, Millet LJ relied on the distinction between those who acquire trust property as trustee or when they are already a fiduciary or trustee in fact, and those upon whom an obligation to account is imposed in equity as a response to wrongful conduct.[550] The liability of those in the first category is not limited by the limitation legislation. They include those who put themselves in the position of a trustee and other fiduciaries who, although not strictly speaking trustees, owe equitable duties to the beneficiaries which are "independent of and preceded" the wrong which gives rise to the liability in the particular case. By contrast, those upon whom a constructive trust is imposed as a response to wrongdoing may plead limitation under the Act because, as Millett LJ explained, such a person "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 which is impugned by the plaintiff".

---

546 *Chalmer v Bradley* (1819) 1 Jac & W 51 at 67, 37 ER 294 (Ch) at 300–301.

547 *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 190, 37 ER 527 (Ch) at 598.

548 See JD Heydon and MJ Leeming *Jacobs' Law of Trusts in Australia* (8th ed, LexisNexis Butterworths, Chatswood (NSW), 2016) at [15-02] and the cases therein cited.

549 The word "constructive" here derives from "construe" and not "construct": see William Gummow "Bribes and Constructive Trusts" (2015) 131 LQR 21. Gummow cites Professor Scott's explanation that "the court construes the circumstances in the sense that it explains and interprets them; it does not construct them": Austin Scott and William Fratcher *The Law of Trusts* (4th ed, Little, Brown and Co, Toronto, 1989) vol 5 at [462.4].

550 *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) at 408–409.

[451] This distinction has been applied recently by the Supreme Court of the United Kingdom in *Williams v Central Bank of Nigeria*.[551] Whether it should apply to those who take trust property as knowing recipients (a point on which Lord Mance dissented in *Williams*) does not have to be addressed for the purposes of the present appeal.

[452] The fiduciary obligations the Crown was under here, both by reason of the circumstances of surrender of land in native title and by reason of its direct assumption of the reserves on behalf of those beneficially entitled, precede and are independent of the wrongful conduct claimed to be in breach of trust: the failure to get in the tenths trust property in the rural sections; the dealings which diminished the trust property through the exchanges and grants of land in the tenths reserves; and the failure to get in and preserve the excluded occupation lands.

[453] Since I am of the view that the Crown was a trustee for the tenths and the occupied lands at the time the lands were vested in it following the Spain award, I consider that the assets of these trusts were converted to the use of the Crown when it held the land as Crown land but failed to give effect to the conditions of the award and afterwards used the land for its own purposes, including in the making of grants of the land to the New Zealand Company and others thereafter. To that extent, I consider that s 21(1) of the Limitation Act preserves the claim, although the extent to which the Crown still holds assets of the trust or has received the proceeds of such assets and converted them to its use has not yet been the subject of specific findings of fact.

[454] The conclusions I have reached that the Crown was a trustee and fiduciary in relation to the tenths reserves mean that those beneficially interested are entitled to an account of what has happened to the trust property. That is available to them not as a response to established wrong, but as of right if the Court thinks it appropriate to enforce performance of the equitable obligation.[552] My provisional view is that such an order is likely to be appropriate and should take place before final consideration of questions of relief.

---

551 *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189.

552 *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at [167]–[170] per Lord Millett NPJ.

The application of the equitable doctrine of laches

[455] In addition to reliance on the Limitation Act, the Crown contends the appellants' claims are barred by the equitable doctrine of laches.

[456] The general approach is that mere delay does not establish laches,[553] although length of delay and the acts done in the interim are always important "in arriving at a balance of justice or injustice between the parties".[554] The doctrine of laches in equity is "not an arbitrary or a technical doctrine", as Lord Selborne LC explained in 1874:[555]

> 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.

[457] When a claim will be barred in equity because of lapse of time is not capable of any clear rule. It depends on the balance of justice, as Cooke P noted in *Neylon v Dickens*,[556] applying Lord Selborne's approach.[557] If there is a balance of justice to be achieved in any particular case, as the cases suggest, the full circumstances will always need to be considered. In *Eastern Services Ltd v No 68 Ltd*, it was acknowledged that "[e]quity has been most reluctant to accept that an equitable interest in land could be 'lost or destroyed by mere inaction'",[558] at least where the circumstances do not

---

553 The cases are set out in JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths, Chatswood (NSW), 2015) at [38-055].

554 See *Neylon v Dickens* [1987] 1 NZLR 402 (CA) at 407 per Cooke P.

555 *Lindsay Petroleum Company v Hurd* (1874) LR 5 PC 221 at 239; applied by this Court in *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 and by the Court of Appeal in *Neylon v Dickens* [1987] 1 NZLR 402 (CA).

556 *Neylon v Dickens* [1987] 1 NZLR 402 (CA) at 407.

557 Cooke P attributes the speech to Sir Barnes Peacock based on the Law Report, but that volume's Errata has a direction to read, for Sir Barnes Peacock "The Lord Chancellor (Lord Selborne)".

558 *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at [39]. The quote is from Dixon CJ and Fullagar J in *Fitzgerald v Masters* (1956) 95 CLR 420 at 433. Application of the principle is shown by cases such as *Sharp v Milligan* (1856) 22 Beav 606, 52 ER 1242 (Ch); and *Williams v Greatrex* [1956] 1 WLR 31 (CA).

amount to waiver or acquiescence on the part of the plaintiff.[559] When a plaintiff sues in a representative capacity, the courts have been even more reluctant to find that delay is a bar.[560]

[458] The Crown says it has been prejudiced by its inability to call and cross-examine witnesses with first-hand knowledge of the events in issue and by the loss of relevant documents. The Crown points out that there is little or no documentary material in relation to the rationale for the Crown's agreement to remodelling of the settlement in 1847 (leading to reduction of the tenths town sections), for example, or in relation to the rationale and consultation regarding the grant of land to the Bishop. The Crown also seeks to establish prejudice on several other bases. It is said to have suffered prejudice due to changes in position because it relied on having unencumbered title to land in Nelson and dealt with the land accordingly; and because it established and relied upon the Waitangi Tribunal process to settle the claims.

[459] I am not persuaded that the Crown has shown material evidential prejudice such as would justify the claim being barred for delay. I agree with the Court of Appeal's unanimous conclusion that the historical record is "relatively intact" and that, as Harrison and French JJ noted, no significant prejudice in a forensic sense to the Crown has been made out.[561] This accords with the view of Clifford J, who pointed out that the parties were able to present a full statement of agreed facts.[562]

[460] In relation to the failure to get in the rural reserves and in the dealings with the established reserves before 1856, no lawful basis on which the Crown, as trustee, could have retained the rural sections and disposed of the town and suburban sections has been put forward. In those circumstances, I do not consider that the motivation the Crown may have had at the time is of great significance. The suggestions put to us in

---

559 That is illustrated by *Re Jarvis* where delay was held to bar a claim for profits in a business but not to defeat a claim to property held on a constructive trust: *Re Jarvis* [1958] 1 WLR 815 (Ch).

560 *Attorney-General v Proprietors of Bradford Canal* (1866) 2 LR Eq 71 (Ch); *Attorney-General v The Sheffield Gas Consumers Co* (1853) 3 De G M & G 304, 43 ER 119 (Ch); *Evans v Smallcombe* (1868) LR 3 HL 249 at 257; *Boswell v Coaks* (1884) 27 Ch D 424 (CA) at 457; and *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 (PC) at 560.

561 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [195] per Ellen France J and at [223] per Harrison and French JJ.

562 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [297].

argument that the Crown is prejudiced by not being able to explore such motivation with witnesses of the time seems rather to be based on the assumption of political trust, which I do not accept. In any event, there is contemporary or near contemporary evidence that, even at the time, the Crown was seen by some to be acting in breach of trust in these and similar dealings.[563] So I doubt that any forensic prejudice (as opposed to prejudice through change of position) will be shown even after the final findings of fact on breach are made.

[461] I accept that the exchange of tenths land at Motueka for occupied Massacre Bay land in 1863 may have been under the statutory authority contained in the Native Reserves Act 1856. If so, the circumstances would require further inquiry before it could be concluded that the exchange was in breach of trust. In respect of that exchange, therefore, I do not think it is possible to dismiss the Crown's reliance on laches arising out of evidential prejudice at this stage. Similarly, the circumstances relating to the loss of occupation lands, which need to be considered further before findings of breach could be made, may raise questions of evidential prejudice through lapse of time.

[462] As a result, my view that it has not been shown by the Crown that laches provides a bar to the claim for evidential prejudice is provisional. It may have to be further addressed once the facts are found if the circumstances warrant its further consideration.

[463] I make a few preliminary remarks about the context in which any claim of specific prejudice arising out of lapse of time (whether in terms of forensic disadvantage or through change of position) would have to be assessed.

[464] First, although Ellen France J noted that if some matters of fact concerning breach and loss were ultimately not able to be resolved, "that would simply mean the appellants have not met the onus",[564] it is not clear to me that any onus would fall on

---

563 See above at [443].

564 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [195]. Clifford J had made the same point: *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 at [297].

the appellants if an account is ordered and deficiencies in the trust property cannot be explained by the trustee.

[465] It will be necessary, too, in any further hearing to consider the appellants' submission that the reluctance to conclude that an interest in land could be lost by inaction is amplified in a case concerning Maori land.[565] In that connection, it is significant that the tenths as constituted were to be inalienable and were to continue for the benefit of the descendents of the original proprietors. In comparable cases in Canada, it has been recognised that the Crown's undertakings to native owners implicate its honour.[566] In New Zealand it would be necessary to consider the background of the engagements given in the Treaty of Waitangi and the 1840 Charter and Royal Instructions, and the Spain award. The Court in *Manitoba Métis* recognised that "a court exercising equitable jurisdiction must always consider the conscionability of the behaviour of both parties".[567] It must be highly significant that Crown itself took the lands and benefited from them. Although the identified tenths reserves were kept apart (other than the dispositions which are the subject of particular claim), the balance of the land (from which the remaining tenths and the excluded occupied lands should have been set aside) became Crown land able to be granted or sold by the Crown or retained by it, to an extent not yet known.

[466] In any further balancing of the equities between the parties, it would be necessary to take into account the challenges that faced the beneficiaries in mounting a claim. Ellen France J adverted to them.[568] They may have seemed insuperable following the determination of the Court of Appeal in *Fitzherbert*, a decision I consider to have been wrong. The difficulties in the way of legal challenge discussed in *Paki (No 2)* also arise here, including the influence of political trust theory.[569]

---

565 In the context of interpreting Te Ture Whenua Maori Act 1993, Lord Cooke for the Board in *McGuire v Hastings DC* [2002] 2 NZLR 577 (PC) at [10] recognised the special significance of Maori land: "[t]he Board is disposed to think that in the context of the Act of 1993, with its emphasis on the treasured special significance of ancestral land to Maori, activities other than physical interference could constitute injury to Maori freehold land."

566 *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511; and *Manitoba Métis Federation v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623.

567 *Manitoba Métis Federation v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623 at [150].

568 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [197].

569 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [160].

[467] The Canadian Supreme Court has similarly recognised as relevant the fact that courts historically did not recognise indigenous peoples' rights, noting in *Manitoba Métis* "it is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights".[570]

[468] In addition, it would be relevant in any assessment of relative equities that the beneficiaries of the tenths did not sit on their hands, as Ellen France J[571] made clear in referring to the efforts which culminated in the Sheehan Commission and which also included repeated petitions to Parliament, beginning in 1854 and continuing into the 20th century.[572] The background of impoverishment of the beneficiaries, attributable in large part to deprivation of their lands (as Ellen France J accepted), would also have to be considered.

[469] Relevant, too, would be the lack of information provided to the beneficiaries about the legal status of the tenths reserves. In their petition of 17 March 1854, Tamihana Ngapiko and Simeon Te Wehi wrote that "[n]ot one of us understands any thing about the land on which we reside here. We wish to know to whom the power over these lands belongs – whether to us or to the Government".[573] The obscurity of the status of the land continued until recent times, as the evidence of Paul Morgan in the High Court makes clear in speaking of the efforts of his father in the mid-1940s to find out from the Maori Trustee details of the management of the land: he was told "Well, you get your cheque and that's all you need to know". As late as the 1970s he says that the Maori Trustee gave out no information about the land, where it was located and what the rentals were.

[470] The Crown argues that it has changed its position in dealing with land in Nelson on the basis that the land it obtained following the Spain award was demesne lands unencumbered by any equitable interest. In the Court of Appeal Harrison and

570 *Manitoba Métis Federation v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623 at [149].
571 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [197].
572 The tenths reserves were the subject of a number of petitions in the nineteenth and twentieth centuries. The first was the petition of 1854 to the General Assembly, described below at [469]. Other petitions followed: for example there were petitions for the return of the land granted to the Bishop in 1882, 1883, 1886, 1887 (in this year organised by tupuna of Mr Stafford), 1889 and 1897.
573 Petition from Tamihana Ngapiko and Simeon Te Wehi to the General Assembly (17 March 1854).

French JJ accepted this submission, at least in relation to dealings in Crown lands following the Native Land Court decision in 1893.[574] Whether subsequent dealings with land which the Crown obtained in breach of trust constitute a change in position sufficient to establish laches would need to be properly made out if the matter requires determination. I do not consider that it was open to the Court of Appeal to accept the assertion of prejudice, in the absence of full information and without balancing the equities as between the parties.

[471] Nor do I accept that Harrison and French JJ were correct to accept the Crown submission that it suffered prejudice because it altered its position by relying on the Treaty settlement undertaken following the report of the Waitangi Tribunal and which led to the deeds of settlement entered into in 2012 and early 2013.[575] Again, I consider that the prejudice would have to be substantiated by the Crown and weighed against the competing equities. On the evidence before the Court, I do not accept the Crown contention that the appellants have sought to "undermine" the Treaty settlement process by filing claims after the process was well advanced, after signing up to it, and when it became clear that the settlement did not suit their wishes for a distinct remedy for the Nelson tenths issues raised by Wai 56. I have referred to the history of the attempts to keep Wai 56 distinct.[576] They were flagged throughout. The mandate given to Tainui Taranaki ki te Tonga to negotiate a settlement of the Treaty claims in the wider district and among all tribal groupings within Te Tau Ihu, preserved a role for Wakatu as "kaitiaki" of Wai 56. Wai 56 was the only claim brought on behalf of all beneficiaries of the tenths reserves and seems to have been the only claim to raise the failure to fulfil the tenths reserves through provision of the rural reserves and the loss of tenths lands which are the subject of the present claim for relief in equity.[577]

---

574 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [222].
575 At [224]–[227].
576 Above at [45]–[49].
577 Wai 561 (brought on behalf of Ngati Kuia) had claimed that Ngati Kuia's exclusion from the tenths was in breach of the principles of the Treaty. Wai 207 (brought on behalf of Ngati Toa) similarly challenged the allocation of interests in the tenths reserves. And in Wai 566 (brought on behalf of Ngati Koata), Wai 594 (brought on behalf of Ngati Rarua) and Wai 607 (brought on behalf of Te Atiawa) the claims made included inadequacy in the administration of the tenths reserves. Other claims by whanau (for example Wai 830 and Wai 923) related to specific interests in tenths or occupation reserves.

[472] Tainui Taranaki ki te Tonga was prepared at one stage to explore with the Crown a separate settlement of Wai 56, but that initiative was rejected by the Crown. Mr Stafford and Wakatu sought an urgent hearing in the Waitangi Tribunal when it became clear that Wai 56 would be part of the overall settlement being negotiated and would not be the subject of distinct relief. It is not clear why the Tribunal declined to grant its application for an urgent hearing on relief. The reasons given (that the district-wide mandate was still in effect and other iwi groups wished to continue with the settlement negotiations) do not further address the merits of the claim to have Wai 56, which had been filed in 1986, determined by the Tribunal. The assertions made that the appellants have caused prejudice through allowing matters in the Waitangi Tribunal and the settlement process to proceed are not ones I am prepared to accept on the material before the Court and in the absence of full argument on the point.

[473] While the Crown does not go so far as to suggest that the appellants' conduct amounted to estoppel, waiver, or acquiescence, it maintains (as Harrison and French JJ accepted in the Court of Appeal) that the alteration of position entailed in the withdrawal from the mandated negotiation and settlement made it "wrong to allow a separate claim relating to the same land to be instituted so long after the alleged breaches occurred".[578] I think a number of responses may be made to this submission.

[474] The first concerns the nature of the Waitangi Tribunal claim and its effect. As the legislative history makes clear, the Treaty of Waitangi Act 1975 provides a system of inquiry into Treaty grievances which was intended to sit alongside, and not to oust, common law rights and remedies. In introducing the Bill, the Hon Matiu Rata explained that "[c]ommon law action is available, and the principal aim here is to cover matters for which the existing law provides no redress".[579] In the present case, the Waitangi Tribunal took the view that historical Treaty claims should be resolved between the Crown and iwi and that the shareholders of Wakatu had Treaty grievances only in respect of grievances after the establishment of Wakatu in 1977.[580] That approach is clearly not referable to legal claims on behalf of beneficiaries to a trust but is based on the jurisdiction of the Tribunal to "make recommendations [to the Crown]

---

578 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [227].
579 (8 November 1974) 395 NZPD 5726.
580 The approach of the Tribunal is referred to below at [478].

on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty".[581]

[475] The second point to be made in answer to the Crown assertion of prejudice arising from the settlement negotiations arises out of the sequence of events. The claim for Treaty breaches arising out of the treatment of the Nelson tenths reserves was filed in 1986. Although Wai 56 was heard by the Tribunal as part of its wider inquiry in Te Tau Ihu, the Wai 56 claimants were separately represented and had the carriage of the claim for Wakatu and the tenths reserves beneficiaries. They sought redress for the failure to protect and reserve the full tenths and for losses arising out of the management of the reserves by the Crown.

[476] After the Tribunal hearings concluded in 2004, a deed of mandate was prepared to form the basis of negotiations with the Crown. As has already been described,[582] the Crown preferred to negotiate with the body that had a mandate to represent all iwi affected. The Crown was reluctant to admit Wakatu as a member of the negotiating team and questioned its inclusion because it did not represent an iwi grouping. A compromise was reached in which it was agreed that Wakatu would be kaitiaki of the Nelson tenths claim for Wai 56 in the negotiations, but would not be beneficiary of any settlement (in apparent recognition of the fact that the beneficiaries of Wakatu, by succession and consolidation were not all descendants of the owners recognised in 1893). On that basis, the claimants in Wai 56, including Mr Stafford, signed the mandate, which was submitted to the Office of Treaty Settlements in December 2005.

[477] Following the reports of the Waitangi Tribunal (a preliminary report in 2007 and the final report in 2008), the Crown (which had accepted that it had been in breach of Treaty principles in matters covered by the claims) entered into negotiations for settlement with the mandated negotiator, Tainui Taranaki ki te Tonga (in which the different iwi groupings and Wakatu were represented). It was agreed that the different iwi would enter into distinct deeds of settlement.

---

581 Treaty of Waitangi Act, long title and s 6.
582 Above at [47].

[478] In December 2008, Tainui Taranaki ki te Tonga raised with the Crown whether it would entertain a separate settlement of Wai 56. In February 2009 the Minister for Treaty of Waitangi Negotiations, in a formal letter of offer to settle all the Te Tau Ihu claims, advised that the "historical aspects of Wai 56 will be discussed by the parties in good faith between the signing of this Letter of Offer and the Deed of Settlement". Wakatu sought to engage the Crown in separate negotiations over Wai 56, but was unsuccessful. The Crown position was that the Wai 56 claim was included in the wider settlement with iwi. As a result of this impasse, in December 2009 Wakatu sought an urgent Waitangi Tribunal hearing. When the Waitangi Tribunal declined to intervene (on the basis that the mandate was still in force, the negotiations were continuing, and there was no basis for considering that there would be prejudice to Wakatu in the settlement)[583] Wakatu issued the present proceedings.

[479] The proceedings were issued before the settlement negotiations were concluded. The negotiations were suspended until delivery of the High Court judgment. Deeds of settlement were concluded after the appeal to the Court of Appeal had been lodged. And that fact led to the specific reservation of the right to prosecute the appeal in the Court of Appeal and any further appeal contained in the deeds of settlement in terms later contained in the Settlement Act.

[480] This history does not suggest any "end run" around the settlement because its terms were disappointing, such as was suggested by counsel for the Attorney-General and which might affect the equities of Wakatu's position. The Wai 56 claimants and Wakatu had throughout sought a distinct settlement of the grievances about the tenths reserves and had issued proceedings only when it became clear that expectation (for which Tainui Taranaki ki te Tonga had provided some support in the negotiations) would not be met by the Crown.

[481] Some care also is required in accepting that a political settlement of claim to the Waitangi Tribunal, a body set up "to make recommendations [to the Crown] on

---

[583] The approach taken by the Tribunal was consistent with the view expressed in its final report, that historic grievances advanced as being in breach of the principles of the Treaty were most appropriately a matter "between the Crown and Te Tau Ihu iwi". It allowed that matters directly affecting the shareholders in Wakatu since its establishment in 1977 "should, on the other hand, be resolved between the incorporation and the Crown": see Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 3 at 1442.

claims relating to the practical application of the Treaty" when it finds that claimants have been "prejudicially affected" by Crown actions "inconsistent with the principles of the Treaty",[584] should pre-empt determination of a legal claim before the courts. That consideration clearly weighed with Parliament in enacting the Settlement Act.

[482] The final point to be made is that the Settlement Act, which explicitly preserves the appellant's appeal rights in the proceedings, is inconsistent with an assertion, unsupported by proof of specific prejudice, that the Crown would be prejudiced to the extent that it should be granted relief in equity by reason of its having entered into the settlement. This was the view taken by Ellen France J in the Court of Appeal. She dealt with the point shortly, noting it was clear Wakatu's position has been preserved by the settlement legislation.[585] I agree.

The effect of the Settlement Act

[483] As has been described,[586] the terms of the Settlement Act were argued by the Crown in the Court of Appeal to prevent the appellants' claims for relief. The Crown submitted that s 25(7)[587] draws a distinction between claims to which the plaintiffs are entitled in their own right and those which they advance on behalf of others (the customary owners): only the former are preserved. The same submission was made to this Court.

[484] I agree with the reasons given by Ellen France J in the Court of Appeal for rejecting this interpretation of the Settlement Act.[588] It is inconsistent with the purpose and text of s 25, construed as a whole. Section 25(6)(c)[589] provides that the plaintiffs are able to pursue the appeal, identified (in s 25(8)) by the specific filing number in the Court of Appeal.

[485] The notice of appeal in the Court of Appeal covered express trust, fiduciary duty and standing. It claimed that the High Court "erred in law in finding that there

---

584 Treaty of Waitangi Act, long title and s 6.
585 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [196].
586 Above at [66].
587 Section 25(7) is set out above at [65].
588 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [38]–[40] per Ellen France J (writing on this point for the Court).
589 Section 25(6) is set out at [64].

was no express trust". In the alternative, it was said that the High Court had erred in finding that there was no resulting trust or no constructive trust. The notice of appeal claimed that the High Court had erred in law in finding that the Crown did not owe a fiduciary duty in the acquisition of the land, in "[i]mplementing the terms of the Spain Commission recommendations and the 1845 Crown grant", and in "[a]dministering the Nelson Tenths Reserves and Maori customary land". It asserted that all three appellants had standing, contrary to the determination in the High Court. It sought declarations:

> A ... that the appellants have standing to bring this proceeding;
>
> B ... that the Crown was obliged to reserve and hold on trust for the whanau/hapu with mana whenua in the Nelson settlement land, one tenth of the land that was acquired, being at least 15,100 acres (including the town and suburban sections already allocated), in addition to excepting their pa, cultivations and burial grounds, and that it failed to do so;
>
> C ... that the Crown had fiduciary obligations to protect the legal and customary rights of the whanau/hapu with mana whenua in the Nelson settlement land in acquiring their land, in implementing the terms of the Spain Commission, recommendations and the 1845 Crown grant, and in subsequently administering the Nelson Tenths Reserves, and that the Crown breached those obligations;
>
> D An order remitting the proceeding to the High Court to determine the outstanding issues as to relief;
>
> E Costs;
>
> F Such further relief as this Court considers just.

[486] The exception provided by the Settlement Act to the general discharge of liability of the Crown for historical claims is therefore provided in respect of the specific claims in this case and for the benefit of those with mana whenua in relation to the tenths reserves. That the enforcement of the claimed trusts or fiduciary obligations by the named plaintiffs would have the effect of benefiting persons who are not named plaintiffs was known and appreciated in the legislation.

[487] I do not consider that s 25(7), intended "to avoid doubt", can cut down the meaning of s 25(6), which is the operative provision. The text and purpose of s 25(7) is to prevent any other claims "by or on behalf of a person who is not a plaintiff". It does not affect the scope of the claim specifically preserved which in its terms is not

confined to any interest Mr Stafford might have personally, as is the effect of the interpretation for which the Crown contends. Moreover, if the Crown is right in its argument, the claims by the corporate entities would have been entirely precluded, notwithstanding the saving in the legislation.

[488] Nor can the Crown's argument be reconciled with the legislative history. The Select Committee report on the Bill explained that it would have been "improper" to obstruct "final determination" of these "private law claims based in trust and fiduciary duty, not based on the Treaty breach".[590] It recognised that "there are issues regarding property rights, and the bill as it stands does not extinguish recourse to the courts":[591]

> The current orthodox position is that the Treaty of Waitangi does not give rise to directly enforceable legal obligations without specific statutory authority. *In the Wakatū proceedings the claims are based around the same factual grievances that are the subject of the settlement, but primarily raise private law claims based in trust and fiduciary duty, not based on the Treaty breach.* The ability to prosecute certain private law claims raised in Wakatū may be impacted by extinguishment provisions of the Tainui Taranaki Treaty settlements and their extinguishment clause, unless expressly preserved. Crown Law advice was sought on this matter and ultimately, it was considered … improper to obstruct final determination in the appellate courts. Legislative drafting was developed to specifically apply a preservation clause only to the current litigation and specific parties to that litigation.

The Select Committee correctly acknowledged that the roles of the Waitangi Tribunal and the courts are different.[592]

Standing

[489] There is generally no distinction in private law between questions of standing and the elements of a cause of action.[593] The availability of relief turns on whether the plaintiff has a cause of action against the defendant.

---

590 Te Tau Ihu Claims Settlement Bill 2013 (123-2) (select committee report) at 3.

591 At 3 (emphasis added); quoted in *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [41]; and *Proprietors of Wakatu v Attorney-General* [2014] NZHC 1785 (a separate judgment by Clifford J concerning caveats on land affected by the plaintiffs' claim) at [52].

592 A point I discuss in *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [165].

593 This was pointed out by Gaudron, Gummow, and Kirby JJ in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49, (1998) 194 CLR 247 at [43].

[490] There are indications in some English cases of a wider approach, more reflective of public law principles, at least when declaratory relief only is sought.[594] Subject to the discretion of the court, any person with an interest in the outcome of the proceedings may have standing. Such relaxation may be appropriate in cases in which equitable obligations are sought to be enforced. And they may have particular value in cases concerning group rights, such as the property interests of native peoples.

[491] In *Manitoba Métis* the Supreme Court of Canada stressed the importance of taking into account the collective nature of indigenous claims when assessing standing.[595] The Court in that case was prepared to recognise the standing of an incorporated body that represented the collective interests of the individual Métis claimants.[596] In this Court, in *Paki v Attorney-General (No 1)*, it was suggested that it may be possible to draw a distinction between those entitled to bring a representative claim and those who will benefit from any remedy granted.[597] Such flexibility is desirable when Maori collective interests are involved. Failing to be responsive to this reality would render the law deficient. It is also difficult to reconcile with the United Nations Declaration on the Rights of Indigenous People,[598] to which New Zealand is a signatory,[599] which recognises a right to redress for lands taken or used without the free and informed consent of its customary owners.[600] The Declaration affirms that:[601]

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. …

---

594 See *Feetum v Levy* [2005] EWCA Civ 1601, [2006] Ch 585 (CA) at [81]–[82] per Jonathan Parker LJ (with whom Sir Peter Gibson and Ward LJ agreed); and see *Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 (CA) at 19 per Sir Thomas Bingham MR and at 22 per Millett LJ; see also Lord Woolf and Jeremy Woolf *Zamir and Woolf: The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at [5-21]–[5-27].

595 *Manitoba Métis Federation v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623 at [43]–[44].

596 The context was a claim for "declaratory relief for the purpose of reconciliation", which is somewhat different to the present case.

597 *Paki v Attorney-General (No 1)* [2012] NZSC 50, [2012] 3 NZLR 277 at [12].

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

599 (20 April 2010) 662 NZPD 10229–10237.

600 See *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [158].

601 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/Res/61/295 (2007), art 40.

A narrow approach to standing does not accord with the principles expressed by the Declaration.

[492] I do not accept the contention on behalf of the Attorney-General that Wakatu is a stranger to any trust for the individual beneficiaries of the tenths reserves. It is true that the owners of Wakatu are not the same as the descendants of the customary owners of the reserves, although there is substantial overlap. But that is not the end of the matter. Wakatu was incorporated by Order in Council (under the provisions of s 15A of the Maori Reserved Land Act 1955) to hold the remaining Nelson tenths on trust for the successors of those found to be entitled as beneficiaries by the Native Land Court in 1893. Such a body is not properly treated as stranger to the trust but rather as analogous to a successor trustee or as a person responsible for correcting an antecedent breach of trust in fulfilment of the "dominant duty" of "recovering, securing and duly applying" the trust property.[602] Wakatu's responsibilities continue notwithstanding the fact that some of the beneficiaries have subsequently lost their legal interest in Wakatu itself. I consider Wakatu has sufficient interest to bring the claim on behalf of those beneficially entitled.

[493] Te Kahui Ngahuru Trust was settled by Mr Stafford to rectify the exclusion from Wakatu of some of those beneficially entitled by descent (through legislation which removed uneconomic interests) and the inclusion of others who are not descendants of the original owners but who have succeeded to interests in Wakatu (through legislation in effect when they succeeded to the interests). Its purpose is stated to be to "represent the Beneficiaries and to facilitate the pursuit and resolution of the Beneficiaries' claims against the Crown arising out of issues associated with the Nelson Tenths Land". It is not a successor trustee as I consider Wakatu should be treated. But for the reasons already given in indicating the need for some flexibility in enabling collective groups to bring claims relating to rights arising from native property interests, I would allow the claim to continue. The purpose of the Trust provides it with sufficient connection to advance the claim.

---

[602] *Re Brogden, Billing v Brogden* (1888) 38 Ch D 546 (CA) at 571 per Fry LJ. In *Young v Murphy* [1996] 1 VR 279 at 281–283, Brooking J pointed out that a trustee who fails to take proceedings against a former trustee may commit a breach of trust because he is obliged to get in the trust estate "which includes rights of action against co-trustees or former trustees and strangers for breach of trust". See also *Re Bennett* [1906] 1 Ch 216 (CA) at 230–231.

[494] There is no question of Mr Stafford's right as a beneficiary of the tenths reserves to claim relief in proceedings for breach of trust or fiduciary duty. Any beneficiary is entitled to have such matters investigated by the Court, as Lord Blackburn made clear in *Kinloch*. I also agree with the Court of Appeal that his customary authority as an acknowledged kaumatua of part of the collective customary owners permits him to bring a representative claim without the need to seek a representative order.[603] Chiefs of high standing have long advanced such collective claims.[604] I do not accept the submission that the fact that Mr Stafford cannot represent all interested hapu should affect his entitlement to claim as someone of standing who is directly interested.

Conclusion

[495] In agreement with Glazebrook, Arnold and O'Regan JJ, I would allow the appeal on the principal point on which it failed in the High Court. Each of us would hold that the Crown was a fiduciary in respect of the Nelson tenths reserves and the occupation lands. Each of us agrees that declaratory relief on this point is appropriate.

[496] I would hold that the Crown was in breach of its duties as trustee and fiduciary in failing to reserve the rural sections of the tenths reserves, amounting to 10,000 acres. There was no doubt as to the loss to the tenths and no basis was put forward to suggest that the Crown's failure to reserve the rural sections from the Crown land it obtained on the basis of the Spain award was other than breach of duty, if it was held to be trustee or fiduciary.

[497] I consider that it is well-arguable that the Crown was similarly in breach of its duties as trustee and fiduciary in failing to exclude the lands occupied by the hapu who were owners according to native custom of the lands the subject of Spain's award in 1845. Since however it is acknowledged that the facts as to breach have not been determined in the lower courts and that they need further consideration on the

---

603 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [30].

604 See for example: *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC); *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321 (CA); and *Wi Parata v Bishop of Wellington* (1877) 1 NZLRLC 14 (SC). In *Nireaha Tamaki v Baker* (1901) NZPCC 371 at 383 the Privy Council took the view that there was unlikely to be "any serious difficulty" in a plaintiff's suing on behalf of the other members of his iwi in order to enforce their collective rights where the iwi members were "too numerous to be conveniently made co-plaintiffs".

evidence, I would remit the claim by all plaintiffs for determination whether the Crown was in breach of trust in failing to exclude and reserve occupied lands. Similarly, I would remit the claims to the High Court for determination whether the Crown was in breach of the duties it owed as trustee and fiduciary in its dealings by exchange and grant and acquiescence in reduction of the Nelson tenths reserves between 1842 and 1882. The facts need to be more fully addressed.

[498] I would affirm the approach taken by Ellen France J in the Court of Appeal that the claims are not affected by the terms of the Settlement Act. I would also hold that the claims are not barred by the Limitation Act, subject only to further consideration of whether equitable compensation, if available, may be barred (a matter upon which we heard insufficient argument for determination and which will have to be considered by the High Court if it is in issue). I consider that whether the claims are barred in equity (including by reason of any change of position by the Crown in the implementation of the settlement) must follow determination of the extent of breach and any detriment to the Crown on facts yet to be found.

[499] I would allow the claims by all plaintiffs to continue. Whether each is entitled to substantive relief will require further consideration but is not appropriately determined as a question of standing. I do not think it is necessary to make any declaration as to the standing of all the plaintiffs (on the approach I favour, in minority position) or as to the standing of Mr Stafford (on which I agree with the other judges in the majority, Glazebrook, Arnold and O'Regan JJ). Although I consider a declaration as to Mr Stafford's standing is not necessary and would not make one in this Court, I do not think the making of a declaration to that effect in the Court of Appeal was an error that would itself have required correction on appeal.

[500] I consider that all consequential questions including as to any remedy (including the availability of a remedy by way of equitable compensation) should be remitted for determination in the High Court. It will be for that Court to consider whether it is appropriate to order an account to be made by the Crown of its dealings in the trust property.

[501] Since Mr Stafford has succeeded on the principal matters argued in this Court, points of considerable importance and complexity, I consider that he is entitled to an award of costs, which I would fix at $55,000, together with disbursements, certifying for second counsel. I would quash the costs orders made in the High Court and Court of Appeal.

GLAZEBROOK J

Table of Contents

	Para No.
Introduction	[502]
Background	[506]
The position up to 1845	[507]
Process of settlement	[520]
Management of the Tenths reserves to 1845	[526]
The position of the Company after 1845	[529]
Management of the Tenths reserves after 1845	[539]
Losses to Tenths reserves and Occupation lands	[547]
Parties' submissions	[553]
The position taken by the appellants	[553]
The Crown's position	[555]
Decisions below	[557]
Issues	[559]
The status of the land before 1845	[560]
The effect of the 1845 grant	[566]
Was there a trust?	[571]
The effect of the Loans Act and the 1848 grant	[583]
Breach of trust	[587]
Fiduciary obligations	[588]
The history and the nature of this claim	[591]
History of the claim	[592]
Statement of Claim	[603]
Relief sought	[606]
The appellants	[609]
The interveners	[619]
Standing in the courts below	[621]
High Court	[621]
Court of Appeal	[625]
Submissions to this Court on standing	[630]
The appellants' submissions	[630]
The Crown's submissions	[635]
The intervener	[638]
Analysis: standing	[641]
The claim	[641]
Claim on behalf of the individual descendants	[649]
Breach of trust claim	[663]
Collective claim	[668]
Conclusion on standing	[673]

Defences [674]
The analysis in the courts below [674]
The appellants' submissions [678]
The Crown's submissions [681]
The Limitation Act [684]
Laches [690]
The settlement [697]
Settlement process [697]
The Claims Settlement Act [705]
Decisions in the Court of Appeal [710]
The submissions [711]
My assessment [712]
Summary [718]
Relief [723]

Introduction

[502] The main issue in this appeal is whether the Crown breached enforceable obligations to reserve land in trust for the benefit of the Maori customary owners or, if not, whether the Crown was otherwise acting as a fiduciary in relation to that land. The land in question is in the Nelson area and forms part of Te Tau Ihu (the northern South Island). It had been the subject of a pre-1840 contract with the New Zealand Company (the Company).

[503] Subsidiary issues include the standing of the appellants to bring the claim, whether there are defences arising because of the lapse of time and the effect of the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 (the Claims Settlement Act) and the associated settlements of this and other Treaty of Waitangi grievances. These issues may also affect the relief that could be granted if the Crown has breached its obligations in relation to the land.

[504] The appellants were unsuccessful in both the High Court[605] and the Court of Appeal.[606] This Court granted leave to appeal on 8 May 2015.[607]

[505] In this judgment I first summarise the factual background. I then set out the arguments of the parties and the decisions in the courts below on the main issue in the appeal, before examining those submissions in light of the factual background. Next I examine the history and nature of the appellants' claim, before deciding the issue of standing, discussing limitation and laches and analysing the effect of the settlement, including the Claims Settlement Act. Finally, I discuss remedy.

Background

[506] The parties were generally content with the exposition of the factual background set out by Clifford J and this summary relies on his judgment to a large degree.[608]

The position up to 1845

[507] The Company, formed to promote the colonisation of New Zealand, issued its first prospectus relating to the establishment of a settlement in New Zealand on 2 May 1839. In October and November 1839 it entered into deeds with Ngati Toa chiefs at Kapiti and Te Atiawa chiefs at Queen Charlotte Sound purporting to purchase extensive areas of land, including land that subsequently became the Nelson settlement. The deeds of purchase guaranteed that a portion of the land would be held in trust for the vendors and their successors.[609]

---

605 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 (Clifford J) [*Wakatu* (HC)].

606 *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 (Ellen France, Harrison and French JJ) [*Wakatu* (CA)]. The lead judgment was delivered by Ellen France J. Harrison and French JJ added some comments on the claims for breach of fiduciary duty and a relational duty of good faith. They also set out their reasons for concluding that the appeal should be dismissed on the ground of delay or laches. Otherwise they agreed with Ellen France J's judgment: at [202]. In this judgment therefore I will refer to Ellen France J's judgment as the Court of Appeal view, except where there was disagreement.

607 *Proprietors of Wakatu v Attorney-General* [2015] NZSC 54 (Elias CJ, Glazebrook and Arnold JJ).

608 For a more detailed exposition, see the judgment of the Chief Justice in this Court. I note that the Chief Justice does disagree with some of Clifford J's factual findings. I have not found it necessary for the purpose of this judgment to come to a position on the differing views of the facts.

609 *Wakatu* (HC), above n 605, at [97]. See also the Chief Justice's judgment for more details on the New Zealand Company and the deeds of purchase: at [108]–[116] of her judgment.

[508] The Company appears to have considered that the reserved lands would be the real consideration or "true purchase-money" for the land. This was because the land was seen as of no value, absent settlement. The reserved land was not to be in large blocks as was the common practice for reserves in North America but was to be set aside "in the same way, in the same allotments, and to the same effect, as if the reserved lands had been purchased from the Company on behalf of the natives".[610] The Company considered that the reserved land, after British immigration and settlement, would be far more valuable than the whole of the land was before.

[509] It is common ground that the contracts would not have been effective under tikanga with regard to the Nelson land as they were not made with all the customary owners of that land.[611] In any event, as the appellants point out, tikanga did not recognise the concept of sale.[612] Tuku whenua was, however, recognised. This was not a permanent alienation of land but an invitation to outsiders to settle the land and become part of the community.

[510] On 21 May 1840, Lieutenant-Governor Hobson[613] made proclamations of British sovereignty over New Zealand. By the acquisition of sovereignty, the Crown acquired radical title to the entire territory of New Zealand, but this was held subject to the burden of Maori customary title.[614] The Crown could not assert an independent proprietary interest in land until customary title had been lawfully extinguished.[615]

---

[610] As evidenced in the 1839 directions from the Company director to Colonel William Wakefield. See also the evidence given by Edward Gibbon Wakefield to the British Parliamentary Select Committee in 1840: *Report from the Select Committee on New Zealand Together with the Minutes of Evidence, Appendix and Index* (House of Commons, 29 July 1844) at 24.

[611] Ngati Toa were not the customary owners of western Te Tau Ihu, as they had not occupied the land subsequent to its conquest as required by tikanga.

[612] In their third amended statement of claim dated 15 November 2010.

[613] Lieutenant-Governor Hobson was appointed Governor of New Zealand by the Letters Patent in November 1840: see at n 617 below.

[614] A summary of the effect of radical title acquired by the Crown with sovereignty was given on behalf of the Court (Cooke P, Richardson, Casey, Hardie Boys and McKay JJ) by Cooke P in *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20 (CA) at 24. See also *R v Symonds* (1847) NZPCC 387 at 389–390 per Chapman J; and *Nireaha Tamaki v Baker* (1901) NZPCC 371 at 384.

[615] *R v Symonds*, above n 614, at 390 per Chapman J, and at 393–394 per Martin CJ; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [30]–[40] and [47] per Elias CJ, [147]–[148] per Keith and Anderson JJ and at [183] per Tipping J (Gault P did not expressly comment on the extinguishment of customary title); and *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [28] and [68] per Elias CJ. This point was not discussed by the other judges in *Paki*.

[511] The acquisition of sovereignty also meant that the Crown had the exclusive right to acquire land from Maori and the Governor had the exclusive power to grant title to land.[616] The power of the Governor to make grants of Crown lands was given in the 1840 Royal Charter establishing the colony of New Zealand[617] and confirmed in the Land Claims Ordinance of 1841.[618] I agree with the Chief Justice that both the Charter and the Ordinance were real recognition of the customary title that existed over the entirety of New Zealand and further that any waste lands theory was expressly not adopted by the 1840 Charter.[619]

[512] In late November 1840, the Colonial Office and the Company reached an agreement with regard to the Company's pre-1840 purchases. The essence of the agreement was that the Company would receive a Charter and be allocated land based on the Company's expenditure on its settlement enterprise.[620] Clause 13 of that agreement provided that, "in fulfilment of, and according to the tenor of" the Company's engagements with Maori, the Crown would set aside reservations "for the

---

[616] This right of pre-emption was secured in the Treaty of Waitangi: *R v Symonds*, above n 614, at 390 per Chapman J, but existed in New Zealand prior to the acquisition of sovereignty, as evidenced by the Marquis of Normanby's instructions to Governor Hobson, dated 14 August 1839. For more, see Richard Boast *Buying the Land, Selling the Land*: *Governments and Maori Land in the North Island 1865-1921* (Victoria University Press, Wellington, 2008) at 19–30.

[617] The Royal Charter established New Zealand as a British Colony on 16 November 1840 and provided for the administration of the government of New Zealand as a separate colony. These were sent to Governor Hobson along with Letters Patent and Royal Instructions "for the guidance" of the administration. The 1840 Charter gave the Governor "for the time being" the power to grant land. The Charter also made it clear that none of its provisions were to "affect or be construed to affect the rights of any aboriginal natives of the said colony of New Zealand to the actual occupation or enjoyment" of any lands that they then occupied or enjoyed. The words of the Instructions which accompanied the 1840 Charter made it clear that any grant by the Crown had to be of land to which the Crown already had title: see at [127] of the Chief Justice's judgment.

[618] Land Claims Ordinance 1841 4 Vict 2. The Land Claims Ordinance was the last of a number of steps that formalised a proclamation made by Governor Gipps in New South Wales on 14 January 1840 that the Crown would not recognise as valid any title to land which was not derived from or confirmed by a Crown Grant, and that all purchases from the date of the proclamation would be null and void. This proclamation was followed by legislation to the same effect: the Court of Claims Act 1840 (NSW) 4 Vict 7. A similar proclamation was made by Lieutenant-Governor Hobson in New Zealand on 30 January 1840. In 1841 the Land Claims Ordinance replaced the Court of Claims Act. The Ordinance confirmed that the Governor had the power to make and deliver grants of land upon recommendation of a Commissioner appointed under the Ordinance: see also *Attorney-General v Ngati Apa*, above n 615, at [141] per Keith and Anderson JJ. I note *Nireaha Tamaki v Baker,* above n 614, at 373, where the Privy Council held that Ordinance did not confer title on the Crown and was "legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi".

[619] See at [100]–[106]; [229]–[233] and n 243 of her judgment. I thus disagree with the points made by William Young J at [839]–[841] of his judgment.

[620] *Wakatu* (HC), above n 605, at [101].

benefit of the Natives".[621] The 1840 agreement was expressed to cover land "at or in the neighbourhood of Port Nicholson [and] New Plymouth". The New Zealand Company asserted that the agreement also related to Nelson. Given that trustees were appointed by the Crown over the Nelson Tenths reserves in 1842, it can be assumed that the Crown accepted that the obligation extended to Nelson.[622]

[513] Under the Land Claims Ordinance of 1841, purchases made from Maori before 1840 were declared null and void unless confirmed by the Crown.[623] The Ordinance gave the Governor power to appoint commissioners to investigate purchases before 1840, their validity being assessed according to the "real justice and good conscience of the case".[624] Once this inquiry process was completed, the Governor was empowered (but not obliged) to make grants of land in accordance with the recommendations.[625]

[514] In December 1840 the Company was informed that its pre-1840 purchases were to be investigated by Commissioner William Spain, despite the 1840 agreement.[626] Commissioner Spain arrived in New Zealand in December 1841 and began by inquiring into the Company's purchases at Port Nicholson. Clifford J found that this investigation was effectively transformed into an arbitration and resulted in the payment of additional compensation to Maori, the final arrangements being reached in a meeting in January 1844.[627]

---

621 The Government also reserved to itself "in respect of all other lands, to make such arrangements as to them shall seem just and expedient for the benefit of the Natives." I agree with Arnold and O'Regan JJ that this has some significance: see at [780] of their judgment.
622 See below at [526].
623 Land Claims Ordinance, s 2.
624 Land Claims Ordinance, s 6.
625 After some confusion as to when the nature of the estate or interest arose, the Land Claimants Estates Ordinance 1844 7 Vict 20 clarified that the legal estate in the land was deemed to have been granted from the date of purchase of the land.
626 For a discussion of the Company's attempt to avoid an investigation, see at [115]–[116] of the Chief Justice's judgment.
627 For more details see *Wakatu* (HC), above n 605, at [131]–[135].

[515] The inquiry into the Nelson purchases also effectively turned into an arbitration,[628] with additional sums being paid to the true customary owners of the land.[629] On 24 August 1844 what were termed "deeds of release" in favour of the Company were signed by local rangatira[630] in relinquishment of their claims to land at Wakatu (Nelson), Waimea, Moutere, Riwaka and Tai Tapu (in Massacre Bay, now known as Golden Bay), but with the exception of their pas, cultivations and burial places.

[516] This led to Commissioner Spain reporting in March 1845 that the Company was entitled to a Crown grant of 151,000 acres in the Nelson area.[631] The Commissioner said that this did not include pas, burial grounds and areas actually in cultivation by Maori (called in this judgment the Occupation lands).[632] Nor did it include the Native reserves[633] set out on the plans attached to the report,[634] "the entire quantity of land so reserved for the Natives being one-tenth of the 151,000 acres awarded to the said Company" (called in this judgment the Tenths reserves). Commissioner Spain dismissed the Company's claim to land in the Wairau on the basis that no evidence had been put to him to substantiate that claim.[635]

---

628 I use Clifford J's terminology, although it is not entirely apt. The term, arbitration, implies that both parties were bargaining on the same basis, which, as noted above at [509], was not the case. Commissioner Spain too would have approached his task from his own cultural perspective and was in any event operating in accordance with the imperial agenda. He was also acting against the background of his knowledge of the 1840 agreement. That he knew of this is evident from his letter dated 29 January 1843: see the judgment of the Chief Justice at n 4.

629 Commissioner Spain reported to Governor FitzRoy in 1845 that "the Natives received a further remuneration, their pas and cultivated lands were secured to them, and one or two exchanges of the reserves for their use and benefit were effected". This was in addition to Captain Arthur Wakefield's initial payment and presents, see below at [521]. As the Chief Justice notes, these additional payments also remedied the fact that there was no adequate description of the land sold: see at [130] of her judgment.

630 The Maori of Massacre Bay (now known as Golden Bay) refused to sign the deed at this time and the money that was to be paid to them was deposited in a local bank. Shortly after Spain's determination the chiefs of Massacre Bay accepted the payment and signed a deed of release: see at [132] of the Chief Justice's judgment. In my view it is of no moment that the Massacre Bay deed was signed later than the other deeds of release. It suffices that it was signed.

631 I do not agree with William Young J when he says that Spain's recommendations represented government policy rather than findings of fact: at [868] of his judgment. The Land Claims Ordinance, under which Spain presented his report, permitted the extinguishment of customary title only if the purchase was deemed valid in the sense that it was just and equitable: see at [513] above. This is what his report addressed.

632 I agree with the comment at [154] of the Chief Justice's judgment that the Court of Appeal misstated Spain's determination: *Wakatu* (CA), above n 606, at [4].

633 There is potential for confusion when it comes to the use of the term "reserves": see at [37] of the Chief Justice's judgment for an explanation of the different references.

634 Clifford J in the High Court held that 5,100 acres of the Tenths Reserves were clearly delineated in the Spain Report: see *Wakatu* (HC), above n 605, at [153].

635 *Wakatu* (HC), above n 605, at [150].

[517] There is an issue as to whether the Tenths reserves should have been one-eleventh rather than one-tenth of the Company's land to accord with the New Zealand Company's Terms of Purchase document.[636] As one-tenth was Commissioner Spain's recommendation in his report, however, we must proceed on the basis that this was the just and equitable result in Commissioner Spain's view. There was also an issue as to whether the Occupation lands were part of the Tenths reserves or separate from them. The terms of Commissioner Spain's report makes it clear that they were separate.[637]

[518] On 29 July 1845, Governor FitzRoy executed the 1845 Crown Grant for Nelson, the terms of which mirrored Commissioner Spain's determination. The evidence before the High Court suggested that the grant had likely also been sealed.[638] At the time of the 1845 grant not all of the relevant land (and in particular the rural sections) in the Nelson region had been surveyed, however. This was not unusual. In 1844 Governor FitzRoy had announced that Crown grants would be issued with only a description of boundaries but on the basis that surveys would occur as soon as possible. This was to avoid long delays in settlements while waiting for full surveys.[639]

[519] The Crown grants for Wellington, Nelson and Taranaki were gazetted on 2 August 1845 as ready for collection upon payment of the requisite fees. The Company was dissatisfied with the 1845 Crown Grant for Nelson and in the end rejected it.[640] The main reasons for the rejection relate to the one-tenth/one-eleventh issue mentioned above,[641] a clause in the grant that allowed other possible land

---

636 See below at [520] and n 645; and the discussion in *Wakatu* (CA), above n 606, at [178]–[179]. Contrary to William Young J's view (at [875](a) of his judgment), the plans attached to the later 1845 grant do not in my view shed any light on the one-tenth versus one-eleventh debate. I also do not accept that a shift occurred from the calculation of the reserves based on land acquired to what was to be sold: at [861] of his judgment.

637 As Clifford J held: *Wakatu* (HC), above n 605, at [151]. Indeed Commissioner Spain, Lord Stanley (the Secretary of State for the Colonies) and Governor FitzRoy made it clear that there were to be no reductions to the Occupation lands: see the Chief Justice's judgment at [121]–[123], [146]–[148] and [154].

638 Neither of the Courts below were asked to decide on this point, and nor did they.

639 As gazetted on 9 May 1844. As the Chief Justice mentions at [134] of her judgment, this meant that the selections of sections for settlers and for the native reserves alike had proceeded on the basis of surveys which had not excluded all cultivations and occupations.

640 *Wakatu* (HC), above n 605, at [155]–[156].

641 See above at [517].

claimants to assert prior claims and an issue as to whether or not at least some Maori cultivation land had been purchased by the Company.

Process of settlement

[520] The Company had issued a "Terms of Purchase" document[642] in February 1841 which in summary set out that the second settlement,[643] (location to be determined) would consist of 1,000 allotments, each comprising a one acre town section, a 50 acre suburban section[644] and a 150 acre rural section. The document indicated that "subject to an agreement with Her Majesty's Government," in addition to the 201,000 acres offered for sale, a quantity "equal to one-tenth thereof" would be added as native reserves.[645]

[521] The Spain inquiry process did not halt the Company's settlement plans. Captain Arthur Wakefield, leading the Company's expedition to find the site of the second settlement, arrived in Nelson on 1 November 1841. He came with "presents" for local Maori.[646] A hui was held at Kaiteretere and meetings were held in other places. Clifford J accepted that Maori participated willingly in the process in anticipation that "mutual benefit would be derived" by the settlement.[647] He also held that it was more likely than not that the Tenths scheme was referred to in the course of Captain Wakefield's dealings with Maori.[648]

---

642 This was a supplementary document to the 1839 Prospectus which did not contain these details.

643 The first was at Port Nicholson.

644 These were referred to as accommodation sections in the Terms of Purchase and in some of the other material before the Court. Other documents referred to suburban sections. In this judgment, I refer to them as suburban sections to avoid the possibility of them being confused with the Occupation lands.

645 As noted above at [517], this is the root of the tenth versus eleventh debate. It appears that the Company intended these reserves to be in addition to the sections sold; that is, the settlement would be 221,100 acres in total and the Tenths one-eleventh of the total settlement. The opposing view, taken by Commissioner Spain, was that the reserves were intended to be included within the number of acres offered for sale, meaning that the Tenths would be one-tenth of the total settlement.

646 The total value of these presents were £980 15s, according to the Spain report and seem to have been designed to overcome possible issues with the Ngati Toa purchase: see at n 611 above and the Chief Justice's judgment at [126].

647 *Wakatu* (HC), above n 605, at [108]–[109]. Additional sums were also paid to Maori in 1844: see above at [515] and n 629.

648 *Wakatu* (HC), above n 605, at [110].

[522] Settlers began arriving from 1 February 1842 onwards.[649] Prior to their arrival, a ballot had been held in London on 30 August 1841 to determine the order of choice of the sections. In the ballot four wheels were drawn from; the first to identify the purchaser (including in this the Tenths reserves), then a separate ballot was drawn to establish the order of priority for the town sections, accommodation land and rural land.[650] The choice for the Tenths reserves was to be by a Company officer "expressly charged with that duty and made publicly responsible for its performance."[651] The Tenths reserves were therefore to be subject to the ballot in the same way as for other purchasers and thus interspersed with settler sections.[652]

[523] By April 1842 the survey of the 1,100 Nelson town sections was complete. The 100 Tenths reserves to be taken from those town sections had been chosen and identified on the maps by the resident Police Magistrate, Henry Thompson. Attention was then turned to the suburban sections and 100 (5,000 acres) were selected as Tenths reserves in August 1842.

[524] There is some evidence that Magistrate Thompson did not have the authority to make the selections. This was raised in 1848 by the Board of Management of Native Reserves in Nelson.[653] Thompson was, however, at some stage prior to the selection of the Tenths reserves appointed agent of the reserves and later Sub-Protector of Aborigines for the Nelson district, although no gazette notice for this appointment has been found. It may have been in this capacity that he made the selections. Alternatively, it may be that Magistrate Thompson made the selections as "a representative of the government" by virtue of his position as Police Magistrate as

---

649 At [111].

650 Details on the ballot itself are scant. However it appears from the 4 September 1841 edition of the *New Zealand Journal* that "four little boys" were stationed behind the four wheels of the ballot. Each wheel had an opening "large enough to admit a child's arm." The ballot lasted for nearly eight hours, with "only the intermission of half an hour to rest the children".

651 As expressed in the instructions from the Company to Colonel Wakefield in 1839. In October 1840 the Company appointed Edmund Halswell, an English lawyer, to the "office of commissioner for the management of the lands reserved for the natives in the New Zealand Company's settlements".

652 The intention being that wherever a settlement was formed the Maori families would have "every motive for embracing a civilized mode of life."

653 This was raised in relation to a claim made by Thompson's estate. The Board was of the view that Thompson had been directed to act as "Protector of Aborigines" but no instructions had been given regarding the management of the reserves and Thompson had taken it upon himself to select them.

the Chief Justice suggests.[654] However, whether he had actual authority is ultimately of no significance as Thompson did select the Tenths reserves and it was on the basis of his selections that the settlement occurred.

[525] The final task was to survey and allot the rural sections. There not being sufficient suitable land for the proposed rural sections, the Company looked to the Wairau Valley. While exploring that valley in June 1843 some members of the expedition, including Captain Arthur Wakefield and Magistrate Thompson, were killed in an encounter with local Maori. A number of Maori were also killed. The rural Tenths reserves were never allocated.

Management of the Tenths reserves to 1845[655]

[526] On 26 July 1842 the Colonial Secretary, Willoughby Shortland, wrote to the then Chief Justice suggesting that the Tenths reserves at Port Nicholson, Nelson and New Plymouth be placed under the supervision of the Chief Justice (Sir William Martin), the Bishop of New Zealand (Bishop Selwyn) and the Chief Protector of Aborigines (George Clarke Senior), pending the creation of a statutory trust, the objects of which were to be the education, spiritual care and advancement of Maori.[656] Prior to this, there had been some general protection of the Tenths reserves by Halswell in his role as office of the commission for the management of the lands,[657] Thompson in his role as agent of the native reserves,[658] and Governor Hobson.[659]

[527] On 6 September 1843, the Bishop wrote to Magistrate Thompson setting out the general principles to be employed in managing the reserves: letting them out to derive income.[660] There were plans to use the resulting funds to erect a chapel, a hostel for the use of Maori visiting Nelson for trade, a hospital and a school on certain town

---

654 See at [125] and n 140 of the Chief Justice's judgment.
655 For a more detailed exposition of the management of the reserves from 1842–1856, see the Chief Justice's judgment at [234]–[271]. I agree with the Chief Justice's analysis of what is to be taken from the history of the management of the reserves at [287]–[293] of her judgment. My only issue with her analysis is whether the land was treated as inalienable prior to 1856 (at [289] of her judgment): see at n 771 below.
656 For more on the content of these instructions, see *Wakatu* (HC), above n 605, at [121]; and the Chief Justice's judgment at [236]–[239].
657 See above at n 651.
658 See above at [524].
659 See also the discussion by the Chief Justice at [234]–[236].
660 See the judgment of the Chief Justice at [238] and [243] for the powers given to the Board.

acres. Magistrate Thompson and his successor Alexander McDonald administered the reserves acting on Bishop Selwyn's instructions until January 1845.

[528] The Chief Justice resigned as trustee in July 1843, concerned about possible conflicts of interest. The Bishop resigned from the office of trustee in February 1844, in anticipation of the Native Trust Ordinance 1844.[661] That Ordinance, which never came into force, would have established a trust for native "education and advancement".[662]

The position of the Company after 1845

[529] In 1847 the Nelson settlement was re-organised. The remodelled scheme reduced the town sections from 1,000 to 530 (effectively to the number already sold). The Nelson Tenths town reserves were reduced proportionately from 100 to 53. This re-organisation was approved by Governor Grey (who had replaced Governor FitzRoy) but it is unclear under what authority he was purporting to act.[663] There was no reduction in the suburban reserves as it was considered that Maori would object.[664]

[530] Also in 1847 Governor Grey arranged purchases from Ngati Toa in the Wairau.[665] This gave sufficient land to fulfil the Company's engagements to its settlers for their rural sections.[666] As part of that purchase, around 117,000 acres in the Kaituna Valley were reserved for the Maori vendors. Fox, the Resident Agent for the Company at Nelson, wrote to William Wakefield saying that this reserve would "at least amount to the whole of the quantity to which the Natives are entitled under the Nelson Scheme (15,000 acres)" and that "in fairness the natives having got their full quantity in the

---

661 As the Chief Justice sets out at [249] of her judgment, it is evident that Governor FitzRoy did not recognise any trustees of the Native Reserves and this could also have led to Bishop Selwyn's resignation.

662 I agree with the Chief Justice that, after the Spain determination, the trust envisaged by the Native Trust Ordinance 1844 was not easily reconciled with the district benefit on which the clearance of native title was conditional: at [248] of her judgment. But again this is of no moment as the 1844 Ordinance never came into force.

663 As pointed out by the Chief Justice at [168] of her judgment.

664 See also the discussion by the Chief Justice at [169] of her judgment.

665 The Company was to reimburse the Government for a proportionate share of the cost. For more details of the purchases, see the judgment of the Chief Justice at [199]–[213].

666 It appears that the ballot process for the settlers had been abandoned in 1847 and instead the rural sections were to be allocated by application to the Company.

Wairau should have none elsewhere". Fox was of the view that the Maori in Massacre Bay were of the "same tribe" as those in the Wairau.

[531] Governor Grey, however, made it clear that the Maori in Massacre Bay were "in fairness entitled to have some land reserved there for their use" as they did not participate in the Wairau purchase.[667] He considered that 3,000 acres (being one-tenth of the 30,000 acres Fox indicated he thought were contained in Massacre Bay) was "much more than need to be allotted to them" and that "perhaps 500 acres" would be sufficient. Later Lieutenant-Governor Eyre of New Munster[668] indicated that Police Magistrate Sinclair[669] was to reserve as much land as was considered "sufficient for the present and future wants" of the Maori but "not the whole quantity of land specified" in Commissioner Spain's report (4,500 acres being one-tenth of the 45,000 acres that Spain's report indicated would be granted to the Company from Massacre Bay).

[532] Evidence from Mr Parker for the Crown indicated that in the end the total reserves in Massacre Bay constituted 737 acres of Occupation lands and 626 acres of additional reserves. It is not clear to me that the 626 acres were seen as being rural Tenths reserves. They may have been an addition to the Occupation lands to resolve the types of issues with settlers that are described in the Chief Justice's judgment.[670]

[533] Over this period the Company was experiencing financial difficulties. In 1847 the Imperial Parliament enacted the New Zealand Loans Act 1847 (the "Loans Act").[671] This Act provided for the Company to act as agent of the Crown in

---

667 As made clear to Colonel William Wakefield: see at [203] of the Chief Justice's judgment.

668 As the Chief Justice sets out at n 255 of her judgment, between 1848 and 1853, New Zealand was made up of two provinces, New Munster and New Ulster, each of which had its own Legislative Council, House of Representatives, Lieutenant-Governor and Executive.

669 Donald Sinclair was made Police Magistrate in Nelson following Magistrate Thompson's death in 1843.

670 See for example at [143] of the Chief Justice's judgment. The view that the 626 acres were not Tenths reserves may be substantiated by the following comment by Alexander MacKay, Commissioner of the Native Reserves: He said "[t]he Golden Bay reserves were intended for the special use and occupation of the resident natives, and similar reserves for occupation should have been made for the Motueka Natives. It has been to the detriment of the Trust property that they have, owing to the want of such occupation reserves, been allowed to occupy the New Zealand Company's reserves": Alexander MacKay *Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 2 at 300.

671 See the detailed description in the Chief Justice's judgment at [193]–[198].

promoting the colonisation of New Zealand.[672] The Crown was to advance a loan to the Company[673] and all demesne lands of the Crown in the province of New Munster (the southern North Island and the South Island) would be vested in the Company in trust for three years.[674] At the end of the three year term, the Company was permitted to relinquish its undertaking if it thought fit, in which event all Company land would revert to and become vested as demesne land of the Crown.[675] The Loans Act also confirmed that the Governor had the power to grant land to the Company and that any grants made thus far to the Company were valid, as were any grants that would be made within six months of the passing of the Loans Act.[676]

[534] There was a new Crown Grant of 1848 covering the entire northern South Island.[677] Excluded from the 1848 grant were reserves for public purposes, the Occupation lands[678] and the Tenths reserves shown in the accompanying plans and schedules.[679] Those plans and schedules showed the land that had already been surveyed and allocated as Tenths land in 1842, less the land lost as a result of the re-organisation of the town sections in 1847.[680] The rural Tenths reserves were not excluded from the grant.

[535] Prior to the 1848 grant, correspondence between Governor Grey, Attorney-General Swainson and William Wakefield had taken place as to the content of the grant. Swainson proposed that the land granted to the Company would exclude the reserved lands. Wakefield did not believe that such terms were practical. His

---

672 New Zealand Loans Act 1847 (Imp) 10 & 11 Vict c 112, s 6.
673 Section 15.
674 Section 2.
675 Section 19.
676 Section 14.
677 The Company was of the view that the 1845 grant was not adequate and had continued its negotiations for a grant it considered acceptable to meet its current settlement needs: see at [519] above.
678 The appellants submit that the excepted pa, burial grounds and cultivation areas in the plans accompanying the 1848 grant were incomplete as the process for identifying these had never been properly completed. Be that as it may, as outlined at [510] above, the Crown had no power to make grants of land over which customary title remained and therefore they would not have been able to grant the Occupation lands, even if they had not been identified on the plans attached to the grant.
679 The Tenths reserves were referred to as Native reserves in the 1848 Grant. However, for consistency, I continue to refer to them as the Tenths reserves. For more details on the plans, see *Wakatu* (HC), above n 605, at [162].
680 As noted above at [529], there had been a reduction from 100 town acre sections to 53. For more details on this, see *Wakatu* (HC), above n 605, at [158].

suggestion was that grants be issued on the basis that the Company would re-convey what land they did not eventually require as well as the Tenths reserves. Any reserves or Occupation lands already identified would, however, be excluded as proposed by Swainson. This was in line with the Otakou (Otago) purchase of 1845, where the agreement to re-convey the land was in a side agreement. This history could provide a fuller explanation of the wide nature of the 1848 grant.[681]

[536] Clifford J was of the view that Governor Grey had abandoned the Tenths reserves by the time of the 1848 grant.[682] The Chief Justice does not agree with this conclusion.[683] It is not necessary for me to come to a concluded view on this point. I would find a breach of trust in either scenario. If Governor Grey did abandon the Tenths scheme, he had no legal authority to do so. After all, these Tenths reserves were an important part of Commissioner Spain's conclusion that the purchase was just and equitable and thus vital to the extinguishment of customary title.

[537] Despite the Loans Act and the 1848 grant, the Company became insolvent and in July 1850 informed the Crown that it had discontinued its operations. In 1851, under s 19 of the Loans Act, the balance of the Company land that was still the subject of the 1848 Crown Grant reverted to the Crown. The New Zealand Company's Land Claims Ordinance 1851 provided the mechanism for the Crown to satisfy the claims of the settlers who had bought land but had never been issued any title by the Company.[684]

[538] Because this was of some importance to the Crown argument, I mention here that the Crown Grants Amendment Act 1867 provided that "every grant whether formally cancelled or not of the land comprised in which a new grant has been duly issued … shall be deemed to be and to have been absolutely void ab initio to all intents and purposes whatsoever".[685] This therefore meant that the 1845 grant was deemed null and void.

---

681 As the Chief Justice indicates at [183]–[184] of her judgment.

682 *Wakatu* (HC), above n 605, at [157]. William Young J is also of the view that the selection of rural reserves was abandoned by the Colonial Government: see at [882](c) of his judgment.

683 See the Chief Justice's judgment at [224].

684 New Zealand Company's Land Claims Ordinance Act 1851 15 Vict 15. The mechanism of this is discussed in *Wakatu* (HC), above n 605, at [167].

685 Crown Grants Amendment Act 1867, s 10.

Management of the Tenths reserves after 1845

[539] Clifford J said that, between 1845 and 1848, clear evidence of the arrangements and responsibilities for administering what remained of the Tenths reserves in Nelson is scant. In his view, this may have been because the Native Trust Ordinance 1844 never came into force.[686] Local agents were, however, appointed in Nelson to manage the reserves of behalf of Governor FitzRoy after the Chief Justice and the Bishop of New Zealand resigned as trustees. What evidence that does exist indicates that the reserves were not administered with any enthusiasm between 1844 and 1848.[687]

[540] On 17 June 1848 the appointment of Messrs Poynter, Carkeek and Tinline as a Board of Management for the Tenths reserves of the District of Nelson was gazetted.[688] They were tasked with examining the state of the Nelson reserves and all arrangements relating to them.[689] Clifford J noted that their appointment appeared to have been ad hoc and not authorised by any particular statutory instrument.[690]

[541] In July 1853 that Board of Management was replaced by the Commissioner of Crown Lands in Nelson and in December 1856 three Commissioners of Native Reserves were appointed to the Nelson District pursuant to the New Zealand Native Reserves Act 1856. The Native Reserves Act 1856 applied both to reserve lands where native title had been extinguished and to reserve lands where native title had not been extinguished.[691] The Native Reserves Act 1856 did not, however, purport to create a trust over the Tenths reserves. It was instead aimed at their administration.[692]

---

686 *Wakatu* (HC), above n 605, at [170].
687 See at [251]–[253] of the Chief Justice's judgment for more detail.
688 See above at [534] as to what these reserves consisted of at the time.
689 For more details see the Chief Justice's judgment at [254]–[267].
690 *Wakatu* (HC), above n 605, at [171].
691 *Wakatu* (HC), above n 605, at [172]. Different management regimes were proposed for each type of land: at [174]–[175].
692 See the judgment of the Chief Justice at [29] and [272]–[275]. As the preamble to the Act stated, its purpose was to provide an "effective system of management". This disposes of Clifford J's view that the enactment of the Native Reserves Act 1856 was significant and that it prohibited any claims against the Crown except by reference to that Act: see *Wakatu* (HC), above n 605, at [176].

[542] The Native Reserves Act 1882 provided for the remaining Tenths reserves[693] to be vested in the Public Trustee, subject to the trusts attached to those lands. The Public Trustee applied to the Native Land Court under s 16 of that Act to ascertain those who had beneficial interests in the Nelson Tenths land. The Native Land Court found that Ngati Rarua, Ngati Tama, Te Atiwa and Ngati Koata owned the land at the time of the sale to the Company. Judge MacKay held that:[694]

> … although the Reserves made by the Company were situated in certain localities, the fund accruing thereon was a general one in which all the hapus who owned the territory comprised within the Nelson Settlement had an interest proportionate to the extent of land to which they were entitled, at the time of the Sale to the Company.

[543] The surviving Tenths members and the descendants of those who were deceased were identified. Court orders of 14 March 1893 included a list of the names of the beneficial owners of the land and their proportionate shares.[695]

[544] The Nelson Tenths were administered by the Public Trustee until 1920, when s 13 of the Native Trustee Act 1920 vested them in the control of the Native Trustee. As permitted by that Act, the Native Trustee appears to have obtained deposited plans of the land and certificates of title were issued in the name of the Native Trustee. The Native Trustee became the Maori Trustee in 1947.

[545] In 1975 the Commission of Inquiry into Maori Reserved Land (the Sheehan Commission) recommended that control of the land be returned to the Maori owners. The owners were given the choice of remaining with the Maori Trustee, forming a trust under s 428 of the Maori Affairs Act 1953 or forming an incorporation. After a postal vote, an incorporation was selected because, as one witness said in evidence, "it gave the owners a direct say in the governance of the new organisation through annual general meetings and the election of the Committee of Management every three years."

---

693 There is some confusion as to whether the remaining Occupation lands were also vested in the Public Trustee.

694 (1892) 3 Nelson MB 1–9.

695 There was another list of beneficial owners made in 1895 but the statement of claim in these proceedings refers only to the 1893 list: see at [603] below. Therefore in this judgment I refer only to the 1893 list.

[546] In 1977 the first appellant,[696] the Proprietors of Wakatu Incorporation (Wakatu) was established[697] and legal title of the land commonly known as the Nelson-Motueka and South Island Tenths was vested in the Incorporation.[698] This land was, in 1977, the residue of the Nelson Tenths and the Occupation reserves, totalling some 3,066 acres. At the time of incorporation, the legal and beneficial title was held by the Proprietors of Wakatu as required by the legislation then in force.[699] Currently, under the Te Ture Whenua Maori Act 1993, the incorporation holds only the legal title to the land, on trust for the beneficial owners in their proportionate shares.[700]

Losses to Tenths reserves and Occupation lands

[547] The appellants say that some 800 acres (including at and around Te Maatu, otherwise referred to as the Big Wood) in Motueka were erroneously treated by Commissioner Spain as Tenths reserves rather than cultivation areas, thus diminishing the Tenths reserves available to Maori.[701] In his report Spain referred to the 1841 interactions between Maori and Captain Arthur Wakefield and accepted that it appeared Maori had stipulated at that time that Big Wood at Motueka was to be reserved for them, as well as their Occupation lands.[702] Spain said that these conditions were complied with through the large number of Tenths reserves allocated in Big Wood. It seems therefore that he may have assumed (wrongly in the appellants' submission) that the Big Wood was not Occupation land.[703] If it had been, then it

---

696 The effect of the Wakatu Incorporation Order 1977 (which provides that the incorporation is to be known as the "Proprietors of Wakatu") and s 250(1)(a) of Te Ture Whenua Maori Act 1993 (which provides that each order of incorporation must include the word "Incorporation" as the last word in the name) appears to mean that its correct title would be the "Proprietors of Wakatu Incorporation". I do note, however, that the Register of Maori Incorporations published by the Maori Land Court has Wakatu's name as "Proprietors of Wakatu Incorporated".

697 This was pursuant to s 15A of the Maori Reserved Land Act 1955 by the Wakatu Incorporation Order 1977, and now constituted under Part 13 of Te Ture Whenua Maori Act 1993: *Wakatu* (HC), above n 605 at [14]. For more on Wakatu, see at [610] below.

698 Explanatory note to the Wakatu Incorporation Order. For more, see *Wakatu* (CA), above n 606, at [13].

699 Maori Affairs Amendment Act 1967, s 31(2).

700 Te Ture Whenua Maori Act 1993, s 357. For more, see below at [610].

701 For more details on these dealings, see *Wakatu* (HC), above n 605, at [182]. See also at [136]–[143] of the Chief Justice's judgment.

702 See at [127]–[128] of the Chief Justice's judgment.

703 I note that the discussion between Stephens, the Company Surveyor, and Ngati Rarua chief, Te Poa Karoro, indicates that it was conveyed that Big Wood would be classed as Occupation lands. Stephens said: "I explained to him through the interpreter I brought with me, that their potatoe grounds would be left entirely for their own use – and that they would also have one tenth of all that we surveyed besides – he appeared to comprehend this, and I left him more satisfied." See at [128] of the Chief Justice's judgment.

would not have been able to be allocated as Tenths land as it would have remained in customary ownership.[704]

[548] There may have been further losses to the Tenths reserves because of the way in which Magistrate Thompson, who selected the Tenths reserves, operated. According to Professor Williams' evidence,[705] Thompson used "his high ranking ballot numbers to select sections of particular significance for Maori".[706] This meant that some of the sections he chose were in cultivation and therefore constituted Occupation land. This may have been a result of confusion as to what the Tenths reserves were intended to encompass: whether one of the purposes was the protection of existing occupied land, or whether they should constitute land in addition to land Maori currently occupied.[707] As Commissioner Spain found, it was the latter.[708]

[549] Further losses to the Tenths reserves occurred in the period up to 1864. There was the reduction in town sections due to the reorganisation in 1847.[709] The Crown did not point to an explicit power under which the Governor was purporting to act in this reorganisation, apart from saying that the reduction is a good example of the Crown's broader role of making decisions about the settlement and balancing the interests of all involved. The Crown submits that the modification was in the interests of Maori as 100 sections in a failed settlement would be of little to no benefit to Maori, whereas 53 sections in a more successful settlement would "almost certainly be more valuable". The Crown does admit that there is little available information about the rationale for the decision. Even if there is some validity in the Crown's argument, it is difficult to see that it would justify what is essentially a breach of trust. At the least, any relinquishment should have been on the basis that the sections would be reinstated if the town expanded. I do not accept that any breach of trust could be justified by an argument that the Crown owed wider duties to the settlers who were not beneficiaries of the Tenths trust.[710]

---

704 See at [162] of the Chief Justice's judgment.

705 Professor David Williams, a Professor of Law, gave expert evidence on behalf of the appellants on the historical record.

706 This ballot process is discussed above at [522].

707 See also the evidence of Native Law Commissioner Thomas Brunner in 1870 at [140]–[141] of the Chief Justice's judgment.

708 See above at [516]–[517]. See also at [152]–[154] of the Chief Justice's judgment.

709 See above at [529].

710 I discuss the Crown submissions relating to conflicting loyalties below at [580]–[582].

[550] In 1849 the Board of Management exchanged six suburban Tenths reserves sections totalling 300 acres for six suburban sections allocated to settlers in or near Big Wood which Maori had refused to relinquish.[711] The Crown submits that it could make such exchanges and that the exchange was in the best interests of those entitled to benefit. This argument could only succeed if the Big Wood sections were properly Tenth reserves, which, if the appellants are correct, they were not.[712] If the appellants are correct, these Big Wood sections, being Occupation land, should not have been allocated to settlers and this exchange would have further diminished the Tenths Reserves.

[551] In 1853 the Crown granted land to the Bishop of New Zealand in trust to provide income for an industrial school at Whakarewa, in the Motueka district. Of the 1,078 acres of land granted to the Bishop, 918 acres were Tenths reserves or a combination of Tenths reserves and Occupation land.[713] This land was returned by way of statutory trust to Ngati Rarua and Te Atiawa descendants in 1993.[714]

[552] The High Court addressed further alleged diminutions in the Tenths Reserves and Occupation lands that occurred between 1853 and 1864 totalling some 750 acres.[715] The appellants also point to additional diminutions over this period with regard to both alienation of Tenths reserves and the wrongful allocation of Occupation lands as Tenths reserves.[716]

---

711 See *Wakatu* (HC), above n 605, at [185].

712 The appellants' position is that the Occupation lands should have remained in customary ownership, as Commissioner Spain accepted: see above at [517].

713 For more information on this, see the Chief Justice's summary at [269]–[271] of her judgment.

714 Pursuant to the Ngati Rarua-Atiawa Iwi Trust Empowering Act 1993. See also the discussion of this at [160] and n 171 of the Chief Justice's judgment.

715 *Wakatu* (HC), above n 605, at [186].

716 The Chief Justice discusses swaps made in 1862, where particular individuals or hapu were identified to occupy 12 Tenths reserves in Motueka: see at [144] and n 156 of her judgment. In her view, this further diminished the Tenths reserves by benefiting particular families and individuals when the land should properly have been excluded from the Tenths and additional provision made. I do not necessarily accept that allowing some Tenths reserves land (assuming it was correctly categorised as such) to be occupied by certain beneficiaries would have breached the terms of the trust. Indeed, occupation had been envisaged by at least some New Zealand Company officials. For example the instructions given to Colonel William Wakefield by the Company provided that as a result of the Tenths reserves, "the chief native families…will have property in land intermixed with the property of civilized and industrious settlers": *Wakatu* (HC), above n 605, at [90]. But note MacKay's comment at n 670 above.

Parties' submissions

The position taken by the appellants

[553] The appellants argue that the Crown was bound by the outcome of the process that upheld the Company's purchase (the Spain determination and the 1845 grant) and that it could not purport to extinguish by the 1848 grant either Maori customary ownership or the trust and/or fiduciary obligations owed in relation to the Tenths reserves. For the purposes of this appeal, the appellants accept that Commissioner Spain was entitled to inquire into and recommend validation of the Nelson sale. This judgment therefore also accepts that as the correct position.

[554] In the appellants' submission, the Tenths reserves were either the subject of a trust for, or a sui generis fiduciary obligation owed to,[717] the customary owners of the land.[718] They submit that the trust and/or fiduciary obligations have been breached by the Crown. As to the Occupation lands, it is submitted that those remained in Maori customary ownership which had not been extinguished. Any purported transfer of those lands to the Crown or to third parties was therefore an invalid expropriation.

The Crown's position

[555] The Crown submits that all of the land that was the subject of the Company purchases in the Nelson area remained in customary ownership until 1848. Most of the land then passed to the Company through the 1848 grant. The "pas, burial places and native reserves" excepted from that grant to the Company vested in the Crown as demesne lands, apart from those in Massacre Bay which remained in customary ownership. The Crown says that the 1845 grant was never delivered and was thus of no effect as a deed and that it was in any event superseded by the 1848 grant and deemed void ab initio by the Crown Grants Amendment Act 1867.[719]

---

[717] Relying on the Canadian authorities *Manitoba Métis Federation v Canada (Attorney-General)* 2013 SCC 14, [2013] 1 SCR 623; *Alberta v Elders Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261; *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245; and *Guerin v The Queen* [1984] 2 SCR 335.

[718] The other causes of action were constructive trust and breach of good faith obligations.

[719] The Crown also submits that there was a change in policy in relation to the reserves. For more on this, see the Chief Justice's judgment at [229]–[233].

[556] It is submitted that there was no express trust and no fiduciary obligations relating to the Tenths reserves. As to the alleged trust, the Crown submits that the required three certainties of a trust were not present. At most there was a political commitment before 1848 to administer the reserves already identified and to set aside further reserves.[720] The evolving policy with regard to reserves was eventually given legislative effect (as had always been intended) in 1856 and later in 1882.[721] In the Crown's submission, there was no fiduciary relationship because the Crown's governmental obligations are inconsistent with such obligations.

Decisions below

[557] The courts below generally accepted the Crown's position.[722] In the High Court, Clifford J was of the view that the 1840 agreement was "essentially a political compact"[723] and that later arrangements regarding the administration of the Tenths reserves were "interim and somewhat pragmatic arrangements" pending the creation by statute of some form of trust.[724] Clifford J held that the 1845 grant did not provide the requisite certainty of intention.[725] Further, the subject-matter was uncertain for the rural Tenths. There was thus no express trust.[726] Clifford J also dismissed any claims of fiduciary obligations owed by the Crown.[727]

[558] The Court of Appeal accepted the Crown's submission that the Occupation lands excepted from the 1848 grant vested in the Crown.[728] The Court agreed with Clifford J that certainty of intention[729] for all the Tenths land was lacking as well as certainty of subject-matter for the rural Tenths.[730] The Court also agreed that the

---

720 The Crown does not, however, seek to rely on any "political trust" doctrine found in *Tito v Waddell (No 2)* [1977] Ch 106 (Ch).

721 As established in the Native Reserves Act 1856. A similar ordinance was enacted in 1844 but was never brought into force: see above at [528].

722 The Chief Justice sets out the lower courts findings in more detail: see at [52]–[61] and [67]–[76] of her judgment.

723 *Wakatu* (HC), above n 605, at [101] and [230].

724 At [235].

725 At [241].

726 At [246].

727 At [301], [303] and [308]. Clifford J did acknowledge that there was an argument that, after the Nelson tenths had been identified, a fiduciary obligation could have arisen, but said that this argument had not been made before him: at [309]–[310].

728 *Wakatu* (CA), above n 606, at [141].

729 At [153].

730 At [161].

Crown did not owe any fiduciary obligations. Ellen France J accepted that a fiduciary duty could arise in cases such as the present.[731] However, in this case, a fiduciary duty was not established as the arrangements "reflected agreements of a political nature which were to be realised in legislation."[732] Further, the duty of loyalty was not established as the Crown was balancing competing interests. Harrison and French JJ were of the view that it would be a rare case where the Crown would owe an absolute duty of loyalty to one group alone as it would negate an essential element of the Crown's constitutional responsibilities.[733]

Issues

[559] The following issues arise from the submissions:

(a) What was the status of the land before 1845?

(b) What was the effect of the 1845 grant?

(c) Was there a trust?

(d) What was the effect of the Loans Act and the 1848 grant?

(e) Were there fiduciary obligations owed to the customary owners?

The status of the land before 1845

[560] Under the 1841 ordinance, pre-1840 contracts for the sale of land were said to be null and void.[734] However, there was to be a process of investigation with the prospect of such contracts effectively being validated and land grants made. It must have been assumed that the Company's contracts would be validated in some measure (perhaps on the basis of additional compensation as in fact occurred). There is no other explanation for the Crown allowing the Company's settlement plans to

---

731 At [118].
732 At [123].
733 At [209].
734 This was also established in a proclamation by Governor Gipps and Governor Hobson: see above at [510].

continue.[735] The Crown also entered into the 1840 agreement with the Company effectively endorsing those settlement plans.

[561] It seems to me therefore that the Company's pre-1840 contract for the purchase of land in Nelson is best seen as akin to a conditional contract: conditional on the inquiry process and the Governor accepting any recommendations arising out of that process.[736] The contract was not of course conditional from inception[737] but effectively became so after the acquisition of British sovereignty. In this sense, the Crown had interposed itself into the contractual relations between the Company and the vendors but without becoming a party to the contract.

[562] It has been held in New Zealand that conditional contracts are capable of passing an equitable interest to the purchaser so long as it is evident that it was intended that equitable title was to pass. The purchaser's interest remains contingent pending fulfilment or waiver of the condition.[738]

[563] In this case it was intended by the Company and the customary owners[739] that the arrangements between them would lead to European settlement and that the Tenths reserves would pass to the Company to be held on trust for the customary owners. With the intervention of British sovereignty, the contracts were, as noted above, effectively rendered conditional but with an expectation that the Spain inquiry process would ultimately lead to title passing at least in part, as evidenced by the fact that settlement was allowed to commence.

[564] This means that the Company can be seen as having equitable title to the land, although the Company's interest remained contingent pending the outcome of the

---

735 See above at [520]–[523].

736 This analogy is strengthened by the Land Claims Estates Ordinance 1844 deeming the legal estate to be in the claimant from the time of purchase rather than the date of any Crown grant.

737 And of course the pre-1840 contracts were not even with the customary owners: see above at [509]. However, there were later dealings with the customary owners and it is those dealings that were effectively validated as just and equitable by the Spain inquiry: see above at [521].

738 See *Bevin v Smith* [1994] 3 NZLR 648 (CA) at 665; *McDonald v Isaac Construction Co Ltd* [1995] 3 NZLR 612 (HC) at 619; *Abis Properties Ltd v Orion NZ Ltd* HC Christchurch CIV-2004-409-659, 3 August 2004; *The Diplomat Apartments Ltd v Cook Island Property Corp (NZ) Ltd* HC Wellington CIV-2006-485-1312, 21 September 2006; *Hinde, McMorland and Sim Land Law in New Zealand* (online looseleaf ed, Lexis Nexis) at [10.009]; and John Burrows (gen ed) Brookers *Land Law* (online looseleaf ed, Thomson Reuters) at [CV7.08(2)(d)].

739 But note what is said above at [509] in relation to Maori not having a concept of sale.

inquiry process and the Crown acceptance of the Spain determination. The Nelson contract, absent the 1840 agreement with the Crown, would have included the Tenths reserves as these were included in the sale, albeit subject to the obligations to hold these on trust for Maori in accordance with the agreement of the Company to do so.

[565] To continue the analogy of a conditional contract, the Crown therefore can be seen as having effectively taken an assignment of the Company's conditional contract in relation to that Tenths reserve land, meaning that the Company's contingent equitable interest in that land must be seen as effectively having been transferred to the Crown.

The effect of the 1845 grant

[566] The Crown argues that the 1845 grant was never delivered and was thus of no effect. This meant that all the land remained in customary title. The Court of Appeal saw merit in the Crown's submission but did not consider it necessary to decide the point.[740]

[567] I would have been inclined to accept the appellants' submission that Crown grants made under the public colonial seal (the colonial equivalent of the Great Seal[741]) required no delivery and that they took effect from the date expressed in the grant.[742] In any event, evidence before the High Court suggests that the grant may have been sealed.[743] It is, however, irrelevant for the purpose of this appeal whether or not the 1845 grant was valid for the reasons explained below.

---

740 See *Wakatu* (CA), above n 606, at [137]–[139]. The High Court came to no concluded view as to whether the 1845 grant came into effect: *Wakatu* (HC), above n 605, at [242]–[243].

741 The Crown submits that, for the law of deeds, the seal of the colony was not the same as the Great Seal. I do not need to decide whether that was the case or not.

742 See *Halsbury's Laws of England* (4ed, reissue, 1996) vol 8(2) Constitutional Law and Human Rights at [849] and [859]; *R v Symonds* (1847) NZPCC 387 at 389; and *In re Bradley Brother's Application* [1920] NZLR 339 at 352–353. The Chief Justice refers to the Conveyancing Ordinance 1842 5 Vict 2 at [90] of her judgment. This Ordinance, while not relied on by the parties, provides in s 1 that "every deed shall be signed by the conveying parties", in s 2 that "Sealing shall not be necessary except where a deed is made by a Corporation" and finally in s 3 that "Delivery and indenting shall not be necessary in any case." The relevant grant was signed by Governor FitzRoy. Therefore as long as "conveying parties" is interpreted as referring only to the party conveying the land and not both parties to the transaction, the Ordinance appears relevant and binding.

743 This evidence was in the reply brief of Professor David Williams.

[568] In order for the Crown to have the power to grant the land after the Spain inquiry process, it had to be part of the demesne lands of the Crown. Land could only be part of the demesne lands of the Crown if customary title had been extinguished.[744] In my view the process of inquiry (to ensure any sale was just and equitable) and the Crown's acceptance of the results of that inquiry extinguished customary title over all of the land covered by the contract and made all of that land (including the Tenths land) demesne land of the Crown.[745] This process preceded the 1845 grant and was not dependent on it.[746] This was necessarily so as, if customary title had not already been extinguished, there was no power to make the 1845 grant.[747] It follows that it was not the 1845 grant that extinguished customary title.

[569] The 1845 grant would (assuming acceptance by the Company) have served to transfer both legal and equitable title to the land granted to the Company but the grant did not include the Tenths land which would remain demesne lands of the Crown.[748] The Occupation lands remained in customary ownership as they were not part of the Spain determination or the grant. The 1845 grant never purported to transfer to the Company the Occupation lands or the Tenths reserves.

[570] The fact that the 1845 grant was not accepted by the Company is also irrelevant.[749] It is inconceivable that the Crown would have considered that any failure

---

744 See above at [510]. At the relevant time this could only occur if the pre-1840 dealings were just and equitable. This standard was met, as evidenced by the Spain report and award and its acceptance by the Crown.

745 As the Chief Justice notes at [92] and [330] of her judgment, the starting point or basis for this is the Land Claims Ordinance 1841 and the Spain determination. The Court in *Regina v Fitzherbert* (1872) 2 NZCAR 143 at 172 found that no formal act of cession to the Crown was necessary and that, from and after the purchase of the lands by the Company, the lands became part of the demesne lands of the Crown. This supports my view that it was the validation of the purchase that caused the land to become desmesne lands of the Crown. This is not to suggest that I agree with the rest of the reasoning in *Fitzherbert*: see the Chief Justice's analysis of that case at [303]–[330], with which I agree. I further agree with Alexander MacKay's response to *Regina v Fitzherbert* and the summary of this by the Chief Justice at [323]–[325] of her judgment.

746 In this regard I agree with the Chief Justice's comments at [91] of her judgment and with the views expressed by Arnold and O'Regan JJ at [762] of their judgment.

747 On this point it is evident that I disagree with William Young J on the significance and effect of the 1845 grant and the treatment of the grant by the Court in *Regina v Fitzherbert*, above n 745: see at [852] and [879]–[880], [912], [915] and [920] of his judgment.

748 As to the rural Tenths reserves yet to be surveyed, the Crown's interest would have remained contingent on survey and identification of the particular land but those rural Tenths reserves were excluded from the Spain determination and not granted to the Company.

749 William Young J's view (at [878] of his judgment) that the reserves were dependent on the 1845 grant being accepted and the Nelson settlement developed may possibly have had force, had settlement of Nelson not in fact preceded the 1845 grant: see at [521]–[523] above.

of that grant would lead to the granted land remaining in customary ownership rather than becoming demesne land of the Crown. The Spain inquiry had held that the transfer of all of the land (including the Tenths reserves) was just and equitable. It cannot have been envisaged that the customary owners would be free to sell their land again and be paid twice for it, if for some reason a grant failed or was not accepted.

Was there a trust?

[571] The Crown argues that there was no certainty of intention or object with regard to any of the Tenths reserves.[750] With regard to the rural Tenths reserves that had not been surveyed, it argues that there was also no certainty of subject matter. It maintains that, at most, there was a political commitment to administer the reserves, with the intention of later creating a statutory regime.

[572] I do not accept these submissions. As to certainty of intention, the alienation from the customary owners was on the basis that, as part of the consideration for the sale, the Tenths reserves would be set aside and held in trust for them. The Company therefore intended to set up a trust.[751] The Crown, by virtue of the 1840 agreement, had agreed to take over the Company's trust obligations[752] and this meant that the Tenths reserves (including the rural Tenths reserves) were expressly not included in the 1845 grant, despite forming part of the consideration for the sale and therefore contributing to Commissioner Spain's view that the transaction was just and equitable.

[573] The Crown may have intended to put in place a statutory regime relating to the Tenths reserves but that does not mean that, in the meantime, there was no intention

---

[750] As the Chief Justice mentions at [55] of her judgment, the Crown submitted in the High Court that any trust would also be void as a result of the rule against perpetuities. I consider that the reasoning of Clifford J on this point has much to recommend it: *Wakatu* (HC), above n 605, at [250]–[251]. In the hearing before this Court Mr Goddard QC for the Crown accepted that there could be a trust for a collective customary group that did not raise perpetuity concerns. I would add that the trust, on the Crown's argument, was in any event intended to be for a limited term, given that it was envisaged that it would be replaced by a statutory instrument.

[751] The Company was of the view that the Tenths reserves were the most valuable consideration given in the sale: see above at [508].

[752] The 1840 agreement provided that, "in fulfilment of, and according to the tenor of the Company's engagements with Maori" the Crown would set aside reservations "for the benefit of the Natives": see above at [512]. That the Company passed on its trust obligations to the Crown in the 1840 agreement aligns with the contemporary thinking at the time, as evidenced by the correspondence between Lord Stanley and the Company in 1843, and later Governor FitzRoy in 1844: see at [115]–[116] and [122]–[124] of the Chief Justice's judgment.

to hold the Tenths reserves on trust.[753] In light of the Crown's then concern to ensure that pre-1840 contracts were only validated if the transactions were just and equitable, it is inconceivable that it would have considered itself free to ignore the obligations to the customary owners that it had taken on with regard to the Tenths reserves.[754] If there was no trust, as the Crown now asserts, then part of the consideration for the sale would not have been honoured.

[574] And, indeed, the Crown did not ignore its obligations with regard to the land in the period up to the 1845 grant. The trustees it appointed administered the surveyed Tenths reserves from 1842 effectively as trust lands.[755] The Crown and Magistrate Thompson would presumably have been involved in the survey and selection (through the ballot) of the rural Tenths reserves on a similar basis to the involvement with the town and accommodation sections had the Company's expedition into the Wairau ended differently. As noted above, the Crown can be seen as holding a contingent equitable interest in the Tenths reserves (including the rural Tenths reserves) up until the Spain inquiry was completed and its determinations accepted. This interest was, however, in turn intended to be held on trust for the customary owners.

[575] There is near contemporary recognition that supports this analysis in the form of Alexander MacKay's memorandum to the Under Secretary of the Native Department in 1873.[756] After the decision in *Fitzherbert*[757] Mackay collated a historical record of the Company's dealings in Wellington and Nelson. Among his

---

753 I do not, contrary to William Young J's view, consider it possible to split the land from its proceeds so that there is a trust in relation to the proceeds but not the land: at [871] of his judgment.

754 William Young J suggests a similar analysis at [911] of his judgment. I do not agree with his reasons for rejecting it set out at [912](a)–[912](c) of his judgment. In particular I reject his concentration on the position and views of the Company as regards the 1845 grant. What was found to be just and equitable by Spain, and accepted by the Crown before it made the 1845 grant, must be seen as making the actual terms of the transaction between the Company and the customary owners irrelevant.

755 Formal trustees were not needed before this point, however, as that is the year actual settlement commenced. The Chief Justice also points to the role of the trustees as evidence that the Crown intended to, and did, deal with the Tenths reserves as trustee. She lists other examples of historical actions by the Crown that evidence a similar intention: at [416] of her judgment.

756 For more, see the Chief Justice's judgment at [323]–[325].

757 *Regina v Fitzherbert*, above n 745.

conclusions, MacKay said that “there is sufficient evidence that the Crown, through its officers, did effectually set apart these lands as Native reserves”.[758]

[576] It is certainly true, as pointed out by Arnold and O’Regan JJ,[759] that, in the period before 1845, some of those involved saw the trust as a proposed trust only. This is unsurprising, given that, until the Spain determination and the acceptance of the recommendations by the Crown, the land remained in Maori customary ownership. The fact, however, that the Nelson settlement was allowed to continue shows that the prospect of the land remaining in customary ownership was seen as effectively non-existent. Given that the “proposed trust” was a vital part of the consideration for the land and that land was being surveyed and allocated throughout this period, the fact that the Tenths reserves would be held on trust was also effectively certain.

[577] As to certainty of object, in the High Court Clifford J held that the range of ways the proposed objects were expressed from 1837 could have created uncertainty as to the beneficiaries, but held that by 1842 there was sufficient certainty of object.[760] The Court of Appeal saw no reason to depart from Clifford J’s view.[761] I agree with the analysis of Clifford J. The trust was for the customary owners of the land and this is sufficient certainty to meet the requirements of certainty of object.[762]

[578] Moving to certainty of subject matter, there is no issue with regard to the Tenths reserves already surveyed and selected. As to the rural sections, the entitlement was for a defined acreage (10,000 acres) within defined boundaries (the 151,000 acre area defined on the plan annexed to the 1845 Crown grant). In addition, there was a mechanism for selecting the property (the Company’s ballot scheme).[763]

---

758 Alexander Mackay “Memorandum by Mr A Mackay on Origin of New Zealand Company’s ‘Tenths’ Native Reserves” [1873] III AJHR G2b at 17. See also his comments, set out at [145] of the Chief Justice’s judgment, that the loss to the Tenths was “greatly to be regretted” and that land should have been provided elsewhere.

759 At [783] of their judgment.

760 *Wakatu* (HC), above n 605, at [247]–[248].

761 *Wakatu* (CA), above n 606, at [163].

762 On this point I agree with the Chief Justice: see at [422] of her judgment.

763 See above at [522].

[579] There is conflicting authority on whether a trust can arise in a case where the property purportedly subject to a trust is undivided but ascertainable.[764] These cases relate to property that is fungible.[765] I do not consider them applicable to land which is in a special category and where an equitable interest will often (as it effectively did here) pass to a purchaser.[766] In this case the Crown held the equivalent of a contingent equitable interest in the land in question. In the circumstances, this seems to me to be sufficient to constitute certainty of subject matter.

[580] The Crown supports the Court of Appeal's conclusions that the 1840 agreement was a political compact that was to be realised in legislation and submits that it did not create a "private law" trust. This submission is related to the submission on certainty of intention discussed above. The Crown also submits that it was, over the relevant period, balancing the various interests of settlers and Maori, meaning that no duty of loyalty had been established.[767]

[581] I accept that the 1840 agreement could be described as a political compact. This does not mean that the trust obligations were not true trust obligations. As noted above, those obligations were part of the consideration for the purchase. The obligations were taken on by the Imperial government, which undoubtedly had the power to do so.[768]

---

[764] Compare, for example, *Re London Wine Co (Shippers) Ltd* [1986] PCC 121 (Ch) which required specific identification or segregation of trust property; approved in *In Re Goldcorp Exchange Ltd (In Receivership): Kensington v Liggett* [1994] 3 NZLR 385 (PC); to *Hunter v Moss* [1994] 1 WLR 452 (CA), where a declaration that shares were held on trust was held to meet the requirement of certainty of subject-matter. In this case, the Court of Appeal favoured the view of *Kensington v Ligget* and distinguished *Hunter v Moss*: *Wakatu* (CA), above n 606, at [154]–[159].

[765] I note that in *Goldcorp*, above n 764, a distinction was drawn between ex-bulk and generic goods: see at [429]–[430] of the Chief Justice's judgment.

[766] Because of this, there is no need to resolve the conflicting cases set out at n 764. If it were necessary to decide the point I would agree with the Chief Justice's analysis at [423]–[436]. I do agree with her view that the cases are not applicable in this case for the reasons she gives. For more, see Andrew S Butler (ed) *Equity and Trusts In New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 77–79; David Hayton: "Uncertainty of subject-matter of trusts" (1994) 11 LQR 335; Sarah Worthington, "Sorting Out Ownership Interests in a Bulk: Gifts, Sales and Trusts" [1999] JBL 1; and Patrick Parkinson "Reconceptualising the Express Trust" (2002) 61 CLJ 657.

[767] For more on this argument, see *Wakatu* (CA), above n 606, at [153] per Ellen France J, applying reasons given at [123].

[768] One of the arguments for the Crown was that the colonial governor had no power to take on such obligations.

[582] I do not accept that the Crown was unable to give its undivided loyalty to the customary owners because of its general governmental obligations including to the settlers.[769] The Tenths reserves were to be held for the benefit of the customary owners and the settlers had no claim on those reserves.[770] They were to be administered for the benefit of the customary owners and were thus not available for any general governmental purposes.[771] The only possible conflict of interest that could have arisen was in the selection of the reserves but this took place in terms of the agreed ballot process.[772] The Crown, in making the Tenths selections, was entitled to choose the best sections for the reserves that remained available as its ballot numbers were reached. The settlers were able to do the same for themselves.

The effect of the Loans Act and the 1848 grant

[583] The Crown argues that the 1845 grant was superseded by the 1848 grant and that the 1845 grant was rendered null and void under the Crown Grants Amendment Act. The first point is that, because the Occupation lands and the Tenths reserves (whether surveyed or not[773]) were excepted from the 1845 grant,[774] it makes no difference that the 1845 grant was deemed void ab initio by the Crown Grants Amendment Act.

---

769 I agree with the comments of Arnold and O'Regan JJ at [785] of their judgment. It follows that I disagree with William Young J's comments at [919]–[920] of his judgment.

770 I do not agree with William Young J that Governor Grey's responsibilities in 1845 to protect the interests of Maori were of a public law character and that he was required to balance the interests of the Company with those of the Maori: at [920] of his judgment.

771 Outside of any proper processes for compulsory acquisition for public works. Unlike Clifford J in the High Court, I am not certain it was established by the 1856 legislation that the reserves were not inalienable: *Wakatu* (HC), above n 605, at [307]–[310]. In my view, and in line with the endowment principles of the reserves, any flexibility in the management of the reserves such as land swaps or sales to purchase other land would always have been acceptable so long as any transaction did not diminish the reserves overall. As a result, the significance of the legislative arrangements in this way is very much diminished.

772 While the ballot process had been abandoned for the settlers in the Wairau, it should have been undertaken after the Spain determination, at least to the extent of the land which was available at that stage.

773 See above at [518].

774 See above at [516] and [518].

[584] The next point is that land could be the subject of the 1848 grant only if customary title had been extinguished.[775] Customary title can be extinguished by statute but there was no legislative authority in the Loans Act (let alone clear legislative authority) to do so.[776] The fact that s 19 of the Loans Act provided that any returned land became the demesne lands of the Crown cannot in itself provide such clear legislative authority. Indeed, the preamble to the Act states that provisions in the 13th Chapter of the 1846 Royal Instructions accompanying the Royal Charter and Letters Patent are suspended, except for those that relate to the means of ascertaining demesne land, claims of the aboriginals to land and the restrictions of conveyance of native land. This is a further indication that the Loans Act did not override customary title.

[585] The Occupation lands remained in customary ownership and title could not pass to the Crown until that customary title had been lawfully extinguished.[777] This applied whether the land was surveyed or not. This means that any Occupation lands included in the 1848 grant were still subject to the burden of customary title. To the extent that the Crown treated these as desmesne lands free from customary title and thus able to be transferred beneficially to the Company under the 1848 grant, I accept the appellants' submission that there was expropriation by the Crown of those lands.[778]

[586] The final point relates to the Tenths reserves. These did form part of the demesne lands of the Crown but they became so on the basis of the Spain report and the Crown's acceptance of the report.[779] The 1848 grant purported to transfer to the Company Tenths reserve land which had not been surveyed (the rural Tenths) and other

[775] See above at [510]. I add that, as the Chief Justice establishes at [188] of her judgment, the 1848 grant also relied on the Spain inquiry and report for the legal basis on which the Crown obtained the land clear of customary ownership. It follows that I disagree with William Young J's analysis at [887]–[900] of his judgment. I do not disagree with his analysis at [901]–[903] of his judgment, however.

[776] I accept that the Privy Council case of *Riddiford v The King* [1905] AC 147 (PC) at 159, described the Loans Act as vesting the land in the Crown in "absolute and unqualified dominion". However, that related to a claim that land vested by way of adverse possession. The context was therefore quite different. This case requires consideration of the position of Maori customary owners who had rights in the land prior to the acquisition of sovereignty. For more analysis on the Loans Act, with which I agree, see the Chief Justice at [193]–[198] of her judgment. It follows that I do not agree with [904] of William Young J's judgment.

[777] See above at [510].

[778] I also reject the Crown submission above at [555] that the Occupation lands excepted from the 1848 grant to the Company then vested in the Crown as demesne lands.

[779] See above at [568].

Tenths reserves that had been lost (as a result of the reorganisation of the Nelson town sections for example). These lands were subject to trust obligations. Any transfer to the Company was therefore in breach of trust (at least as regards what should have been rural Tenths reserves). The Company was aware of the trust obligations (and indeed had instigated them) and thus would have taken the land subject to the trust.[780] Even if this were not the case, the land was returned to the Crown. It would be a novel view that, by way of breach, trust obligations can be brought to an end so that a trustee can re-acquire lands freed from trust obligations.

Breach of trust

[587] As indicated above, not allocating the rural Tenths reserves was a breach of trust and meant that part of the consideration for the sale by the customary owners was not satisfied.[781] The losses from the town and suburban Tenths reserves and the swaps may also have been in breach of trust. I accept, however, as Arnold and O'Regan JJ point out,[782] that there have been no detailed findings on breach in the courts below. We thus cannot, on the material and arguments put before us, make definitive findings on particular alleged breaches. These detailed findings will be for the High Court.[783]

Fiduciary obligations

[588] If I am wrong on the trust analysis, the narrative set out above would create obligations so close to those of a trustee that it is an inevitable conclusion that the Crown owed fiduciary obligations to the customary owners,[784] both in regard to the

---

780 It is possible that the Company mistakenly considered that the Kaituna reserves meant that the rural Tenths did not need to be allocated. It is not necessary to analyse the effect of this mistaken view (if indeed it was truly held and was not merely a political negotiating stance). The trust obligation rested not with the Company but with the Crown in terms of the 1840 agreement.

781 See above at [530]–[531]. By way of completeness, I note that it cannot be argued that the Kaituna reserves were a substitute for the rural Tenths. They were related to the Wairau purchase only and not the Nelson purchase, as recognised by Governor Grey.

782 At [789] of their judgment.

783 See below at [719].

784 I agree with the Chief Justice that the Crown can be a trustee or a fiduciary, and further that, when it is, it is likely to act through officials: see at [331]–[378] of her judgment. The Crown did not challenge that it can be a trustee or fiduciary but said it was not in this case. I also agree with the Chief Justice's analysis of *Kinloch v The Secretary of State for India in Council* (1882) 7 App Cas 619 (HL) at [336]–[338] of her judgment, and further that the authorities she discusses arise in circumstances very different to the present case: at [339] of her judgment. I am also in agreement with her conclusion that the Crown conduct shows an assumption of trust: at [410]–[416].

Occupation lands and the whole of the Tenths reserves, including the rural Tenths which were never allocated.

[589] In this case, the Company's promise to hold the Tenths reserves on trust for the customary owners must be seen as an important reason the purchase was held to be just and equitable and thus an important reason the land in question became desmesne lands of the Crown. The Crown had agreed to take on that trust obligation through the 1840 agreement with the Company, which is why the Tenths lands were excluded from Commissioner Spain's recommended grant to the Company. Against that background, the Crown could not purport to take those lands free from the obligation to hold them for the benefit of the customary owners. It took the land subject to an obligation to continue to hold the identified Tenths town and suburban reserves on trust and to identify and hold on trust the rural Tenths reserves. As to any Occupation lands appropriated by the Crown, the obligation was to return title and possession to the customary owners.

[590] The above analysis does not depend on any special fiduciary duty of the Crown in its dealings with the property of indigenous people. If it were necessary to rely on such special duties, I consider the analysis of the Chief Justice on this point has much to recommend it, at least in the circumstances of this case.[785] It is not, however, necessary for the purposes of this judgment to come to a definitive view on that wider analysis.

The history and the nature of this claim

[591] In order to assess the issue of standing and the extent to which this appeal and the underlying claim is preserved under the Claims Settlement Act, it is first necessary to analyse the history and nature of the claim, including ascertaining the identity and role of the appellants and the interveners in this Court and the courts below.

---

785 At [340]–[391] of her judgment.

History of the claim

[592] Mr Paora Te Poa Karoro Mokena, known as Paul Morgan, is the Chairman of Wakatu. In his evidence before the High Court, he explained that Wakatu had been instrumental in filing the Wai 56 claim.[786] What was to become Wai 56 was filed in 1986[787] by Messrs Rore Stafford and Hohepa Solomon on behalf of themselves, Ngati Tama, Te Atiawa,[788] Ngati Koata, Ngati Rarua, Wakatu and all Maori people affected by the claim. The claim covered the Tenths reserves.[789]

[593] In the period between the initial filing of Wai 56 and the issuance of the Waitangi Tribunal report, numerous iwi trusts were established pursuing their own claims in relation to Te Tau Ihu. Thirty-one of these claims were consolidated in Wai 785, including Wai 56. The Waitangi Tribunal issued its report on most of these claims in 2008.[790] The Tribunal found that the Crown had breached the principles of the Treaty of Waitangi in a number of ways, including in relation to the Tenths reserves.[791] The Tribunal recommended that settlement of historical grievances occur between the Crown and Te Tau Ihu iwi.[792]

[594] The Waitangi Tribunal hearings concluded in 2004. By the end of 2004, Wakatu and the iwi trusts for Ngati Koata, Ngati Rarua, Te Atiawa and Ngati Tama had decided to come together to form a large natural grouping in accordance with the Crown's preference for negotiating settlements of historical claims.[793] This grouping is now known as Tainui Taranaki ki te Tonga Limited (TTKTT) and was incorporated

---

786 As acknowledged by the Waitangi Tribunal in *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vol 2 at 935 and 936 [Wai 785 Report].

787 As the Chief Justice points out at n 38, the copy of the claim to the Waitangi Tribunal provided to the Court is dated 1988, but the evidence of Mr Morgan indicates that the claim was originally lodged in 1986.

788 The Waitangi Tribunal noted that the name 'Ngati Awa' was commonly used in the historical records but that 'Te Atiawa' became more commonly used in the documentary record from the 1860s onwards. The Waitangi Tribunal used the name Te Atiawa in its report because it is the name the iwi calls itself today: Wai 785 Report, above n 786, Preliminary Report at n 2.

789 Wai 56 also encompassed other issues, including fishing rights.

790 Two of these claims were not reported on as the Tribunal was of the view they were not within its jurisdiction: Wai 785 Report, above n 786, vol 1 at 16.

791 Wai 785 Report, above n 786, vol 2 at 939.

792 Volume 3, at 1442.

793 See Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua, Healing the past, building a future. A guide to Treaty of Waitangi claims and negotiations with the Crown* (March 2015) at 27. See also John Dawson and Abby Suszko "Courts and Representation in the Treaty Settlement Process" [2012] NZ L Rev 35.

on the 11 August 2005.[794] The shareholders of TTKTT were the four iwi trusts and Wakatu. Each held equal shares and the right to nominate two representatives to sit as directors.[795]

[595] A Deed of Mandate was prepared, as required by the Crown for negotiating a settlement.[796] Such deeds define the claimant group, identify the historical Treaty of Waitangi claims to be settled and outline the process undertaken to secure the mandate. TTKTT held five informational hui and 14 mandating hui around the country with 100 per cent support recorded from those who attended. TTKTT also sent out a postal ballot which again had 100 per cent support from those who responded. The resolution put to iwi members clearly stated that the mandate included Wai 56.

[596] In reaching the Deed of Mandate, at a hui with TTKTT representatives and representatives from the Office of Treaty Settlements, it was made clear that Wai 56 was a pan-iwi claim covering all four iwi represented in TTKTT. The Crown queried the inclusion of Wakatu based on its policy of negotiating settlements with "kinship groups" rather than private corporations or individuals. The Crown also queried in what respect Wakatu was not a duplicate of the iwi already represented in the claim. Eventually a compromise of sorts was reached, where Wakatu was included in the mandate as kaitiaki (guardian) of Wai 56 on behalf of Ngati Koata, Ngati Rarua, Ngati Tama and Te Atiawa, but was not included within the definition of the claimant group and therefore would not be a beneficiary in the settlement.

[597] Terms of Negotiation were signed on 27 November 2007,[797] which similarly excluded Wakatu from the definition of claimants and further said that the negotiations were intended to effect the settlement of "all issues relating to Historical Claims and that litigation by either [party] connected with the Historical Claims would be

---

794 Other acknowledged mandates in Te Tai Ihu have been established: Te Runanga o Toa Rangatira Incorporated and the Kurahaupo ki To Waipounamu Trust.

795 Tainui Taranaki ki te Tonga Limited [TTKTT] was removed from the Companies Register on 23 June 2016.

796 Evidence for the Crown said that a claimant group must obtain a mandate before negotiations can commence to assure both parties that their representatives have the support and authorisation of the members. The Deed of Mandate was submitted 14 December 2005 by TTKTT to the Office of Treaty Settlements after receiving the mandate from iwi. The Office then invited public submissions ending in March 2006 before confirming the mandate on 3 October 2006.

797 The position of the Crown is that these Terms of Negotiation are not legally binding, but are an "expression of good faith".

prejudicial and may cause the negotiations to cease." Wai 56 is included within the definition of Historical Claims. The terms of negotiation were signed by Rore Stafford and Waari Ward-Holmes "For Wai 56 (Wakatu Inc)".

[598] In December 2008, counsel for TTKTT requested that the Crown explore specific redress for Wai 56. In early 2009 Wakatu became concerned that deeds of settlement were to be signed with the four iwi trusts and not with Wakatu. This raised a concern that the Tenths reserves could be neglected in any settlement. On 11 February 2009 a Letter of Agreement was sent from by the Minister for Treaty of Waitangi Negotiations to TTKTT. The letter provided an acknowledgment by the Minister that the "historical aspects of Wai 56 will be discussed by the parties in good faith" before the signing of any deed of settlement. Following meetings with the Office of Treaty Settlements it was evident that Wakatu sought a separate settlement for Wai 56. It was also evident that it was the position of the Crown that Wai 56 was addressed as part of the settlement with TTKTT.

[599] On 4 December 2009 Wakatu applied to the Waitangi Tribunal for an urgent inquiry into alleged contemporary Treaty breaches by the Crown and sought a separate settlement addressing the Wai 56 claim.[798] This application did not succeed. Chief Judge Isaac noted that there was no clear evidence that the mandate of TTKTT had been withdrawn or that the negotiations had broken down. Rather, all the individual iwi had conveyed through their counsel that they considered the negotiations to be ongoing. Further, there was nothing in the Crown's failure to settle separately that would cause significant prejudice.[799]

[600] The position of the Crown (that the Tenths issue was covered in the general settlement) did not change and eventually these proceedings were filed in the High Court in May 2010. On 26 October 2010, the Crown suspended negotiations with the iwi trusts pending the outcome of the litigation.

---

798 This appears to be on the basis of a challenge to the Crown's settlement policies and the alleged failure to resolve Wai 56 adequately.

799 Waitangi Tribunal *Wai 56 #2.85* (2010) at [63].

[601] After the High Court decision on the substantive claim on 26 June 2012, deeds of settlement were signed on 21 December 2012 with Ngati Koata and Te Atiawa, 13 April 2013 with Ngati Tama on 20 April 2013 with Ngati Rarua. It was made clear that the negotiations of the deeds had formed "part of a wider process of settling the historical claims of iwi with interests in Te Tau Ihu" and within each deed there was an acknowledgment by the Crown of the failure to reserve the Tenths reserves. The definition of historical claims included Wai 56, insofar as it relates exclusively to the respective iwi "or a representative entity".

[602] The entry into deeds of settlement was in accordance with the Crown's usual negotiations process, as was the enactment of the Claims Settlement Act in 2014.[800] Each deed acknowledged that the settlement legislation resulting from the deed would "preserve the plaintiffs' ability to appeal" in the current proceedings and included similar provisions to those in the Claims Settlement Act as discussed below.

Statement of Claim

[603] In the third amended statement of claim dated 15 November 2010, the first cause of action alleges that the Tenths reserves were the subject of an express trust for the benefit of those identified by the Native Land Court in 1893 as the customary owners of the land, the list being attached to the statement of claim.[801] It is further pleaded that the Crown was the intended trustee and that it breached the trust by failing to ensure that the Tenths reserves were allocated separately from the Occupation lands and that the full 15,100 acres were reserved. It is also pleaded that the Crown significantly reduced the reserves that had been allocated between 1845–1849. In the alternative, a number of claims are made, including a breach of fiduciary duty, a constructive trust on the grounds of equitable fraud and a breach of the obligation of good faith.[802]

[604] Clifford J in the High Court said that the claim had changed in the course of the hearing before him from one asserting a trust for the benefit of the current owners

800 See Office of Treaty Settlements, above n 793, at 65–69.
801 See above at n 695.
802 In the lower courts, the appellants argued that, as the Nelson settlement eventually compromised 172,000 acres, the Nelson Tenths should have totalled 17,200 acres: *Wakatu* (HC), above n 605, at [30] and *Wakatu* (CA), above n 606, at [154]. This claim was not pursued in this Court.

of the individualised beneficial interests originally held by the persons shown in the 1893 list to one asserting fiduciary duties owed to the customary and collective groups who had aboriginal title or mana whenua over the land.[803]

[605] The statement of claim in fact equates those two groups. It is alleged that, according to tikanga Maori, certain sections of Ngati Rarua, Ngati Awa (Te Atiawa), Ngati Tama and Ngati Koata acquired mana whenua rights when they settled in various areas of the northernmost region of the South Island, known to Maori as Te Tau Ihu. It is then asserted that the list, compiled in 1893 (and attached to the statement of claim), comprises the members of those groups who had been living in the Nelson settlement area at the time the land was acquired by the Company and refers to this as the "final list of original owners".[804] The claim as pleaded therefore is that the customary owners of the land were the same as those in the 1893 list.

Relief sought

[606] At the hearing of the appeal in this Court, the declarations sought in the pleadings were replaced by the following:

> (a) A declaration that, in the circumstances in which Maori land was acquired for the New Zealand Company's Nelson settlement, the Crown was in breach of legally enforceable obligations owed to the particular hapu and whanau who held aboriginal title (mana whenua) to that land to:
>
> > (i) Reserve and hold on trust for those hapu and whanau one-tenth of the land that was acquired by the New Zealand Company, being the 15,100 acres as identified in the 1845 Grant;
> >
> > (ii) Except pa, burial places and cultivation grounds from the 1845 and/or 1848 Grants; and

---

803 *Wakatu* (HC), above n 605, at [311].
804 See above at [542]–[543].

(iii) Protect and not to act adversely to the interests of the hapu and whanau who held aboriginal title (mana whenua) in any such land.

(b) A declaration that those hapu and whanau have not lost their right to enforce such obligations by reason of defences available to the Crown through lapse of time.

(c) A declaration that all three appellants have standing to bring this proceedings, and to seek and obtain relief in relation to it.

[607] The appellants ask that the matter be remitted to the High Court to inquire into and decide the relief to be granted arising out of the declarations. This is because there has not been a comprehensive identification of the relevant property. They also say that, if there is any dispute about the membership of the customary groups, the High Court can state a case to the Maori Appellate Court. The appellants' position remains, however, that the customary owners were correctly identified in the 1893 lists.[805]

[608] In the courts below, the argument concentrated on the alleged losses to the Tenths reserves caused by the wrongful treatment of Occupation land as Tenths reserves. The argument in this Court was somewhat wider and included an argument that some Occupation land was wrongly subject to the 1848 grant and then returned to the Crown after the demise of the Company and thereafter treated wrongly as Crown desmesne land.

The appellants

[609] Mr Stafford, the second appellant, is a kaumatua of Ngati Rarua and Ngati Tama descent. His tupuna, Ramari Herewini, her biological father, Hare Porea, and her whangai (adopted) father Pene te Poa, were all named as beneficial owners of the Tenths Reserves in 1893. He is thus a direct lineal descendant of Tenths' owners.

---

805 For more on the 1893 list, see above at [542]–[543]. In their submissions to this Court, the appellants further rely on the evidence of Hillary Mitchell and Maui Mitchell who concluded that the 1893 lists accurately recorded the customary owners at the time of the Company's purchases.

Mr Stafford was one of the claimants in the initial claim to the Waitangi Tribunal, Wai 56, in relation to the Nelson Tenths reserves.[806]

[610] The first appellant, as set out in the third amended statement of claim, is Wakatu and is said to be suing as trustee of the Tenths reserves. As indicated above,[807] Wakatu is a Maori incorporation established by the Wakatu Incorporation Order 1977 to constitute the proprietors of the remnants of the Tenths reserves. It was established pursuant to s 15A of the Maori Reserved Land Act 1955. The Incorporation Order provides that the beneficial owner of the land is a Maori incorporation to be known as the Proprietors of Wakatu "under and subject to Part 4 of the Maori Affairs Amendment Act 1967".[808] Under that Act the legal and beneficial title of the land was held by the incorporation.[809] However, as a result of the Te Ture Whenua Maori Act coming into force, now only the legal estate in the land is held by an incorporation and the land is held on trust for those who are entitled to the beneficial interest in the land in their proportionate shares.[810]

[611] The Te Ture Whenua Maori Act provides that, once incorporated, the owners of the land become a body corporate with perpetual succession with the power to do and suffer all that bodies corporate may lawfully do.[811] The Act also provides that the incorporation acts through and by a Committee of Management (the Committee) elected by the owners.[812] The land held by the incorporation continues to be or is

---

806 See above at [592].
807 See above at [546].
808 Wakatu Incorporation Order, s 2.
809 Maori Affairs Amendment Act 1967, s 31(2).
810 Te Ture Whenua Maori Act, s 357. These owners are shareholders in the incorporation. The term shareholders is used in Te Ture Whenua Maori Act when providing for the operation of an incorporation. In this judgment, the term owners will be used to reflect that the shareholders are beneficial owners of the land.
811 Section 250.
812 Te Ture Whenua Maori Act and the Maori Incorporations Constitution Regulations 1994 set out how a Maori incorporation is run. The Committee of Management is required to comply with the terms and conditions of any resolutions relating to the powers and functions of the incorporation passed at a general meeting of the shareholders: Te Ture Whenua Maori Act, s 270(6). Certain matters can only be dealt with by way of a special resolution passed at a general meeting of shareholders: Maori Incorporations Constitution Regulations, sch 1, r 4. A Maori incorporation is bound by every act of its committee: Te Ture Whenua Maori Act, s 271(1). Generally every shareholder/owner has one vote and a resolution passes by majority, unless a poll is demanded by not less than five persons present in person at a general meeting or by any person or persons entitled to exercise at least one-tenth of the total votes of those present in person or in proxy. In such a case, the voting powers are determined by the number of shares held by each shareholder: Te Ture Whenua Maori Act, s 275.

deemed to be Maori freehold land once it is vested in the incorporation.[813] Section 260 provides that shares in a Maori incorporation are deemed to be undivided interests in Maori freehold land and are therefore subject to the same alienation rules as other Maori freehold land unless otherwise expressly provided. No shareholder has the capacity to dispose of their equitable interest otherwise than by a disposition of their shares.[814]

[612] Some of the shareholders of Wakatu are not descended from the Tenths owners listed in Schedule 1 of the statement of claim. This is because past legislation allowed previous owners of the land to gift or leave by will their shares to those who do not whakapapa to the land.[815] Further, a number of descendants had been removed from the owners' roll as a result of the Maori Reserved Land Act 1955. This legislation authorised[816] the Maori Trustee to apply to the Court for an order vesting in the Trustee what were termed "uneconomic shares". The Court was compelled to make such an order upon application and the Maori Trustee had to pay the former beneficial owner the value of the interest.[817]

[613] Because its owners are not the same groups as the descendants of the 1893 listed owners, Wakatu does not seek any remedy for itself but instead seeks a remedy on behalf of the descendants of the Tenths owners.

[614] Mr Morgan, in his brief of evidence before the High Court, set out the process Wakatu underwent before taking the claim. The Management Committee passed resolutions relating to the litigation on 19 April 2010, 4 June 2010 and 26 November 2010. The Committee has, however, always pursued a policy of open

---

813 Section 250(6).

814 For the rules of individual alienation see Part 7 and ss 108–121 of Te Ture Whenua Maori Act. A Maori incorporation can only alienate the land vested in it by sale or gift if authorised by a special resolution passed by shareholders holding 75 per cent or more of the total shares in the incorporation. It can enter into long-term lease if approved by a court and the lease is authorised by shareholders holding 50 per cent or more of the total shares in the incorporation: Te Ture Whenua Maori Act, s 150B.

815 *Wakatu* (CA), above n 606, at [15].

816 In the period from 1956 to 1968.

817 Maori Reserved Land Act, s 21. An uneconomic interest was defined as having a value that did not exceed £25: s 19. According to the evidence of Mr Morgan, because the majority of shareholdings in the Tenths reserves were very small, 348 people were adversely affected by this legislation. These provisions were repealed by s 130 of the Maori Affairs Amendment Act 1967.

communication with the owners. The Waitangi Tribunal claim[818] and the current litigation have been discussed at Special and Annual General meetings of Wakatu over the period 2009 to 2011 and in regular hui around the country. Mr Morgan acknowledged that, at the Annual General meeting held in Nelson in November 2010, some of the members of Wakatu did express concern about the Crown's decision to suspend negotiations with the iwi trusts.[819] However, he said that the prevailing view was that Wakatu should continue with these proceedings. He therefore considers Wakatu to have a mandate from its owners to proceed with the action.

[615] In his oral evidence Mr Morgan, in updating the Court, said that, at a Management Meeting and a General Management Meeting held on 26 March 2011 a full presentation was made. There was unanimous support from the Committee to continue with the proceedings and no opposition from the owners. He said that there was what he would call "a steely commitment" by the owners to proceed on this matter.

[616] Mr Morgan said that it is the practice of Wakatu for the Committee and the owners to discuss matters until consensus is reached rather than undermining anyone's mana by putting a decision to the vote. Both the Wai 56 claim and the High Court proceedings were approached and discussed in this manner.

[617] The third appellants are the trustees of Te Kahui Ngahuru Trust,[820] a trust settled on 19 July 2010 by Mr Stafford to facilitate the pursuit and resolution of the claim against the Crown by the beneficiaries, being those who can establish a direct lineal descent from the Tenths owners identified in the 1893 list. The trust is intended to be limited to achieving this purpose and will be wound up on resolution of the claims and any settlement being applied to entities created by the beneficiaries. The trust deed provides for there to be a Trust Board (consisting of the trustees) to administer the trust.

---

818 See above at [592]–[602].

819 See above at [598]–[600].

820 Mr Morgan's evidence was that the name of the trust, loosely translated, refers to the gathering of the descendants of the Tenths.

[618] Mr Morgan, in his evidence before the High Court, said that the Wakatu owners were fully aware of the objective and role of the Te Kahui Ngahuru Trust. It had been discussed at meetings with the owners and by the Committee. There is no evidence on whether or not those who are descendants of those on the 1893 list but who are not owners of Wakatu were consulted about the litigation or the setting up of the Te Kahui Ngahuru Trust.

The interveners

[619] In the High Court ruling on the applications to intervene, Clifford J noted that the appellants accepted at the hearing of the application that there may be issues of representation on which it was appropriate that the interveners be heard.[821] He therefore granted intervener status to three iwi trusts which had been established to receive redress for the claims in relation to Te Tau Ihu:[822] the Ngati Rarua Iwi Trust, the Ngati Koata Trust, and the Ngati Tama Manawhenua ki te Tau Ihu Trust.[823] There was an attrition in the number of interveners in the Court of Appeal to two, the Ngati Rarua Iwi Trust and the Ngati Koata Trust.

[620] Only one iwi trust was an intervener in this Court, Te Runanga o Ngati Rarua.[824] Ngati Rarua says that it (along with Ngati Tama, Te Atiawa and Ngati Koata) have the only customary interests in Te Tau Ihu (including the Nelson and Motueka Tenths). The intervener relies on the findings of the Waitangi Tribunal that its interest was "based on take raupatu,[825] followed by itinerant resource use, residence, and

---

821 *Wakatu Incorporation v The Attorney-General,* HC Nelson CIV-2010-442-181, 7 December 2010 at [23].

822 At [24] and [64](a).

823 Te Runanga o Ngati Kuia Trust and the Ngati Apa ki te Ra To Trust also sought leave to intervene on the basis that some members of their iwi were wrongly excluded from the 1893 lists. Clifford J "tend[ed] to the view" that the Trusts should be granted leave to intervene, but "raise[d] for the[ir] consideration … whether now is necessarily the most practicable time for that claim to be heard", given that relief (even if forthcoming) would likely fall to be determined at a later stage of the proceedings: at [31]–[33]. In his substantive judgment, Clifford J said that "as matters transpired" it was only the Ngati Rarua, Ngati Koata and Ngati Tama trusts that took an active part in the proceedings, with Ngati Kuia and Ngati Apa maintaining a "watching brief": *Wakatu* (HC), above n 605, at [25].

824 This is the new name of the Ngati Rarua Iwi Trust which appeared as intervener in both the High Court and Court of Appeal.

825 As were the interests of Ngati Tama and Te Atiawa. The rights of Ngati Koata were derived from "take tuke, and from itinerant resource use, occasional residence in the company lands, intermarriage, and burial of the placenta and the dead in the land": Wai 785 Report, above n 786, vol 2 at 921.

cultivation and by the beginnings of intermarriage with the defeated peoples and the burial of placenta and the dead in the land”.[826]

Standing in the courts below

High Court

[621] Clifford J held that Wakatu did not represent the customary owners as it is an incorporation of individuals in their capacity as holders of private and individualised property rights in land vested legally in Wakatu. It is not itself a customary, collective group, despite the fact that many of its members do belong to the relevant customary groups.[827] Wakatu therefore did not have standing to pursue the claim.[828] He acknowledged that Wakatu sees itself as an entity able to protect and promote the broader issues relating to the Tenths reserves but added:[829]

> But it was a tension in the case from the outset that an entity established to bring together individualised, English law, legal interests in land should contend that it was the appropriate plaintiff to bring a customary, collective claim.

[622] Clifford J acknowledged the contest between Wakatu and the interveners as to the identity of the relevant customary groups but did not consider that he was in a position to resolve it.[830] He recognised the debates and tensions about the extent to which modern collective entities can and do represent groups with separate identities within the overall collective and the tensions created by the Crown’s policy of settling with “large natural groupings”.[831] This did not alter his view on standing.

---

826 At 921.
827 *Wakatu* (HC), above n 605, at [312].
828 At [313].
829 I comment that this seems the worst of both worlds. At the time the customary owners were given the choice (see above at [545]–[546]) an incorporation was the best means on offer to replicate customary ownership and can be seen as the modern manifestation of it. To the extent it does not replicate customary ownership this should be laid at the Crown’s door and not that of Maori. I accept the appellants’ submission, set out at [632] below, that it was the Crown that sanctioned Wakatu’s establishment through Order in Council and that the Crown’s wrongdoing in transforming collective customary tenure to an individualised ownership structure should not operate as a bar to Wakatu’s claim.
830 As noted above at [620] the intervener’s position is that it, along with the other relevant iwi, have all the customary interests in the land. See at [605] for Wakatu’s position.
831 *Wakatu* (HC), above n 605, at [314].

[623] Clifford J was of the view that Mr Stafford would have had standing as a member of the beneficiary group (a descendant of the customary owners) as regards any breach of trust. As to the alleged breach of fiduciary duty, Clifford J was of the view that, if such a duty were owed, it would be to the relevant customary groups, and there was no evidence that Mr Stafford represented those groups. He therefore did not have standing to pursue the claim. If Mr Stafford's argument was that the relevant customary groups were not properly represented by the interveners, then the appropriate course to take would have been for Mr Stafford to apply for representative status. No such application had been made.[832]

[624] Clifford J considered it was clear that the third plaintiff did not have standing. He observed that merely by creating a trust, a settlor cannot vest in that trust property that is not his or her own to vest.[833]

Court of Appeal

[625] The Court of Appeal held that, while Wakatu has as its members a number of people who would be beneficiaries of any private trust, Wakatu itself is a separate legal entity which does not possess the requisite standing. For similar reasons, Wakatu's claim that, as successor trustee, it can sue the Crown in its role as predecessor trustee for breach of trust failed.[834] Regarding the claim of fiduciary duty, the Court agreed with Clifford J that any such duty would be owed to the collective customary owners[835] and, for similar reasons, Wakatu did not have standing to bring the claim.[836]

[626] The Court of Appeal rejected Wakatu's argument that a more relaxed approach to standing should be taken in matters of this nature.[837] It did not consider this appropriate for what is essentially a private law claim.[838] Further, the issue of standing was not a technical one given the different positions taken by Wakatu and the Interveners.[839]

---

832 At [316].
833 At [315]. I am not sure what Clifford J meant by this.
834 *Wakatu* (CA), above n 606, at [16].
835 At [17].
836 At [18]–[21].
837 At [23]–[24].
838 At [24].
839 At [26].

[627] Like Clifford J, the Court of Appeal did not consider that it was in a position to resolve questions about the identity of those holding customary rights and whether any Crown duties were owed to the iwi interveners or to narrower hapu groups. It did note that there was a group of descendants of the original Tenths owners not represented by Wakatu.[840]

[628] The Court of Appeal saw Mr Stafford as being in a different position. Because of the customary authority associated with his status as rangatira of the collective (or at least of part of the collective), it was not necessary for Mr Stafford to obtain a representative order before asserting authority in the proceeding. This is consistent with other litigation taken in the name of the chief.[841] Mr Stafford therefore had standing to bring the proceeding.[842]

[629] The Court of Appeal agreed with Clifford J that the third appellant did not have standing.[843]

Submissions to this Court on standing

The appellants' submissions

[630] As to Mr Stafford, the appellants support the Court of Appeal's decision on standing. In relation to Wakatu and the third appellant it is submitted that the courts below erred in adopting a narrow and technical approach to standing and in seeing the possibility that others could bring a claim as a factor that negates standing. In their submission the courts also erred when they failed to approach the question of standing primarily from the viewpoint of tikanga.

[631] In the appellants' submission Wakatu has standing due to its historical connection to the Tenths reserves. For this they point to its status as the trustee of the remaining Tenths reserves and to the fact that most of the beneficiaries are descendents of the customary owners. They also highlight that Wakatu is the only legal entity

---

840 At [21].
841 See for example *Te Heuheu Tukino v Aotea District Maori Land Board* [1939] NZLR 107 (SC); affirmed [1939] NZLR 114 (CA); and further affirmed in [1941] NZLR 590 (PC).
842 *Wakatu* (CA), above n 606, at [30].
843 At [28].

whose owners belong to all five tribal groupings of hapu and whanau with manu whenua in the Nelson settlement lands. They further submit that Wakatu is recognised by the iwi as the kaitiaki of the Wai 56 Tenths claim in the Deed of Mandate for the settlement process.[844] As a result, they submit Wakatu can legitimately claim to represent the collective hapu and whanau in relation to the Tenths reserves.

[632] The appellants also submit that Wakatu is a successor trustee and can sue its predecessor.[845] In addition, the appellants submit that it was the Crown that sanctioned Wakatu's establishment through Order in Council and that the Crown's wrongdoing in transforming collective customary tenure to an individualised ownership structure should not operate as a bar to Wakatu's claim.

[633] The appellants argue that the third appellant has standing because it was established to represent the descendents of the customary owners.

[634] As to the intervener trusts in the High Court, the appellants submit that at least two of those represent a broader class than the descendants of the customary owners and, therefore, like Wakatu, cannot receive relief in their own right.[846] Wakatu's position was that mana whenua rights were particularised from location to location in hapu and whanau groupings and that the term iwi as it is now used in any event encompasses a larger group than would have been the case in the nineteenth century.

The Crown's submissions

[635] The Crown adopts the view of the courts below that the first and third appellants have no standing to pursue these claims. It submits that the claim was not pleaded on the basis that it was a representative claim on behalf of the customary owners and no representation order was sought. In the Crown's submission, if a representation order had been sought by either of those appellants, the interveners

---

844 See above at [595]–[596].

845 Relying on *Young v Murphy* [1996] 1 VR 279 (VSCA) at 281–282.

846 See above at [619]–[620] for discussion on the intervener iwi trusts. The appellants say that two of the trusts have as their beneficiaries wider groups that extend to eastern Te Tau Ihu such as Ngati Rarua.

would likely have contested it. The Crown argues that the appellants cannot appoint themselves as representatives of the customary owners.[847]

[636] The Crown has always accepted that Mr Stafford has standing for a personal claim as a beneficiary but say the claim has evolved to a claim regarding equitable obligations owed to collective customary groups so that the claim as originally pleaded in the High Court no longer exists. In the Crown's submission, Mr Stafford has no standing to bring a private law claim of this kind on behalf of a number of collective customary groups in circumstances where there is no pleading or evidence that he was authorised to do so and no order had been sought or made to confer representative status. The Crown submits that it is inappropriate for Mr Stafford to have standing as an individual where there are other parties both before and not before the Court who claim to have authority.

[637] The Crown submits that it is highly relevant that claims brought by some of these other groups have been settled by their mandated representative and given effect through legislation. In the Crown's submission, courts should be slow to find that the Treaty settlement process can be hindered by a single rangatira "who, dissatisfied with the conduct of a claim by the mandated representatives of the customary groups, commences proceedings in his or her own name without seeking any formal confirmation of the representative status of their claim." It says that its cross appeal on this issue should be allowed.

The intervener

[638] Ngati Rarua was granted leave to intervene in this Court on 31 August 2015. The iwi contends that it, along with other iwi, had in 1840 and continues to have all the relevant customary interests in the land subject to this case. In its submission this interest should have been fully and better recognised by the Native Land Court in 1892 and 1893.[848]

---

847 As set out above at [614]–[616], the appellants have not appointed themselves as representatives but instead sought the approval of Wakatu's owners. They do therefore have the consent of most of the descendants from the 1893 lists.

848 This is essentially the argument of the iwi interveners in the High Court: see *Wakatu* (HC), above n 605, at [37]; and *Wakatu* (CA), above n 606, at [19].

[639] It submits that Wakatu and the third appellant do not represent the iwi, do not have consent from others with interests in the relevant lands to represent them, and did not seek or obtain a representative order.[849] It further submits that relief can only be granted to those who have standing to prosecute the claims (being those who have the customary interests in the land).

[640] Originally Ngati Rarua also opposed Mr Stafford's standing. However, at the hearing of this appeal, its counsel notified the Court that the intervener withdrew its opposition to his standing. Ngati Rarua reserves the right to be heard on relief that may be available to Mr Stafford as its interests could be affected. However, it resists the proposition that any relief beyond a declaration can be the subject of determination in this Court.

Analysis: standing

The claim

[641] The analysis on standing must take into account the nature of the claim. As outlined above, I have accepted the appellants' claim that the Crown held the Tenths reserves in trust for the customary owners, including those Tenths reserves that were never allocated.[850] The Crown breached this trust by failing to allocate the rural Tenths. It may[851] also have breached the trust by wrongfully allocating some Occupation lands as Tenths reserves, and through some of the other losses to the Tenths reserves discussed above.[852] The Occupation lands remained in customary ownership and could not pass until such ownership had been lawfully extinguished.[853] If, contrary to this, the lands were misappropriated by the Crown, they should have been returned to the customary owners. To the extent they were not, they were held on trust. If wrong in the trust analysis, I have accepted that the Crown owed a fiduciary duty to those customary owners and that this duty would have been breached in a similar manner.[854]

---

849 Again I note that owners of Wakatu did consent to this: see above at [614]–[616] and n 847.
850 See above at [571]–[582].
851 I say may because there were not findings on all the alleged losses in the High Court.
852 At [547]–[552] and [587]. See also the analysis of the Chief Justice on breach at [417]–[445] of her judgment.
853 See above at [510] and [585].
854 See above at [588]–[589].

[642] It is important to note that the trust and/or fiduciary obligations were to the customary owners as a group and in relation to the whole of the Tenths reserves. It was not envisaged that the Tenths reserves would be divided into separate trusts for the particular customary owners in particular areas. The land was held for the benefit of the customary owners collectively. This is reflected by the fact that the reserves in the ballot were selected on the behalf of Tenths owners and not for individual groups. Any apportionment was only in relation to income accruing from the leasing of the reserves.

[643] The Native Land Court investigated the Tenths owners and made up a list in 1893 of the customary owners. The remaining Tenths reserves were held on trust for those owners and their descendants until Wakatu was set up and the remaining reserves transferred to it. Currently the beneficial ownership of the land is held in proportionate shares by the descendants of those owners[855] and managed in accordance with the provisions of the Te Ture Whenua Act relating to incorporations.[856]

[644] It is reasonable to assume that, had the remaining Tenths reserves been identified and held on trust, as they should have been, and there had been no other losses to those reserves, the same process would have occurred. Thus the descendants of the customary owners would have held proportionate shares in the whole of the Tenths reserves. That appears to have been the way the appellants were regarding the Tenths claim at the beginning of the High Court hearing.[857]

[645] Another way of looking at the claim is that it is a claim for the trust property to be restored to the trust (insofar as that remains possible) or for compensation to be paid to the trust with regard to the breaches where restitution of trust property is not possible. The beneficiaries of the trust are the descendants of the customary owners. This appears to be the position taken by the appellants by the end of the High Court hearing, in the Court of Appeal and in this Court. In both cases, however, the

---

855 Except for the exclusion of certain descendants with uneconomic shares and the inclusion of some who do not whakapapa to the land: see above at [612].

856 See above at [610]–[611], n 810 and n 812 for detailed discussion of the provisions governing Maori incorporations.

857 See *Wakatu* (HC), above n 605, at [31].

appellants treat the customary owners as being those identified in the 1893 list attached to the third amended statement of claim.

[646] It is possible that the claim could have been presented in another way altogether. It could have been presented for example as a collective claim by the customary owners alleging wrongdoing preceding the original sale (and thus challenging the Spain inquiry process) or alternatively as a challenge to the process undertaken by the Native Land Court to ascertain the customary owners of the land and the result of that process. These matters (and others) were in fact challenged in the course of the Waitangi Tribunal hearing on Wai 785.[858]

[647] I am not to be taken as suggesting collective claims presented in such a way would or even may have succeeded in court. I am also not suggesting that the alternatives suggested are the only other possible bases of a collective claim.[859] I am just setting out these possible claims as they highlight some of the differences between the position of the appellants and the intervener. These differences are also relevant to the issue of the settlement of the claim, which both the intervener and the Crown rely on in their arguments on standing.

[648] I propose to deal with the issue of standing with regard to each of the possible manifestations of the claim in turn, before considering how the process of settlement might impact the claim.[860]

Claim on behalf of the individual descendants

[649] Had the claim been presented as a claim by the descendants of the customary owners as it appears to have been at the beginning of the High Court hearing,[861] it is

---

[858] See Wai 785 Report, above n 786 , at vol 1 at ch 4; and vol 2 at ch 9. While the settlement deeds did not refer specifically to the pre-1845 claims, they had a very wide definition of the historical claims being settled. In some ways this definition may even be wider than that contained in the Ngāti Kōata, Ngāti Rāroa, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014.

[859] Indeed, the claim made in this Court with regard to the expropriation of Occupation lands through the 1848 grant can be seen as a collective claim: see above at [554].

[860] Given the close link between the trust claim and any fiduciary duty claim, I do not think the analysis for a fiduciary duty claim would differ significantly from that relating to the trust claim. As a result I will analyse the situation in terms of the trust claims only.

[861] See at [644] above.

likely that this would have been required to be presented as a representative claim in terms of r 4.24 of the High Court Rules,[862] which provides:

> **4.24 Persons having same interest**
>
> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding–
>
> (a) With the consent of the other persons who have the same interest; or
>
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[650] Also relevant are rr 1.2, 5.25(1) and 5.35 of the High Court Rules, which provide that:

> **1.2 Objective**
>
> The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.
>
> **5.25 Proceeding commenced by filing statement of claim**
>
> (1) A proceeding must be commenced by filing a statement of claim in the proper registry of the court.
>
> …
>
> **5.35 Representative capacity of party**
>
> A party to a proceeding who sues or is sued in a representative capacity must show in what capacity the party sues or is sued in the statement of claim.

[651] Although it is not explicitly stated, it may be implicit in r 4.24 that a person suing in a representative capacity must have the same interest in the subject matter of a proceeding as those he or she represents.[863] It is certainly clear that a representative must either have the consent of the other persons on whose benefit he or she is acting

---

[862] These rules are now found in the High Court Rules 2016, but their substance and numbering remains the same.

[863] This was the view of the minority (Elias CJ and Anderson J) in *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [50]–[55]. The majority (McGrath, Glazebrook and Arnold JJ) did not explicitly comment on this, although it may be implicit from the comments at [129].

or be acting pursuant to a representation order of the court. In accordance with r 5.35, the statement of claim must show in what capacity the person sues.

[652] Taking these requirements in reverse order, it is clear from the statement of claim that all of the plaintiffs are purporting to act for and on behalf of the descendants of the Tenths owners as defined in the list of 1893, as required by r 5.35.

[653] No representation order has been sought by any of the appellants.[864] However, it is clear from the evidence of Mr Morgan[865] that the owners of Wakatu did consent to the proceedings and also, it seems, to the establishment of the Te Kahui Ngahuru Trust and the role of the third appellant (the trustees) in the litigation.[866] At the time they consented they were aware of the settlement negotiations and the position of the iwi trusts. There is, however, no evidence that the descendants of the customary owners who are not Wakatu owners consented to the proceedings. A representation order would therefore have been required in relation to them.

[654] I turn now to the likely requirement that representatives must have the same interest in the subject matter of the proceedings as those they purport to represent. Mr Stafford, as a descendant of Tenths owners, would meet this requirement.

[655] The third appellant (being a newly set up trust) may be seeking a remedy on behalf of all of the descendants of the customary owners it seeks to represent but it cannot be seen as having the same interest in the proceedings as those owners. At most the trustees' interest is in their capacity as trustees (and perhaps even only as bare trustees) for these owners.

[656] Wakatu does not itself seek redress because some of its members are not descendants of the Tenths owners identified in 1893 and some of the descendants of those Tenths owners are not members of Wakatu. It too, therefore, would not meet any requirement that a representative should have the same interest in the subject matter of the proceedings as those it seeks to represent.

---

864 See *Wakatu* (HC), above n 605, at [316].
865 See above at [614]–[616].
866 I would also note that whether there has been consent in these circumstances must also be decided taking into account tikanga.

[657] Ultimately, in cases such as the present involving breaches of duty to Maori by the Crown, the courts should, as far as possible, attempt to provide suitable procedures to bring claims.[867] I would hold that the requirement (if indeed there is one) that the representative have the same interest in the subject matter of the proceedings as those he or she seeks to represent, should not apply. I would therefore have held that both Wakatu and the third appellant (as well as Mr Stafford) were eligible to bring a representative claim.

[658] I would add that, if the matter is looked at in terms of the High Court Rules relating to representative actions, there is nothing in those rules that requires there to be only one representative action on behalf of all those having the same interest. Therefore, the fact that there are other groups that claim to be the true representatives of the relevant customary groups would be of no moment.

[659] In *Credit Suisse*,[868] for example, there would have been nothing to stop another shareholder seeking a representation order as well as Mr Houghton. There would also have been nothing to stop an individual shareholder (subject to any limitation issues) starting his or her own personal action. In terms of the objective of r 1.2, the court could, of course, have required the matters to be heard together or made some other arrangements for the just, speedy and inexpensive determination of the proceedings. Such other arrangements could entail the courts restricting the extent of representative proceedings and the role of a representative.[869]

[660] As there can be multiple representatives, it follows that the courts should not refuse a representation order because of contested representation. In a case where there are two or more representative claims filed in relation to the same claim, a court should set up a process whereby all those to be represented are able to choose which of those claims, if any, they wish to come under.

---

867 This is in line with the principles of the Treaty of Waitangi and also the United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/Res/61/295 (2007) (the "Indigenous Rights Declaration"), which New Zealand adopted in April 2010. I agree with the comments of the Chief Justice in this regard at [491]–[492].

868 *Credit Suisse*, above n 863.

869 As accepted could be possible by the majority in *Credit Suisse*, above n 863, at [132].

[661] In addition, if it is clear from a statement of claim (as it was here) that the claim is a representative one, and particularly if, as here, representation is contested, the court should in my view consider of its own motion whether a representation order should be made, even if there is no application for such an order before the court. In the current proceedings this should have occurred at the High Court when it became apparent the interveners would be contesting representation. It would have been open to the High Court at that stage to hear all parties and consider any appropriate representation order.

[662] I do not consider that failing to come within r 4.24 means a person claiming as a representative has no standing. The issue is procedural only, although an order may have substantive effect in terms of res judicata and may affect remedy.[870]

Breach of trust claim

[663] The claim was, however, in the end not run in this Court as a claim on behalf of the individualised owners. As this claim was argued, it was a claim in relation to a breach of trust, the beneficiaries of which are the descendants of the customary owners identified in 1893.[871] Any single beneficiary has standing to enforce a trust.[872] While all of the beneficiaries of the trust would benefit from any relief granted, an action to enforce a trust is a personal action of the beneficiary and not one on behalf of the other beneficiaries and thus it is not a representative action under the High Court Rules. Mr Stafford, as a beneficiary, clearly has standing to bring a claim to enforce the trust.

[664] Neither Wakatu nor the third appellant claim that they are beneficiaries of the trust. If Wakatu had the same members as those it sought to represent, however, in my view it would clearly have had standing to enforce the trust. This would have been on the basis that Wakatu is the modern manifestation of the customary owners as established by the 1893 lists and also on the basis that it can be seen as a successor trustee.

---

[870] I also agree with the points made by the Chief Justice regarding standing: at [93] of her judgment.
[871] See above at [645].
[872] See Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (19th ed, Thomson Reuters, London, 2015) at [39–071]–[39–079].

[665] The Wakatu owners are, however, a different group in some respects from the descendants of the original customary owners. Structurally, Wakatu (as a collective of beneficial owners) would not seem to be able to hold any property other than on behalf of its members – hence the setting up of the third appellant to hold any property on behalf of all the descendants of those on the 1893 lists. Despite these complexities, I would hold that both Wakatu and the third appellant have standing.[873] In the context of a case of this nature relating to Maori collective interests in land and allegations of breach of trust, some flexibility is required. Further, I would accept the appellants' submission, that this conclusion is reinforced by the fact that it was the actions of the Crown that transformed collective customary tenure to an individualised ownership structure.[874]

[666] The analysis of the courts below focused on Wakatu's corporate status.[875] I would not place any emphasis on this point because structurally Wakatu is something of a hybrid. In some ways it can be seen as effectively a collective of its members as beneficial owners of the land and thus cannot be equated to a normal company under the Companies Act 1993.[876]

[667] For completeness, I record that I do not accept the Crown's submission,[877] that the settlement process would negate standing. This would be tantamount to denying access to the courts because of a private extra-judicial process. I do, however, accept that there are aspects of the settlement process in this case (including the Claims Settlement Act) that could impact on remedy, which I discuss below.

Collective claim

[668] If the claim had been a collective claim[878] (rather than a claim on behalf of the beneficiaries of a trust), then it seems to me that this would have been outside the representative action rules, at least for any plaintiff within the collective group itself. A court faced with such a claim would need to decide on the procedures to be followed.

---

[873] I therefore essentially agree with the Chief Justice's analysis at [491]–[494].
[874] As noted above at n 829, the position taken by the High Court on this point (see at [621] above) seems the worst of both worlds.
[875] See *Wakatu* (HC), above n 605, at [312]; and *Wakatu* (CA), above n 606, at [16].
[876] See at [610]–[612] above for an explanation on Wakatu's structure.
[877] See above at [637].
[878] See above at [646].

Any decisions on appropriate procedures in the case of collective claims should, however, be made with a view to facilitating rather than obstructing such claims.[879]

[669] In this case the appellants say that they are the appropriate plaintiffs according to tikanga. This is disputed by Ngati Rarua, in relation to both Wakatu and the third appellant. It says that it and the other iwi trusts (if they had not chosen to settle the claim) would have been (both in 1840 and now) the proper plaintiffs according to tikanga. Ngati Rarua now accepts that Mr Stafford is a proper plaintiff. I agree with Ngati Rarua's concession regarding Mr Stafford, given his authority as rangatira.[880]

[670] Where there is a collective claim, it would not be unusual for an issue to arise as to the appropriate plaintiff, if indeed there is (particularly in modern times) only one appropriate plaintiff in all cases. The appellants' submit that decisions on the appropriate plaintiff or plaintiffs should be decided according to tikanga,[881] which is part of the values of the New Zealand common law.[882]

[671] I would accept that this would normally be the case. Tikanga, however, can vary between different iwi and hapu and it can evolve and develop over time.[883] Further, individual rights may also have arisen, as a result of historical developments (for example in this case as beneficiaries of the trust). There may also be issues as to the rights of smaller collective groups (such as hapu) against a wider collective group

---

[879] The Indigenous Rights Declaration, above n 867, in its introductory paragraphs, recognises and affirms the existence of collective rights. The Indigenous Rights Declaration also affirms the right to effective remedies for all infringements of collective rights: art 40.

[880] In this regard I agree with the Court of Appeal: *Wakatu* (CA), above n 606, at [30] and the reasons of the Chief Justice at [494] and the cases relied on at n 604 of her judgment. See also *Te Heuheu Tukino*, above n 841.

[881] The appellants point to *Williams v British Columbia* 2012 BCCA 285, [2012] 10 WWR 639 at [146]–[149] where it was held that "the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself." The actual decision in that case was overturned by the Canadian Supreme Court but no comment was made on this point: see *Tsilhgot' in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257.

[882] As the Chief Justice said in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

[883] Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [10]. See also Annis Somerville "Tikanga in the Family Court – the gorilla in the room" (2016) 8 NZFLJ 157 at 158.

(the iwi).[884] In her book, *Indigenous Rights and United Nations Standards*, Dr Alexandra Xanthaki acknowledges such possible conflicts but points out:[885]

> … conflicts between rights is a common phenomenon in human rights; apart from the general distinction between derogatory and non-derogatory rights, no predetermined hierarchy exists. Any such conflicts between rights, principles and norms are generally solved on an ad hoc basis, after taking into account various considerations. The same process must be used in conflicts between individual and collective rights.

[672] Where there are conflicting claims as to customary authority and entitlement, it seems to me that these would usually be much better dealt with at the relief stage, rather as an issue of standing.[886] This would mean that all findings of fact would have been made, enabling the decision on authority and rights to be customised for the particular case, in the manner suggested by Dr Xanthanki.[887]

Conclusion on standing

[673] A flexible approach to facilitate claims of this nature, rather than one that obstructs such claims with procedural hurdles, is to be preferred. I would hold that all three appellants have standing to bring the claim relating to the breach of trust, which is how the claim was ultimately run.[888] Mr Stafford had the right to bring the claim in his own right as a beneficiary of the trust and as a rangatira. Wakatu could bring the claim as a representative of the beneficiaries or as a successor trustee. Wakatu's corporate structure and the fact that the members of Wakatu do not coincide totally with the descendants of those on the 1893 list meant that the third appellant was a necessary addition and therefore also has standing.

---

[884] See the discussion in *Takamore v Clarke* [2011] NZCA 587 at [16] and [250]–[253]. This particular point was not dealt by the Supreme Court: *Takamore v Clarke*, above n 882. For more on the reconciling of Maori legal systems with New Zealand law, see Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (UBC Press, Vancouver, 2016) at ch 2 and ch 4. See also Law Commission *Māori Custom and Values in New Zealand Law*, above n 883; and Annis Somerville, above n 883. Issues between the authority of iwi and hapu to act in Treaty settlements have been the courts before: see, for example *Turahui v Waitangi Tribunal* [2016] NZSC 157.

[885] Alexandra Xanthanki *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, Cambridge, 2007) at 34.

[886] I recognise, however, that a conflict may relate to standing where there is a dispute over whether a potential plaintiff is in fact a rangatira of the relevant collective group.

[887] There is under s 61 of Te Ture Whenua Maori Act the ability to refer any question of fact relating to the interests or rights of Maori in land or personal property, or where any question of tikanga Maori arises to the Maori Appellate Court. This power could be of assistance in deciding relief.

[888] I include in this conclusion a breach of fiduciary duty, if an express trust is not found.

Defences

The analysis in the courts below

[674] Clifford J in the High Court did not deal with limitation (or laches) issues as it was not necessary.[889] In the Court of Appeal, Harrison and French JJ would have dismissed the appeal on the grounds of laches.[890] They noted that the events giving rise to this claim occurred over 160 years ago and that, throughout that time or at least from 1893 until 1986 when Wai 56 commenced, the Crown had acted on the premise that its claim to title was unchallenged. The Crown had altered its position to its detriment because, in its capacity as legal owner, it had alienated or used the land for other purposes.[891] Harrison and French JJ also considered that the Crown had altered its position by establishing and relying upon the Treaty settlement process to resolve historical issues.[892]

[675] Ellen France J only made provisional observations on limitation as it was not possible to address the issues in any useful way without "establishment of the facts giving rise to liability".[893] She did not see any merit in the "continuing violation doctrine"[894] for the reasons given by William Young J in *Paki v Attorney-General (No 2)*.[895] Ellen France J acknowledged the force of the Crown's submission that the claims do not fall within the exceptions under s 21 of the Limitation Act 1950. This appears to have been on the basis that the appellants had not identified the relevant land. She did not consider it satisfactory for the appellants to rely on any difficulties in tracing the properties prior to the High Court trial.[896]

[676] As to laches, Ellen France J was not convinced that the Crown had shown prejudice had arisen.[897] She agreed with Clifford J that the historical record is

---

889 *Wakatu* (HC), above n 605, at [317].
890 *Wakatu* (CA), above n 606, at [225]–[227].
891 At [222].
892 At [224]. They did agree with Ellen France J that the historical record was relatively intact and there would be no prejudice (in a forensic sense) for the Crown's defence: at [223].
893 At [192], citing Elias CJ in *Paki*, above n 615, at [162].
894 See below at [678]–[683] for the submission on this to this court.
895 At [193], citing William Young J in *Paki*, above n 615, at [301].
896 At [194]. For completeness at n 172 Ellen France J recorded that Mr Goddard also referred the Court of Appeal to s 23 of the Limitation Act dealing with claims against the Crown and in force until 1962.
897 At [195].

relatively intact and the parties had been able to present a fairly comprehensive statement of agreed facts.[898] While there may be some matters that would ultimately not be resolved, that would simply mean that the appellants have not met their onus.[899] Ellen France J accepted that there are benefits in resolving historical grievances through the Treaty settlement process and that it was important not to undermine that process but it was also clear that Wakatu's position has been preserved by the settlement legislation.[900]

[677] Ellen France J noted the disadvantages suffered by to the Tenths owners, such as the extreme poverty as a result of being alienated from their lands and traditional resources. Further, there had been attempts to seek to have the matters rectified earlier culminating in the Sheehan Commission, so the owners "did not sit on their hands." While it could have been argued that, by the time Wakatu was incorporated, the position had changed, at that point the prospects of a successful claim were "fairly bleak." In light of those circumstances in her view it was not fair to say that the appellants should have pursued their claims earlier.[901] Ellen France J was of the view that the same considerations would be relevant to consideration as to whether any claim for breach of a fiduciary duty is barred by analogy.[902]

The appellants' submissions

[678] The appellants submit that the action is not time barred as the Limitation Act 1950 does not bar fiduciary duty claims.[903] Further, they submit that the relief sought falls within s 21(1)(b) of the Act. The appellants also argue that declaratory relief is not prevented by the Act, which they say is in any event not intended to bar a constitutional claim like this.[904]

---

898 At [195]. See *Wakatu* (HC), above n 605, at [297].
899 *Wakatu* (CA), above n 606, at [195] citing Clifford J, *Wakatu* (HC), above n 605, at [297].
900 *Wakatu* (CA), above n 606, at [196].
901 At [197].
902 At [198].
903 Limitation Act 1950, s 4(9); relying on *FAI (NZ) General Insurance v Blundell and Brown Ltd* [1994] 1 NZLR 11 (CA) at 16 per Richardson J, and at 20 per Hardie Boys J; and *Johns v Johns* [2004] 3 NZLR 202 (CA) at [80].
904 This is based on a comment made by McGrath J's in *Paki*, above n 615, at [181]. The appellants also rely on *Métis*, above n 717.

[679] Alternatively, they submit that the emphasis on restitution in the United Nations Declaration on the Rights of Indigenous Peoples (Indigenous Rights Declaration) means that the Crown should be regarded as being in continuous breach of its duty, "preventing Limitation Act time bars from tolling". The appellants say that William Young J's dismissal of a continuing breach in *Paki (No 2)* and the Supreme Court of Canada's decision in *Wewaykum Indian Band v Canada*[905] both occurred prior to the Indigenous Rights Declaration and therefore these decisions were not decided in light of, and consistently with, that declaration.

[680] The appellants submit further that none of the remedies that they seek are barred by defences based on delay. Equity is "most reluctant to accept an equitable interest in land can be lost through inaction".[906] They argue that this principle ought to have particular resonance in the case of Maori land. The appellants also argue that, insofar as the defence of laches is concerned, the Crown has suffered no meaningful prejudice, whereas the customary owners suffered severe hardship after losing their land.[907] In addition, Maori historically could not obtain meaningful access to or relief from the Courts. The appellants point to *Regina v Fitzherbert*[908] as an example of an earlier attempt to bring a similar case. They submit that Crown culpability is also relevant.[909]

The Crown's submissions

[681] The Crown submits that the proceedings are barred by the Limitation Act[910] (either directly or by analogy) or by the equitable doctrine of laches. In its submission the s 21(1)(b) exception has not been shown to apply[911] because the appellants have not identified any Tenths land that was acquired by the Crown as a result of any alleged

---

905 *Wewaykum*, above n 717.
906 As accepted by the Supreme Court in *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at [39], citing *Fitzgerald v Masters* (1956) 95 CLR 420 at 433.
907 Relying on *Wakatu* (HC), above n 605, at [6] and [297]; and *Wakatu* (CA), above n 606, at [195]–[197] .
908 *Regina v Fitzherbert*, above n 745. There is also helpful commentary on this case from the Waitangi Tribunal in *Te Whanganui A Tara Me One Takiwa, Report on the Wellington District* (Wai 145, 2003) at [13.25].
909 Relying on *Paki* above n 615, at [42]–[43] and [159]–[160] per Elias CJ, and at [309] per William Young J.
910 The Crown referred to earlier legislation but was content to argue the case on the basis of the Limitation Act 1950.
911 The Crown also submits that s 21(1)(a) of the Limitation Act does not apply.

breaches of trust and which is still held by the Crown or which was received by the Crown and dealt with for the Crown's benefit.[912]

[682] In the Crown's submission the delay in bringing these proceedings is significant and as a result it is not possible to do justice between the parties. The Crown is significantly prejudiced by its inability to call and cross-examine witnesses with first-hand knowledge of what occurred and by the inevitable loss of documents. There is little to no documentary material in relation to the rationale of the Crown's approval for the 1847–1848 remodelling of the settlement for example.

[683] In addition, the Crown submits that it has relied on its unencumbered legal title to the land it holds in the Nelson region and the Crown has altered its position by establishing and relying upon the Treaty settlement process to resolve historical grievances with Maori. The New Zealand public and other iwi also rely on the settlement process. The Crown submits that the filing of a claim in court after the Treaty settlement process was well advanced, and continuing the claim after the Treaty settlement process was concluded, undermines the settlement process.

The Limitation Act

[684] Section 21 of the Limitation Act 1950[913] provides for a six year time bar with regard to claims for breach of trust unless:

(a) there was fraud or a fraudulent breach of trust to which to the trustee was a party or privy;[914] or

---

912 In fact, as noted by Ellen France J, evidence was put forward by the appellants identifying some properties that were Tenths reserves and which are currently in Crown ownership: *Wakatu* (CA), above n 606, at [194].

913 As this action is based on conduct which occurred prior to 1 January 2011, the Limitation Act 1950 still applies: Limitation Act 2010, s 59: Limitation Act 1950, s 2A.

914 Section 21(1)(a). There is New Zealand authority to support the proposition that this includes equitable fraud discussed in Andrew Butler and James Every-Palmer "Equitable Defences" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [38.1.2(3)(c)]. We did not hear full argument on this point (or the extent to which it may apply here) so this may be an issue to be considered in the High Court: see above at [587] and below at [720].

(b) where the action is to recover trust property or the proceeds thereof either in the possession of the trustee or previously received by the trustee and converted to his or her use.[915]

[685] Section 21 covers both express trusts and constructive trusts but (possibly) not remedial constructive trusts.[916] In this case, there was either an express trust or a close analogy of an express trust, based on a breach of a fiduciary duty to hold the identified Tenths town and suburban reserves on trust and to identify the rural reserves and hold them on trust.[917] On the fiduciary duty analysis, the Crown became a trustee de son tort, having abused the trust and confidence imposed on it to obtain the Tenths reserves for its own use rather than for the benefit of the customary owners.[918]

[686] The current action is to recover the expropriated Occupation lands, as well as the property that was lost to the Tenths reserves or, in the case of the rural Tenths reserves, was not allocated. Alternatively, to the extent recovery is not possible, it is an action for the proceeds of any such land alienated by the Crown for its own benefit. It thus comes within the savings provision in s 21(1)(b) of the Limitation Act.[919]

[687] There may be an issue as to whether the Crown benefited from some of the land lost to the Tenths.[920] I do not necessarily accept that this means any claim for equitable compensation is outside the exceptions in s 21(1)(b) of the Limitation Act. The land may still have been previously received by the Crown and converted to its

---

915 Section 21(1)(b).

916 See discussion in *Paki*, above n 615, at [163] per Elias CJ, and at [297]–[298] per William Young J. See also William Young J's judgment in this Court at [932]–[933]. It is not necessary in this case to decide if the distinctions between constructive trusts arising by law and by fraud drawn by Millet LJ in *Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400 (CA) (set out at [934] of William Young J's judgment in this Court) apply in New Zealand, as this case does not involve a remedial constructive trust.

917 See above at [586] and [588]–[590]. See also the comments of Bowen LJ in *Soar v Astwell* [1893] 2 QB 390 (CA), discussed by the Chief Justice at [448]; and the Chief Justice's discussion from [449]–[452].

918 Recognised as coming within the English equivalent of s 21 by Millett LJ in *Paragon*, above n 916, at 408. This reasoning was recently approved by the United Kingdom Supreme Court: *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189.

919 In terms of s 21(1)(b) of the Limitation Act. This means that it is not necessary to deal with the arguments regarding any continuous breach of trust or the Indigenous Rights Declaration.

920 It does not appear, for example, that the Crown received money for the transfer in 1853 to the Bishop of New Zealand (see above at [551]). This land, however, except to the extent it may involve a loss to the Tenths reserves, is no longer at issue as it has been returned to the customary owners: see at n 714 above.

use.[921] We did not have full argument on this point and it is difficult to consider in the abstract. I thus consider that this matter will have to be considered by the High Court.[922] There may also be an issue, with regard to some of the restructuring, whether there was equality of benefit for the customary owners (although on the evidence to date that seems unlikely, given the magnitude of the shortfall in the Tenths reserves).

[688] I do not accept that it is relevant that the land has not been identified by the appellants.[923] Section 21(1)(b) of the Limitation Act applies in this case to protect both the land still in possession of the Crown and also the proceeds from any alienation of the land by the Crown. It was the duty of the Crown either to keep the Tenths reserves for the benefit of the customary owners in accordance with the terms of the trust or to account to the customary owners for any proceeds arising from any dealings with the Tenths reserves. It should thus be up to the Crown, as trustee, to identify the trust land still held by it and the proceeds it received from land it had wrongly disposed of. Equally, the Crown, in its capacity as trustee, would have to show that there had been equality of benefit and, if it maintains this to be the case, how and why it did not convert the land to its use.[924]

[689] As to the Occupation lands, any that were wrongfully granted or taken were, as the appellants argued, expropriated from the customary owners. This would have created a similar obligation to hold the land on trust for the customary owners and, as such, the above analysis applies to these lands also.

Laches

[690] I do not consider that there is 'forensic prejudice' to the Crown of a kind that would support laches with regard to the whole claim. Both the Court of Appeal and

---

[921] See for example *Mackenzie v Mackenzie* (1894) 12 NZLR 590 (SC) at 593; *Nocton v Lord Ashburton* [1914] AC 932 (HL) at 956–957; *Re Howlett (dec'd)* [1949] Ch 767 (Ch) at 778; and *Tito v Waddell (No 2)]* [1977] Ch 106 (Ch) at 249–250.

[922] See also the views of the Chief Justice, at [454] of her judgment, and Arnold and O'Regan JJ at [816].

[923] Contrary to Ellen France J's view in the Court of Appeal: see at [675] above.

[924] See also the comments of the Chief Justice at [454] of her judgment.

Clifford J were of the view that the historical record is relatively intact and I agree.[925] I do accept, however, the Crown submission that the records in some time periods might be less clear, although it seems to me that the crucial period is from 1840 to 1845 when the record is relatively intact. The fact remains also that the rural Tenths were never allocated. Therefore the trust was not honoured and an important part of the consideration for the original sale of land was not paid. It is difficult to see how this could be explained by any missing documentary records.

[691] I do not rule out the possibility, however, that there may be aspects of particular transactions where the lack of full documentary records mean that it is impossible to come to a view on what occurred. This will need to be considered by the High Court. I also acknowledge that it may be more difficult for the Crown at this distance in time to identify the extent of the Occupation lands wrongly treated as demesne lands. A defence of laches may therefore be available with regard to these lands.

[692] The Crown argues that it has acted in reliance of its unencumbered title to the land in Nelson. This may have been so but there was no justification for it to have held that view, given the 1840 agreement, the Spain determination and the basis on which the land became the desmesne land of the Crown. A trustee cannot justify a breach of trust or escape the consequences by saying it thought the trust property belonged to it.[926]

[693] Further, I agree with Ellen France J that it cannot be said that the owners "sat on their hands". Therefore, they cannot have induced in the Crown a belief that its title was unchallenged. The evidence filed on behalf of the appellants makes this very clear. For example, in 1854 a petition was written by Tamihana Ngapiko and Simeon Te Wehi to the General Assembly inquiring about the fate of their land and in particular who held the power over it. Mr Wheeler gave evidence that his grandmother had met with the Prime Minister in 1936 to discuss her lands at Motueka and issues with the Tenths. Mr Morgan gave evidence of his father's attempts in the 1940s to find out

925 See above at [676] and n 892. This is very different to *Paki*, above n 615, where the issue revolved around contemporary understanding of an oral transaction.

926 The importance of upholding trust obligations, and particularly returning trust property and proceeds held in breach of trust, is demonstrated by the existence of the long-standing exception to limitation periods as found in s 21(1)(b) of the Limitation Act.

how the land was being managed. He said that his father was told by officials "Well, you get your cheque and that's all you need to know." The lobbying that led to the Sheehan inquiry and the actions taken by Wakatu since 1977 including the bringing of the Wai 56 claim, would have made it clear that the Tenths owners were not acquiescing in the treatment of their lands. I note too that any earlier court action would have been discouraged by the result in *Fitzherbert*.[927] Historically, Maori have been prevented from bringing claims or obtaining meaningful relief.[928]

[694] The Crown submits that it has altered its position by establishing and relying upon the Treaty settlement process to resolve historical grievances with Maori and that claims such as this, when the Treaty settlement process has all but concluded, undermines this process.

[695] I do not accept that the Treaty settlement process in itself can constitute a change in position, particularly where the Crown has failed in its duties as trustee. As the appellants point out, the Treaty of Waitangi Act 1975 was intended to sit alongside, and not oust, common law rights.[929] Claims regarding property are properly brought to the courts.[930] Further, access to other legally available remedies should not be denied just because there is a settlement process. This would particularly be true if settlement negotiations failed. However, as noted below, I do accept that the actual settlement process in this case is relevant to remedy.

[696] Ultimately the defence of laches is an equitable defence which requires that the defendant has an equity which on balance outweighs the plaintiffs' rights.[931] This takes into account the length of delay and the nature of the acts done during the interval of time.[932] However, these are not the only factors and ultimately it is a balancing of equities "in relation to the broad span of human conduct".[933] This would include the

---

927 See above at [680]. See also the comments of the Chief Justice, at [466] of her judgment.
928 See *Ngati Apa*, above n 615, at [41] per Elias CJ; and see also *Paki*, above n 615, at [309] per William Young J, who admitted that this argument has force.
929 I agree with the comments of the Chief Justice at [471]–[481] of her judgment for her position on the Crown's reliance on the Treaty settlement process and her summary of the settlement process prior to these proceedings.
930 *Paki*, above n 615, at [165] per Elias CJ.
931 *Eastern Services*, above n 906, at [13], citing *Nwakobi* v *Nzekwu* [1964] 1 WLR 1019 (PC) at 1026.
932 For more on this doctrine, see generally *Eastern Services*, above n 906, at [29]–[40].
933 *Eastern Services*, above n 906, at [37].

particular settlement reached in this case and may include consideration of the real difficulties the lapse of time may have caused in identifying the Occupation lands and in ascertaining the effect of certain transactions relating to the Tenths reserves. I agree that, until the full position with regard to the remaining trust land and/or proceeds has been ascertained, a definitive decision on laches cannot be made.[934]

The settlement

Settlement process

[697] As set out above, following the Waitangi Tribunal report in 2004, settlement negotiations were entered into. Eventually, settlement was reached and enshrined in the Claims Settlement Act.[935] In order to assess the effect of that Act and the settlement I need to first say something more about the settlement process.

[698] In this case Wakatu[936] was part of TTKTT, the entity formed by Wakatu and several iwi trusts to accord with the Crown's preference for negotiating settlements with large natural groupings. Wakatu was represented on the TTKTT Board.[937] Indeed at one of the hui it was said that all eight iwi representatives on the TTKTT Board are also owners in Wakatu.[938] Wakatu was a party to the Deed of Mandate as kaitiaki of Wai 56 (the Tenths claim) and was also a party to the Terms of Negotiation representing the Wai 56 claimants. Through the process referred to by Mr Morgan[939] all owners of Wakatu were aware of the settlement negotiations relating to the Wai 56 claim. I assume that, as members of the relevant iwi, all descendants of the original customary owners as identified in the 1893 lists (including those who are not owners of Wakatu) were involved in the mandating process (or had had the opportunity to be involved).

[699] The Deed of Mandate made it clear that the Tenths claim (Wai 56) was one of the claims to be settled. But the claims to be settled were wider and were always

934 See above at [462] of the Chief Justice's judgment.
935 See above at [592]–[602].
936 Through the process described by Mr Morgan, the owners of Wakatu were kept informed of and approved Wakatu's involvement.
937 See above at [592]–[598].
938 This comes from the minutes of a hui of TTKTT held 4 August 2005 in Nelson.
939 See above at [614]–[616].

intended to be wider in terms of the Deed of Mandate. The Deed defined historical claims as all claims made at any time by TTKTT whanui or anyone representing them that were founded on breaches of the Treaty of Waitangi by the Crown or by legislation and which arose before 21 September 1992. The Deed then lists some of the claims that had been presented to the Waitangi Tribunal, including Wai 56. Other claims listed involved challenges to other transactions of the New Zealand Company and the Crown as well as challenges to the Spain determination.[940]

[700] Further, it was clear from the Deed of Mandate that the only claimants were the four iwi trusts.[941] Wakatu is not included as a claimant in the Terms of Negotiation. Rore Stafford and Waari Ward-Holmes did, however, sign the Terms of Negotiation for Wai 56 on behalf of Wakatu. The Terms do say that the definition of claimant may be developed further over the course of the negotiations for inclusion in any Deed of Settlement that may be agreed between the parties. However, given the Crown's policy of dealing only with large natural groupings and the debate leading up to the mandate, it would not have been reasonable for Wakatu to have any expectation of its later inclusion as a claimant.

[701] The terms of negotiation say that "both parties may withdraw from negotiations at any stage". However this is a reference to TTKTT, not any of its constituent shareholders, including Wakatu. The Deed of Mandate acknowledges that the Constitution of TTKTT provides for shareholder withdrawal from TTKTT. This requires two hui-a-iwi before sending a formal notice to TTKTT which must decide whether it is a management decision or "Fundamental Decision".[942] If it is a "Fundamental Decision" it can only be exercised by a resolution of the Harakeke (the beneficiaries of the shareholders in TTKTT). The effect of this withdrawal would be that TTKTT no longer represents the Waitangi Tribunal claims of that shareholder.

---

940 Such as Wai 566, Wai 594, Wai 607 and Wai 723, which all alleged deficiencies in the Spain commission process.

941 See above at [596].

942 A "Fundamental Decision" is defined in the Constitution as meaning a decision concerning the liquidation of TTKTT, appointment of representatives to negotiate with the Office of Treaty Settlements, any offers of settlement from the Crown, the division of any settlement from the Crown or any other matter which the directors decide should be a Fundamental Decision.

[702] There is no evidence that Wakatu sought to invoke this procedure, although a letter from Wakatu dated 24 February 2009 does say that Wakatu would be unable to continue to be involved in the process if the Wai 56 issues are not addressed. Wakatu was still listed as a shareholder on 23 June 2016, when TTKTT was removed from the New Zealand Companies Register.

[703] I note also that in the urgent Waitangi Tribunal hearing, it was held that there was no clear evidence that the mandate of TTKTT to negotiate a settlement of "all historical claims of Ngati Tama, Te Atiawa, Ngati Rarua and Ngati Koata has been withdrawn".[943] The Tribunal also said: "It has also been confirmed by counsel for Wai 56 that the Wai 56 claimants are all part of the iwi that are presently negotiating with the Crown and who do not want these negotiations undermined, hampered or delayed."[944]

[704] After the release of the High Court judgment deeds of settlement were signed by the claimants. These deeds included the Tenths claim as envisaged in the deed of mandate.[945] As noted above at [602], the deeds all included savings provisions in relation to this litigation similar to those in the Claims Settlement Act.[946] The effect of these provisions is discussed below.

The Claims Settlement Act

[705] The settlement as a whole has been enshrined in legislation. Section 25(1) and (2) of the Claims Settlement Act provide that historical claims (as defined in s 24) are settled and that the Crown is discharged from all obligations and liabilities in respect of those claims. It is common ground that the definition of historical claims extends to the Tenths claim at issue in this appeal.

---

943 See above at [599].

944 Waitangi Tribunal *Wai 56 #2.85* (2010) at [63].

945 For example, the Ngati Rarua settlement deed provides that historical claims means every claim that Ngati Rarua or a representative entity had at any time before the settlement date, including Wai 56.

946 Before leaving this topic, I note that, to the extent that the Tenths claim is a claim for a breach of trust, any settlement of the claim would be for the benefit of future as well as current beneficiaries. Normally any such settlement would require to be authorised by the courts: see s 64A of the Trustee Act 1956. However, in this case the settlement has to be looked at in the context of a pan-iwi settlement of a number of claims and it has also been sanctioned by legislation.

[706] Section 25(4) and (5) provide that no court or other judicial body has any jurisdiction to inquire any of the historical claims, the deeds of settlement or the redress provided, apart from issues relating to the interpretation or implementation of the deeds of settlement or the Claims Settlement Act.

[707] Section 25(6)–(8) of the Act are savings provisions in relation to these proceedings. They provide:

> (6) Subsections (1) to (5) do not affect—
>
> (a) the ability of a plaintiff to pursue the appeal filed in the Court of Appeal as CA 436/2012; or
>
> (b) the ability of any person to pursue an appeal from a decision of the Court of Appeal; or
>
> (c) the ability of a plaintiff to obtain any relief claimed in the Wakatū proceedings to which the plaintiff is entitled.
>
> (7) To avoid doubt, subsection (6) does not preserve any claim by or on behalf of a person who is not a plaintiff.
>
> (8) In this section,—
>
> **plaintiff** means a plaintiff named in the Wakatū proceedings
>
> **Wakatū proceedings** means the proceedings filed in the High Court as CIV–2010–442–181.

[708] Section 25(6) and (7) of the Claims Settlement Act mean that this appeal can proceed and that relief can be granted to any of the plaintiffs in the proceedings. However, in terms of s 25(7), no claim by or on behalf of a person who is not a plaintiff is preserved. Any such claim would be barred under s 25(4) and (5) of the Act.

[709] The settlement deeds were signed after the release of the High Court judgment which held there was no trust and no fiduciary obligations owed.[947] All parties to the negotiation were, however, aware that the appeals to the Court of Appeal and eventually the Supreme Court on the trust and fiduciary duty points were live.

---

[947] *Wakatu* (HC), above n 605, at [221]–[252].

Decision in the Court of Appeal[948]

[710] Ellen France J's view was that, had the claim succeeded, the appellants would have been entitled under s 25(6)(c) of the Claims Settlement Act to obtain the relief sought.[949] She considered that the intention of the legislature was two-fold: to allow the appeal to be dealt with and to allow those who wanted to settle to do so without being barred by the ongoing litigation. It was always clear that the claims were being pursued in large part on behalf of customary groups and the reference to the specific Court of Appeal file number in the legislation showed that the legislature was aware of the nature of the claim. She rejected the distinction the Crown sought to draw between the appellants themselves and the claims advanced on behalf of others.[950]

The submissions

[711] The appellants support the view of Ellen France J as to the purpose and effect of the settlement legislation. The Crown seeks to make the distinction rejected by Ellen France J. It submits that the Claims Settlement Act bars any historical claim "for the benefit of the collective customary groups that had customary interests" but does not bar the appellants' express trust claims "in so far as they seek recognition of existing property rights under such trusts for their own benefit".

My assessment

[712] The Claims Settlement Act preserves the appeal rights, including to this Court, for the plaintiffs named in the High Court proceedings. It also preserves the ability to obtain any relief to which any of the plaintiffs are entitled. It does not preserve any claim by, or on behalf of, any person who is not a plaintiff. The plaintiffs named in the statement of claim are Wakatu (the first appellant), Mr Stafford in his own right (the second appellant) and Mr Stafford, Mr Morgan, Mr Ward-Holmes and Mr Wheeler as trustees of the Te Kahui Ngahuru Trust (the third appellant).

---

948 This was not addressed in the High Court's substantive judgment as at the time of the decision the formal execution of the settlement deeds and legislation was on hold pending the outcome of the proceedings: *Wakatu* (HC), above n 605, at [12]. In a separate judgment regarding caveats on 30 July 2014 Clifford J acknowledged that it is clear a degree of preservation was intended by the legislation but that he was not in a position to resolve the meaning of the provisions: *Proprietors of Wakatu v Attorney-General* [2014] NZHC 1785 [*Wakatu* (caveats judgment)] at [51] and [58].

949 Harrison and French JJ may have been of a different view: see *Wakatu* (CA), above n 606, at [215].

950 *Wakatu* (CA), above n 606, at [39]–[40].

[713] Mr Stafford is a beneficiary enforcing the trust and thus would be entitled to relief in his own right. To the extent Wakatu and the third appellants can be seen as bringing the action as a successor trustee then they too can be seen as claiming relief in their own right. In all cases the effect of any substantive relief (as claimed in the statement of claim) would, however, be to benefit the wider group of descendants of the original customary owners of the land as identified in the 1893 list.[951]

[714] It may be possible to read s 25(7) of the Claims Settlement Act as meaning that, because others would benefit from any relief given, substantive relief is not available, despite it being relief to which a plaintiff is entitled in his or her own right. This would be a very narrow interpretation of the savings provision which would effectively rob it of all meaning. Like Elias CJ, Arnold, O'Regan and Ellen France JJ, I do not consider this interpretation could stand.[952] After all, the savings provision was passed (and included in the deeds) in full knowledge of what is effectively the representative nature of the proceedings.[953]

[715] The preservation of appeal rights in the deeds of settlement and the Claims Settlement Act, however, has to be read in the context of the case. This includes the fact that: the settlement explicitly covers the Tenths claim; Wakatu was a shareholder of TTKTT and therefore involved with the Deed of Mandate and the Terms of Negotiation that led to the settlement; the descendants of those in the 1893 lists are all members of the various iwi which settled the claim and thus had the opportunity at least to be part of the mandating process.[954] There is also the fact that there are conflicting views as to the proper claimants between the appellants and the intervener. These may not be a definitive list of all relevant considerations.

[716] In these circumstances it cannot have been anticipated that there would be double recovery – under the settlement and under the current proceedings. Indeed, on

---

951 I accept that the declarations sought as to the historical position do not come into the same category. They have major cultural significance as they relate to land and mana.

952 See in this Court the judgment of the Chief Justice at [483]–[488], and that of Arnold and O'Regan JJ at [824]. See also Ellen France J in the Court of Appeal: Wakatu (CA), above n 606, at [39]–[40]. I agree with Arnold and O'Regan JJ in this Court that the Select Committee report is of significance in this regard: see at [824] of their judgment.

953 Clifford J said that the proceedings had been from the outset brought on behalf of others: *Wakatu* (caveats judgment), above n 948, at [62].

954 This can be contrasted with *Turahui v Waitangi Tribunal*, above n 884.

ordinary principles, to the extent that the settlement has rectified the trust breaches, there should be no additional remedy.[955] I consider that s 25(7) and its equivalent in the deeds of settlement was designed to put beyond doubt that there would be no such double recovery.

[717] It would be for the Crown in its capacity as trustee to show double counting. However, in my view a broad view of the settlement would be appropriate in this exercise, rather than a concentration on Wai 56. This is because the claims in the Tribunal included those pre-dating the trust, such as challenges to the sale and the Spain determination and these were encompassed in the wide wording defining the historical claims settled contained in the deeds and the Claims Settlement Act. These claims (and perhaps others) can be seen as directly linked to the events out of which the Tenths claims at issue in this appeal arose. Any issues about the correct distribution of any settlement funds related to the Tenths claims, being issues related to individual beneficiary rights and/or smaller collective group rights as against the rights of the wider collective groups (iwi), may also be relevant, as will the other factors outlined at [715].

Summary

[718] In my view, the Crown held or should have held the Tenths reserves (including the rural Tenths reserves) on trust for the customary owners.[956] Even if there was no express trust, I agree with Elias CJ, Arnold and O'Regan JJ that the Crown was under a fiduciary obligation to hold the lands for the benefit of the customary owners, although my reasons for this finding differ in some aspects from theirs.[957] The same applies to the Occupation lands, to the extent they were appropriated by the Crown and were not available for use and enjoyment by the customary owners.

[719] The trust and/or fiduciary obligations have been breached by the Crown with regard to the rural Tenths reserves. We are not, however, in a position to determine the extent to which there were other breaches, given the lack of findings in the courts

---

[955] This can be likened to accord and satisfaction: see, for example *British Russian Gazette Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 at 643–644; and *McFall Enterprises Ltd v Mutual Leasing Ltd* HC Hamilton AP 47/99, 12 August 1999.

[956] See above at [571]–[582].

[957] At [588]–[590]. In particular, I do not rely on a *Guerin* analysis.

below and the limited argument before this Court. I agree with Elias CJ, Arnold and O'Regan JJ that the issue of breach must be returned to the High Court for determination.[958]

[720] I would have held that all three appellants had standing to bring the claim.[959] Further, the claim is not statute barred under the Limitation Act, to the extent it is a claim for return of trust land or the proceeds.[960] There are, however, issues identified above, including those relating to equitable compensation and whether there has been equality of benefit, that will need to be resolved by the High Court.[961] I also agree with Elias CJ, Arnold and O'Regan JJ that there are issues relating to laches, which this Court is not in a position to resolve, and which also must be returned to the High Court.[962]

[721] I consider that the Claims Settlement Act and the equivalent provisions in the deeds of settlement mean that the appellants cannot claim relief in these proceedings to the extent that it would result in double recovery in combination with the settlement.[963] This issue must also be returned to the High Court for determination.

[722] It will be for the Crown (as trustee) to identify what has happened to the trust land and whether any of that land (or any proceeds) is still held by the Crown. The Crown should also identify the extent to which any land or proceeds (or compensation) passed under the settlement and whether there is and, if so, the extent of any "double counting".[964]

Relief

[723] I agree with the relief and the costs award set out in the judgment of the Chief Justice.[965]

---

958 At [587].
959 At [673].
960 At [686].
961 At [687].
962 At [696].
963 In the sense described above at [715]–[717].
964 At [717].
965 See above at [495]–[501].

ARNOLD AND O'REGAN JJ

Table of Contents

	Para No.
Overview	[724]
The historical background	[729]
Trust/Fiduciary duty	[770]
Does Wakatu have standing?	[790]
Does Mr Stafford have standing?	[803]
Do the trustees of the Te Kahui Ngahuru Trust have standing?	[808]
Limitation	[811]
Laches	[817]
Effect of Settlement Act	[821]
Result	[827]

Overview

[724] The principal issue in this appeal is whether the Crown owed fiduciary duties, whether by virtue of an express or implied trust or otherwise, to the Maori who were the original customary owners (the original customary owners) of certain lands in and around what is now known as Nelson but was known to Maori as Wakatu. The appellants claim against the Crown as representatives of the hapu and whanau who held customary title to land sold to the New Zealand Company (the Company). They allege that the Crown undertook fiduciary obligations in relation to land that was (or should have been) reserved for Maori, specifically the Tenths reserves, which were to be held in trust for Maori, and Occupation lands comprising pa, burial grounds and cultivations, which were to be excluded from sale and to remain in customary title.

[725] The appellants' claims were unsuccessful in the Courts below. While the High Court and Court of Appeal found against the appellants on several grounds, the principal reason for the rejection of their claims was that the claimed private law obligations never came into existence as the Crown was acting in its role as government, not in a trust or fiduciary capacity, in respect of arrangements for the protection of the interests of the original customary owners in the lands at issue. The arrangements were political in nature; any "trust" that was contemplated was to be established through legislation.

[726] We have concluded that the Crown did owe fiduciary duties to the original customary owners of the Nelson land purchased by the Company in 1839 in relation to the Tenths reserves and in relation to the Occupation lands. Adopting the general approach of the Supreme Court of Canada in *Guerin v The Queen*,[966] we consider that the Crown's fiduciary duties arose out of the Crown's assumption of responsibility for ensuring that the Tenths reserves were dealt with as had been agreed with the Company and that the Occupation lands were excluded from sale. We do not determine whether there was an express or other form of trust as this was not the central focus of the appellants' argument before us and it is not an issue that requires resolution for the purpose of the principal declaration sought.

[727] We consider that a declaration should be issued to the effect that the Crown owed certain fiduciary duties to the original customary owners. For the appellants, Mr Galbraith QC indicated that if a declaration was granted, the matter should be remitted to the High Court for further consideration. We agree that the case should be remitted to the High Court to determine whether there was any breach of the fiduciary duties we have identified and, if so, whether any remedy should be granted. That will require consideration of the nature of the claims and any defences available to the Crown.

[728] We write separately to set out our views, albeit briefly, on the various issues raised in the appeal.

The historical background

[729] Before the High Court, the parties submitted an agreed statement of facts with extensive reference to the affidavit evidence and the documents in the agreed bundle. In his judgment, Clifford J gave a useful account of the historical background, which the parties largely accepted in argument before us.[967] In her judgment, the Chief Justice has explored the factual background in detail, which enables us to focus, in a more summary way, on the elements of the historical background that underpin our conclusion that the Crown assumed fiduciary responsibilities to the original customary

---

966 *Guerin v The Queen* [1984] 2 SCR 335.
967 *Proprietors of Wakatu Inc v The Attorney-General* [2012] NZHC 1461 [*Wakatu* (HC)].

owners of the land purchased by the Company in the Nelson area in 1839 and for the Occupation lands. For the purpose of our analysis, the key events occurred over a decade or so, from the late 1830s until the enactment of the New Zealand Native Reserves Act 1856.

[730] An important part of the background is that when the Crown assumed sovereignty over New Zealand following the making of the Treaty of Waitangi in February 1840 (confirmed by Lieutenant-Governor Hobson's two proclamations of sovereignty on 21 May 1840) all land in New Zealand was subject to customary title, albeit that the Crown acquired radical title.[968] Customary title had to be cleared to enable the Crown to obtain full rights to land, which it could then sell or grant to others. Title could only be obtained through the Crown, either by the Crown exercising its exclusive right of pre-emption as provided for in the Treaty or by the Crown confirming pre-1840 purchases following investigation, as was initially set out in Governor Hobson's second proclamation of 30 January 1840 and later in the Land Claims Ordinance of 1841 (the 1841 Ordinance).[969]

[731] In 1839 the New Zealand Company wished to purchase land in and around Nelson from Maori for settlement purposes. The Company's 1839 instructions to its agent, Colonel William Wakefield, in relation to land purchases emphasised two points in particular. The first was that the effect of any land sale was to be carefully explained to the relevant Maori so that they understood that the land would be made available to settlers. The second was that every land purchase contract had to make it clear that "a proportion of the territory ceded, equal to one-tenth of the whole, will be reserved by the Company, and held in trust by them for the future benefit of the chief families of the tribe". The instructions stated that these intended reserves were "regarded as far

---

968 See *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20 (CA) at 24 per Cooke P for the Full Court; and *Attorney–General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [30]–[31] per Elias CJ, at [102] per Gault P, at [140] and [143] per Keith and Anderson JJ and at [183] and [185] per Tipping J. Within the Imperial Government at the time, there were competing views as to the extent of customary title, in particular whether it covered all of the country or simply those areas which were customarily occupied or used by Maori, the remainder being "waste lands" to which the Crown acquired full title on the acquisition of sovereignty. Whatever may have been the position in other countries, in New Zealand, the former view prevailed: see, for example, Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland University Press, Auckland, 1977) at ch 6; Richard Boast *Buying the Land, Selling the Land* (Victoria University Press, Wellington, 2008) at 24–26; and the Waitangi Tribunal *Te Tau Ihu a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vo1 1 at 286.

969 Land Claims Ordinance 1841 4 Vict 2.

more important to the natives than anything which you will have to pay in the shape of purchase-money".

[732] In late 1839, William Wakefield entered into deeds of purchase on behalf of the Company with Ngati Toa chiefs at Kapiti and Te Atiawa chiefs at Queen Charlotte Sound in relation to large tracts of land, including land in the general Nelson area. This was on the basis that:

(a) William Wakefield would hold the land as a trustee for the Company; and

(b) the Company undertook that:

> a portion of the land ceded by [the Chiefs], suitable and sufficient for the residence and proper maintenance of the said chiefs, their tribes and families, will be reserved by [the Company] and held in trust by [the Company] for the future benefit of the said chiefs, their families, tribes and successors, for ever.

It is unlikely that Wakefield fulfilled his instructions to explain the effect of the transactions fully to Maori as the deeds appear to make no specific provision for the exclusion of pa sites, burial sites and cultivations (that is, Occupation lands). As Commissioner Spain subsequently concluded when investigating the Company's land purchases, Maori did not consent to alienate these areas.

[733] What the Company had in mind as to the reservation of land for Maori was explained by Edward Gibbon Wakefield to the Imperial Parliament Select Committee on New Zealand in July 1840. He emphasised two features:

(a) The Company would reserve a portion equal to one-tenth of all the land it was able to acquire for native families.

(b) The reservation of the tenths was the true purchase price for the land, the price component being the large increase in the value of the land that was anticipated following settlement.

His evidence to the Committee was recorded as follows:

> [Members of the Company] instructed the agents whom they dispatched to New Zealand to pay but little attention to the subject of the first consideration

> money for the land, because they regarded all the payments that had been made in New Zealand by missionaries and others only as little more than nominal; and they laid down a plan of reserves of land for the natives which they hoped would become in the long run a very valuable consideration indeed. They determined to reserve a portion, equal to one-tenth of all the land which they should acquire, for the native families. That plan has been so far successful, that the value of the reserves which they made in the first settlement, being a portion equal to one-tenth of 110,000 acres, is now estimated to sell in London for very nearly [£30,000]. This matter was fully explained to the natives before any purchases were made, and this was conceived to be the only true consideration for the land.

Later in his evidence, Wakefield noted that the Company wished to place the reserved lands in trust for Maori, but that it was not possible to do so at that stage because the Government had "refused to let law be established in New Zealand". He said that the Company would create a trust as soon as it could, but in the meantime had appointed a commissioner and sent him to New Zealand "for the purpose of preserving, letting, and taking care of those lands".

[734] Mr Ward, the Company Secretary, also advised the Select Committee that the Company required that one-tenth of the land be reserved for Maori. When he was asked how the Company intended to give Maori the benefit of the tenth reserved for them, Mr Ward said:

> Trustees will be appointed to hold it for their benefit. The company has appointed a gentleman to go out and take upon himself the management and control of those lands; to secure the land, and to do what may be necessary for clearing and looking after it, and for managing it for their benefit. I believe it is then intended to vest it in trustees, who will hold it for the inalienable use of the natives.

[735] In October 1840, the Company appointed Mr Edmund Halswell, an English barrister and Magistrate, as its commissioner for the management of the lands reserved for Maori in its settlements. Part of his initial task was simply to gather information about the situation in New Zealand. But the Company's letter of instructions to him also recorded that the Company wished to put in place arrangements that it hoped would avoid some of the undesirable impacts of colonisation on the indigenous people. The letter said:

> To secure the natives from this impending danger was one of the first and leading purposes of the New Zealand Company. From the very commencement of its proceedings, the Company determined to reserve, out of every purchase of land from the natives, a proportion of the territory ceded,

> equal to one-tenth of the whole, and to hold the same in trust for the future benefit of the chief families of the ceding tribes. … the Company's reserves were to be made in the same way as if the reserved lands had been actual purchases made of the Company by the natives.

The letter went on:

> As the appropriation of land to purchasers proceeds, it will become your specific duty to select an eleventh, or a quantity equal to one-tenth, of the land appropriated from time to time to purchasers, as native reserves. The directors desire me to impress on you the importance of taking care, on such occasions, that the lands you may chose for the natives are the most valuable then open to appropriation.

[736] After Mr Halswell had arrived in New Zealand in March 1841, Governor Hobson appointed him to various official posts, including Commissioner for the Management of the Native Reserves and Protector of Aborigines of the Southern District of the North Island. He does not appear to have played any particular role in relation to the Nelson reserves. But the important point for present purposes is that the Company envisaged a two-fold obligation – to reserve land for Maori and to vest it in trustees for the long-term benefit of Maori – and appointed Mr Halswell to begin implementing these obligations.

[737] In November 1840, the Company and the Imperial Government entered into an agreement to provide for the incorporation of the Company and to deal with land purchases made by the Company in New Zealand prior to the signing of the Treaty. The agreement recognised that there would need to be some "retrospective adjustment" of the Company's pre-Treaty purchases. Importantly, cl 13 of the agreement provided:

> It being also understood that the Company have entered into engagements for the reservation of certain lands for the benefit of the Natives, it is agreed that, in respect of all the lands so to be granted to the Company as aforesaid, reservations of such lands shall be made for the benefit of the Natives by Her Majesty's Government, in fulfilment of, and according to the tenor of, such stipulations; the Government reserving to themselves, in respect of all other lands, to make such arrangements as to them shall seem just and expedient for the benefit of the Natives.

[738] There are two significant features of cl 13:

(a) First, the Crown agreed that it would make reservations in the land grants made to the Company in fulfilment of the Company's reservation obligations to the Maori vendors.

(b) Second, independently of that, the Crown reserved to itself, as Government, the power to make arrangements for Maori in relation to *other* land.

This distinction between the Crown undertaking to implement the Company's obligations to Maori in respect of confirmed land purchases and the Crown reserving to itself the ability, as Government, to make other land-related arrangements for the benefit of Maori is of fundamental importance to our analysis of the nature of the Crown's obligations in relation to the Tenths land, as will become clear.

[739] The 1840 agreement referred specifically to land at Port Nicholson and New Plymouth. However, it seems to have been accepted that it applied generally to the Company's pre-Treaty Nelson purchases. We say this because, consistently with cl 13, the Government appointed trustees to administer the Nelson Tenths reserves, as we discuss further below.

[740] In a prospectus dated 15 February 1841, the Company offered for sale allotments at what it described as its second settlement in New Zealand (Port Nicolson being the first). Although the location of the settlement had not been determined at that time, Captain Arthur Wakefield chose Wakatu (Nelson) as the site later in 1841. The prospectus said that the settlement would comprise 201,000 acres, which would be divided into 1000 allotments of 201 acres, each containing three sections – a one acre town section, a 50 acre suburban section[970] and a 150 acre rural section. The prospectus provided that an additional 20,100 acres would be held as native reserves. The proposed town would therefore comprise a total of 1,100 acres. Settlers set sail from England in September and October 1841 and began arriving in Nelson from February 1842. A few months later, the survey of the 1,100 town sections at Nelson

[970] The suburban sections were also referred to as accommodation sections. We will use the term "suburban sections".

was completed and selections had been made of the 100 town sections reserved for Maori by Henry Thompson, the Nelson Police Magistrate. (It is unclear on what authority, or on whose behalf, Thompson did this.) From this point, settlers began to take possession of their town sections. Suburban sections became available later in 1842, and 100 of these were selected by Henry Thompson for Maori as Tenths reserves.

[741] The 1841 Ordinance declared that purchases made from Maori before 1840 were null and void[971] but could be confirmed by the Governor on behalf of the Crown after examination by commissioners to ensure that they were on equitable terms.[972] Consistently with the Treaty, the underlying premise of the 1841 Ordinance was that the Crown had the sole right to purchase land from Maori and, in that way, to extinguish native title. The Company considered that, as a result of the 1840 agreement, its pre-Treaty purchases were not subject to this process of investigation. The Crown did not accept that, however, and required the Company's purchases to undergo investigation in terms of the 1841 Ordinance.

[742] William Spain was appointed to undertake the investigations. He arrived in New Zealand in December 1841 and began work by investigating the Company's land purchases at Port Nicholson before turning to the Company's land claims in the Nelson area in 1844.

[743] When selecting reserves in other districts, Mr Halswell had included areas containing pa and cultivations within them. On the instructions of Governor Hobson, the Colonial Secretary (Mr Shortland) wrote to Mr Halswell criticising this. He confirmed that the Occupation lands should be retained by Maori independently of the reserves, on the basis that they had never been sold, as Commissioner Spain subsequently confirmed in his report in 1845.

---

971 Land Claims Ordinance 1841, s 2.

972 Section 3. Section 6 of the Ordinance made it clear that the Governor was not obliged to accept the commissioners' report: "… nothing herein contained shall be held to oblige the said Governor to make and deliver any such grants as aforesaid, unless His Excellency shall deem it proper to do so".

[744] In 1842 Governor Hobson replaced Mr Halswell with three trustees charged with the responsibility of administering the Company's native reserves in Nelson for Maori. The three trustees selected were the Chief Justice, Sir William Martin, the Bishop of New Zealand, Bishop Selwyn, and the Chief Protector of Aborigines, Mr George Clarke, although the Chief Justice soon indicated that he intended to resign, considering that the role created the possibility of a conflict of interest given his judicial office.[973] In the letter advising the trustees of their appointment, the Colonial Secretary said that it was desirable that the reserved lands and the proceeds from them should be vested in one set of trustees "possessing the confidence of the Government and the New Zealand Company". The Governor contemplated that the land reserved by the Company would be vested in the Crown (rather than in the Company as originally envisaged), which would then vest it, by legislation, in the trustees. Any funds generated would be used for the benefit of Maori.

[745] The trustees appointed Henry Thompson to act on their behalf in selecting and administering the Tenths reserves. As previously noted, Mr Thompson had selected the town sections for Maori in April 1842 and the 100 suburban sections in August that year. The rural sections had not yet been selected as the Company was having difficulty finding the required number of sections. In his September 1842 letter of instructions on behalf of the trustees, Bishop Selwyn noted that the Board of Trustees had still to be formally constituted but asked that Mr Thompson "continue to act on behalf of the Natives". The Bishop gave detailed instructions as to the leasing of the reserved land, indicating in what circumstances it was appropriate to grant leases of seven, 14 or 21 years. So for example, a lease of 21 years could be given, with a covenant to build and keep in repair brick or stone houses of a certain value.

[746] In a letter dated 13 September 1842 to his mother following a stay in Nelson, Bishop Selwyn described what was happening there. He said:

---

[973] The Chief Justice did not formally resign until July 1843 however. In his letter of resignation, the Chief Justice refers to himself as "one of the Trustees of the lands reserved by the N. Z. Comp for the benefit of the Native population and of the Fund appropriated or to be appropriated out of the proceeds of Government Land Sales for the same purpose". When the Attorney-General, William Swainson, was asked if the resignation of the Chief Justice would affect the further operation of the trust he replied that it would not as it was "only a proposed trust", not yet legally formed. He considered that the appointment of a successor trustee was unnecessary for the time being.

> The native reserves of which the Government has appointed me one of the Trustees, I find are very valuable: having already buildings of a considerable value upon them, – and yielding a rental of from £300, to [£]400 p. an. With the produce of these lands it is proposed to found institutions for the improvement of the Natives; in Religion, in habits, in useful arts, in health, and in every way that may be likely to advance them in the scale of society; and to promote their spiritual good.

Similarly, in a letter written in September 1846 to the Colonial Secretary (Mr Andrew Sinclair), the Bishop said:

> In August 1842, I visited Nelson for the first time, and proceeded to act upon the authority delegated to me by Governor Hobson by enquiring into the subject of the Native Reserve Property, which I found to be of considerable value and already occupied by several very respectable tenants. The estimated rental of the property at that time in the Town alone was between £200 & £300. This was chiefly owing to the judgment shown by the late Mr Thompson in selecting for the Native Trust.

[747] The Bishop and the Company advanced the trustees modest sums to facilitate building work on Tenths land. The Company proposed that it would advance the trustees £5,000 against the security of the Tenths reserves at the Company's settlements at Wellington and Nelson. The Bishop recommended to the Government that this offer be rejected, both on account of the power of sale which the Company required and rate of interest proposed. The Bishop said that "a power of sale cannot be granted over lands which are by their very nature inalienable". The Government agreed.

[748] We pause at this point to say that what this illustrates is that, despite the fact that the land at Nelson was still subject to customary title as the investigation of the Company's pre-Treaty purchases there had not been completed, both the Crown and the Company were working on the basis that the settlement was proceeding, that commitments had been made to the Maori vendors as part of the purchase which had to be honoured and that steps were being taken to ensure that they were. The foreshadowed legislation, "An Ordinance for appointing a Board of Trustees for the Management of Property to be set apart for the Education and Advancement of the Native Race", was enacted in 1844 but, although it received the Royal Assent, it was never gazetted and so never came into force. The reason for this is not clear. Nor, given the generality of its terms, is it clear that the Ordinance covered Tenths land.

[749] By 1843, the Company realised that it did not have access to sufficient rural land to provide the settlers and Maori with the rural sections which it had agreed to provide. The Company undertook surveying work in the Wairau (where it considered it had purchased land) in preparation for making land there available to settlers. Local Maori objected. Following several confrontations, Arthur Wakefield and Henry Thompson took a group of armed men to the Wairau and attempted to arrest the chief, Te Rauparaha. Fighting broke out, resulting in a number of deaths of both Maori and pakeha, including Wakefield and Thompson. Following Thompson's death, Bishop Selwyn appointed Alexander McDonald to replace him as the agent for the reserves.

[750] In December 1843, Governor FitzRoy arrived in New Zealand. In February 1844, Bishop Selwyn resigned as a trustee, stating that he had been told by Governor FitzRoy that the Governor did not recognise any trustees of native reserves. As its February 1841 prospectus indicated, the Company was taking the view that its obligations to Maori in relation to reserves were for an eleventh rather than a tenth of the relevant land. However, in a letter of 18 April 1844, Lord Stanley instructed Governor FitzRoy that the correct figure was one-tenth, not one-eleventh. He wrote:

> Turning now to the subject of the native reserves, there can, I think, be no question that they should be taken out of the Company's lands. The Company had, in former instructions to their agent, provided for reserving one-tenth of all lands which they might acquire from the natives, for their benefit. By the 13th clause of their agreement of November 1840, the Government was, in respect of all lands to be granted to them, to make reservation of such lands for the benefit of the natives, in pursuance of the Company's engagements to that effect. It seems quite plain, therefore, that the Government is to reserve for this purpose one-tenth of the Company's lands.

[751] In August 1844, Commissioner Spain began his investigation into the Company's Nelson purchases. The investigation became what was effectively an arbitration, involving the identification of further customary owners and the payment by the Company of additional compensation to Maori, who executed deeds of release in return. Spain submitted his award in relation to the Nelson purchases on 31 March 1845. The relevant features of the award were that:

(a) it was for 151,000 acres;

(b) pas, cultivations and urupa (that is, the Occupation lands) were specifically excepted; and

(c) ten per cent of the 151,000 acres to be awarded to the Company was reserved to Maori.

[752] It is not clear precisely what the status of the Occupation lands and Tenths reserves was intended to be from the terms of the 1845 grant, given that the grant simply excepted both categories of land from the grant. Presumably, the Occupation lands were to remain in customary title – having never been sold by Maori, they were never intended to become part of the demesne lands of the Crown. The Tenths reserve lands were sold by Maori as part of the parcels of land sold to the Company, and were selected subsequently as reserves. Once the sale was confirmed by investigation, all the land sold (including the Tenths reserves) became part of the demesne lands of the Crown. The reservation of the Tenths reserves from the grant must be taken to mean that the Crown was to retain legal title to them, but to hold them for the benefit of the original customary owners.

[753] As will be obvious, the Spain award was not consistent with what the Company had said in its prospectus,[974] nor with what was occurring in Nelson at the time. As Clifford J observed, there was a considerable gap between legal theory and "on the ground" reality.[975] The difference between the overall acreage of the Company's claim (201,000 acres) and the amount awarded by Spain (151,000 acres) may be accounted for by the fact that Spain disallowed the Company's claimed purchase of land in the Wairau.

[754] In January 1845 Governor FitzRoy asked the Bishop to hand over the papers relating to the Nelson reserves to the Police Magistrate in Nelson, Donald Sinclair. This suggests that, following the resignation of the Bishop as a trustee in 1844, the Government had assumed rather more direct responsibility for the administration of the reserves.

---

974 See above at [740].
975 *Wakatu* (HC), above n 967, at [112].

[755] On 29 July 1845, Governor FitzRoy executed a land grant in favour of the Company. The 1845 grant was based on, and was in materially the same terms as, the Spain award – it was for 151,000 acres and, relevantly for present purposes, excepted the Occupation lands as well as:

> all the Native reserves marked on the plan hereon [e]ndorsed, and coloured green – the entire quantity of land so reserved for the Natives being one-tenth of the 151,000 acres hereby granted to the said Company.

It is fair to say, then, that the Government accepted the Spain award on behalf of the Crown for the purposes of the 1841 Ordinance.

[756] The Company refused to accept this grant. Among other reasons, the Company considered that the amount reserved for Maori should be one-eleventh of the granted land, not one-tenth, and that the grant did not deal with cultivations clearly. Most importantly, however, it objected to the fact that the grant made provision for the possibility that there might be pre-1840 land claims prior to those of the Company. The Imperial Government referred the Company's concerns to the new Governor, Governor Grey, who had arrived in New Zealand in November 1845, and asked him address them.

[757] Governor Grey was sympathetic to the Company's concerns. In 1847, he purchased land in the Wairau and in Porirua from Ngati Toa and invited the Company to select land from those areas so as to fulfil their remaining obligations to settlers. It may be that he took the view that reservations in the Wairau for Maori did away with the need for reservations of rural sections elsewhere in the Nelson area, although it may just be that the rural sections were over-looked given other pressures. Clifford J considered that Governor Grey had abandoned the Tenths scheme at Nelson at this stage,[976] although the Chief Justice does not agree with his assessment.[977]

---

[976] At [157].
[977] Above at [224], referring in particular to Mr Parker's evidence.

[758] Clifford J explained the position in 1847 as follows:[978]

> In 1847 the Nelson settlement was reorganised. By this time only 530 of the 900 allotments available under the Second Settlement prospectus had been sold by the Company to settlers. At more or less the same time, the Company had come to the conclusion that the Nelson scheme of settlement could not work due to the lack of suitable land. The settlement was reorganised. Settlers could, if they wished, give up town and [suburban] sections selected in 1842 and reselect from a reduced number of still available sections. The remodelled scheme reduced the number of allotments from 1,000 to 530. In this context, that reorganisation is best understood as a rationalisation of the allocation of Nelson town sections to reflect the numbers actually sold to settlers. The settlers' town sections were – in effect – to be concentrated. It was proposed by the settlers, and agreed by the Government, that the number of one acre town sections in the Nelson Tenths Reserves was to be reduced proportionally, from 100 to 53. That is, the allocation of town sections for the Nelson Tenths Reserves was reduced to one-tenth of the allotments actually on-sold to settlers, as opposed to one-tenth of the land granted to the New Zealand Company. As can be seen from the great congruence between the Company's 1842 survey plans and the maps of Nelson today, the "reduction" was but a temporary phase in the development of Nelson, whilst the loss to the Nelson Tenths Reserves was permanent. There was no equivalent adjustment to the suburban,… sections that had been allocated as reserves.

[759] In addition, the Company was facing financial pressures, which culminated in the enactment by the Imperial Parliament of the New Zealand Company Loans Act 1847.[979] The effect of the Act was to suspend (with some exceptions) the operation of the Royal Instructions as to the settlement of waste lands in "New Munster" (that is, the South Island and the southern part of the North Island)[980] and to vest all the demesne lands of the Crown in New Munster in the Company in trust for the purposes and subject to the provisions of the Act.[981] Importantly, it also authorised a loan to the Company.[982] The Act contemplated that the Company might not be able to continue with its endeavours and provided that the Company could surrender its lands to the Crown, which would take them over as demesne lands of the Crown subject to any existing contractual or other liabilities.[983]

---

978 *Wakatu* (HC), above n 967, at [158].
979 New Zealand Company Loans Act 1847 (Imp) 10 & 11 Vict c 112.
980 Section 1.
981 Section 2.
982 Section 15.
983 Section 19.

[760] In mid-1848, a three person Board of Management of Native Reserves was set up for the Nelson district. A memorandum dated 23 June 1848 which accompanied the Board's letter of instructions noted that the Company had set aside reserve lands in its settlements for the benefit of Maori. It said that the trustees who had been appointed "found many obstacles to the due execution of their trust" and ultimately resigned. The memorandum noted that arrangements had been entered into with settlers in relation to reserved lands, but these were not legally binding and were not being monitored or enforced. Accordingly, it was necessary for the Government to step in more directly. The Board was to enquire into the present state of the reserves and consider how best they might be utilised to create a fund to be used for the benefit of Maori.

[761] In August 1848, the Crown made a new Crown grant to the Company.[984] This grant covered the entire northern South Island. Occupation lands were excluded from the grant, as were the Tenths reserves shown in the plans annexed to the grant. The Tenths reserves included town sections[985] and suburban sections[986] but no rural reserves. The effect of this was that the 47 town sections taken as a result of the 1847 reorganisation of Nelson township were not excluded from the grant and were lost to Maori, as were some suburban sections and the rural Tenths reserves which had never been, and never were, allocated to Maori.

[762] As the Chief Justice has said,[987] like the 1845 grant, the 1848 grant must have been based on the Spain award as there was no other legal mechanism by which the land at issue could become the demesne land of the Crown. Accordingly, the fact that the Company did not accept the 1845 grant is not, in our view, critical in the analysis; nor is the fact that s 10 of the Crown Grants Amendment Act 1867 rendered the 1845 grant null and void. The Crown could only grant land for which customary title had been cleared. Given the legal framework which had been established, the Crown's title to the relevant land must have been based on its acceptance of Spain's findings as

---

984 Clifford J noted that it is not easy to explain the relationship between the New Zealand Company Loans Act and the 1848 Crown grant as they do not appear to be consistent: see *Wakatu* (HC), above n 967, at [160]. But see the Chief Justice's explanation, above at [196]–[197].

985 Reduced in number to 53.

986 There had been some swaps of sections which had the effect of reducing the number of suburban sections: see below at [768].

987 Above at [192].

to the Company's entitlements. At the time it made the 1845 grant, the Crown was asserting that the land at issue was part of the demesne lands of the Crown and, as a result, was available to be granted (the Occupation lands were excepted and remained in customary title). The same analysis applies to the 1848 grant – by making that grant, the Crown was asserting that the land granted was part of the demesne lands of the Crown. Some of the land that was subject to the 1848 grant had been purchased by the Crown directly. But the Nelson land purchased by the Company in 1839 could only have been granted on the basis of the Spain award as that was the only mechanism by which the Crown obtained title to it. A critical element of the Spain award was the reservation of the Tenths lands (initially to be held in trust by the Company but, after the 1840 agreement, to be held in trust by the Crown). As has been noted, as far as the Company was concerned, this was the principal consideration for the transactions.

[763] Ultimately, the Company was unable to overcome its financial difficulties and in July 1850 it surrendered its Charter and its lands to the Crown. The Crown made grants to settlers whose purchases had not then been completed by the Company.[988] What land remained would have reverted to the Crown as part of its demesne lands. The New Zealand Loan Act 1856 authorised a payment of £200,000 "[i]n liquidation and full discharge of the debt due to the New Zealand Company".[989]

[764] In 1853, the Board of Management of Native Reserves was replaced by the Commissioner of Crown Lands, Nelson. The Crown granted land (largely Maori reserves) at Whakarewa to the Bishop of New Zealand for the establishment of an industrial school for children of all ethnicities, although it may be that at least some Maori agreed to the grant. The grant caused controversy in Nelson, with a special committee of the Nelson Provincial Council raising the question "whether the grant was a breach of the equitable trusts upon which the lands were originally reserved, owing to the extension of the educational trusts to the Natives of Polynesia".[990]

---

988 This was done pursuant to the New Zealand Company's Land Claims Ordinance 1851 15 Vict 15, s 19.

989 New Zealand Loan Act 1856, sch.

990 For further detail, see the judgment of the Chief Justice above at [270] and [277]. See also Waitangi Tribunal *Te Tau Ihu a Maui: Report on Northern South Island Claims* (Wai 785, 2008) vo1 2 at 807, where it is noted that, in practice, attendance was almost exclusively Maori.

[765] In 1856, the New Zealand Native Reserves Act was enacted. It established a system of management applicable (potentially at least) to all lands set apart for Maori, whether or not customary title had been extinguished in the land. In respect of land in which customary title had been extinguished, the Commissioners of Native Reserves could exercise "full power of management and disposition … with a view to the benefit of the aboriginal inhabitants for whom the [land] may have been set apart".[991] In respect of lands in which customary title had not been extinguished, they could be made subject to the Act, but only if the Maori owners agreed.[992] Three Commissioners of Native Reserves were appointed to the Nelson District under the Act.

[766] What followed this Act was described by Clifford J as follows:

> [177] A series of amendment acts, and successive Reserves Acts, were passed in the 1860s, 70s and 80s, culminating, for these purposes, in the Native Reserves Act of 1882. In 1862, the power of Commissioners was vested in the Governor. In 1873, Commissioners – based in territorial districts – were again provided for. Included in the schedule of land the subject of that Act were (by my count) some 51 of the original town sections and part of one other, and some 84 of the original suburban sections, or parts thereof, as shown on the maps of the 1848 Crown Grant.
>
> (footnote omitted)

[767] Section 8 of the Native Reserves Act 1882 provided for the reserves to be vested in the Public Trustee, subject to any relevant trusts. Later, the Public Trustee applied to the Native Land Court to ascertain who was beneficially interested in the Tenths reserves at Nelson.[993] The Court made its award on 14 March 1893, identifying 254 beneficiaries.[994]

[768] Obviously, much has been omitted from this brief account. But we must mention one aspect of the background that featured in the appellants' claims, namely land exchanges. There were several land exchanges from 1844 that the appellants say operated to their distinct disadvantage. Most relevantly, the appellants alleged:

---

991 New Zealand Native Reserves Act 1856, s 6.
992 Section 14.
993 This application was made pursuant to the Native Reserves Act 1882, s 16.
994 The agreed statement of facts referred to 253 beneficiaries, but we have used 254 as that was the number generally referred to in argument.

(a) In 1844–1845 some exchanges were sanctioned by Commissioner Spain in the area of Te Maatu, or Big Wood, which was an important living and cultivation area for Maori. Spain re-designated as Occupation reserves eight of the 50 acre suburban sections selected by Henry Thompson as Tenths reserves. This was done because they were occupied by Maori. However the lost suburban sections were not replaced in the Tenths reserves by further suburban sections. In addition, Spain arranged for a further group of suburban sections which had been allocated to settlers to become Occupation reserves and in return took eight suburban sections reserved for Maori and made them available to settlers. The appellants say that as a result of these exchanges, the suburban reserves were reduced by 16 sections (that is, 800 acres).

(b) In 1849, the Board of Management of Native Reserves exchanged six suburban sections allocated to Maori for six suburban sections allocated to settlers. The sections initially allocated to settlers were in the area of Te Maatu. Maori were living on them and refused to relocate. The appellants say that these sections should never have been allocated to settlers but should have been treated as Occupation reserves, the result being a further shortfall in the number of suburban sections allocated to Maori.

[769] Overall, then, the appellants' argument was that Maori lost 47 of the 100 one acre town sections that had originally been reserved for them; they did not receive any rural sections as none were ever allocated; and they lost a significant number of their 50 acre suburban sections in the exchanges that were made.

Trust/Fiduciary duty

[770] In this Court, Mr Galbraith placed the fiduciary duty claim at the forefront of the appellants' argument. While the argument based on express trust was not abandoned, it was sufficient for the appellants' purposes that they establish that the

Crown owed a fiduciary duty even if there was no express trust. Accordingly, we intend to focus on the fiduciary duty argument.

[771] We begin by discussing the decision of the Supreme Court of Canada in *Guerin*.[995] An Indian Band lived on a reserve of a little over 416 acres on the outskirts of Vancouver. By the 1950s, it had become clear that the land was very valuable and the Band had received offers to lease or buy parts of it. A Vancouver golf club was about to lose the lease of its land and was looking for an alternative site. The Band were willing to consider leasing some of their reserve to the Club and eventually agreed to surrender some 162 acres to the Crown, to be held on trust "to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people".[996] The Crown then leased the land to the golf club but, unfortunately, on terms which were much less favourable to the Band than those which the Band had indicated to the Crown that they were prepared to accept. The Crown did not seek authority from the Band to proceed on the basis of the less advantageous terms, or even draw them to the Band's attention.

[772] The Band claimed against the Crown on the basis that it was in breach of trust in respect of the lease and had not exercised the requisite degree of care and management as a trustee. The Crown contended that if there was a trust, it was a "political trust" enforceable only in Parliament rather than a true trust enforceable in the courts, relying on *Kinloch v The Secretary of State for India in Council*[997] and *Tito v Waddell (No 2)*.[998] The trial Judge found against the Crown, holding that it was in breach of trust in entering into the lease, and made an award of damages. The Crown successfully appealed to the Federal Court of Appeal against that decision. The Supreme Court of Canada allowed the Band's appeal against the Court of Appeal's decision.

[773] Three judgments were delivered. Wilson J delivered the reasons of Ritchie, McIntyre JJ and herself; Dickson J delivered the judgment of himself, Beetz,

---

995 *Guerin*, above n 966. The Chief Justice has conducted a full review of the authorities in her judgment: see above at [340]–[366]. In the light of that, we have chosen to focus on the decision which we regard as the most significant in this context.

996 At 346.

997 *Kinloch v The Secretary of State for India in Council* (1882) 7 App Cas 619 (HL).

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

Chouinard and Lamer JJ; and Estey J delivered his own judgment. We will focus on the judgment of Dickson J. Before we do so, however, we mention that s 18(1) of the Indian Act 1952 provided:[999]

> Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

[774] In essence, Dickson J found that although the Crown's obligations towards the Indian people were not trust obligations, the Crown did owe fiduciary obligations to them. Dickson J explained the basis for this as follows:[1000]

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act.* The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. In order to explore the character of this obligation, however, it is first necessary to consider the basis of aboriginal title and the nature of the interest in land which it represents.

[775] Later, Dickson J stated the underlying principle in the following terms:[1001]

> [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

---

[999] Indian Act RSC 1985 c I-5.
[1000] *Guerin*, above n 966, at 376.
[1001] At 384.

[776] Dickson J went on to say that the fact that the Crown is not normally regarded as a fiduciary in the exercise of its legislative or administrative functions (as cases such as *Tito v Waddell* illustrate) does not mean that the Crown cannot be bound by fiduciary obligations. The Crown's duty to the Indian people was not a public law duty but was in the nature of a private law duty. Dickson J said that it was not improper to regard the Crown as a fiduciary "in this *sui generis* relationship".[1002]

[777] Dickson J noted that s 18(1) of the Indian Act conferred a broad discretion on the Crown in dealing with surrendered land. Because the Band had surrendered its interest in the land to the Crown on particular terms, "a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf".[1003]

[778] In her judgment, Wilson J advanced a slightly different analysis. She agreed that the Crown owed a fiduciary duty, which arose independently of s 18(1), to the Band arising from its control over the use to which their land could be put and distinguished the "political trust" cases. The Judge went further than the majority, however, in holding that the fiduciary duty crystallised into an express trust on surrender of the land to the Crown by the Band. (For completeness, we note that Estey J dealt with the case simply on the basis of agency.)

[779] We consider that the general approach adopted by the majority in *Guerin* applies to the present case and that the Crown owed fiduciary duties to Maori who had customary rights to the land purchased by the Company in the Nelson area.[1004] The Crown did so because it assumed the Company's obligation to allocate the Tenths reserves and to manage them in the best interests of the original customary owners. This was in addition to its own governmental responsibilities towards Maori. As we have already noted,[1005] this is well illustrated by cl 13 of the November 1840 Agreement between the Crown and the Company, which we repeat for ease of reference:

[1002] At 385.
[1003] At 385.
[1004] There is of course an issue, which we do not address, as to the validity of the sales in terms of tikanga: see the judgments of the Chief Justice above at [126] and Glazebrook J above at [509].
[1005] Above at [737]–[739].

> It being also understood that the Company have entered into engagements for the reservation of certain lands for the benefit of the Natives, it is agreed that, in respect of all the lands so to be granted to the Company as aforesaid, reservations of such lands shall be made for the benefit of the Natives by Her Majesty's Government, in fulfilment of, and according to the tenor of, such stipulations; the Government reserving to themselves, in respect of all other lands, to make such arrangements as to them shall seem just and expedient for the benefit of the Natives.

[780] As observed earlier, the clause drew a clear distinction between:

(a) the Government's role in ensuring that the Company's commitments to Maori in respect of the reservation and management of land were honoured; and

(b) the Government's role in making arrangements in respect of other lands for the benefit of Maori in exercise of its general governmental responsibilities.

[781] The Company had undertaken to reserve a certain quantity of land from the land purchased and to vest it in trustees so that it could be managed in the long term for the benefit of the original customary owners. The Company regarded this as the major consideration for the land sales and appointed Mr Halswell to begin implementing its obligations to Maori. We see the Company as owing fiduciary duties to the original customary owners in these respects. The Government in effect took over the Company's obligations, as is evidenced by the 1840 agreement. It appointed the Chief Justice, the Bishop of New Zealand and the Chief Protector of Aborigines as trustees of the Tenths reserves, on the basis that they had the confidence of both the Company and the Government. The trustees in turn appointed Henry Thompson to continue with his selection of the Tenths reserves and to administer them. They gave him explicit instructions as to the types of arrangement that he could make with the reserves. At least some of the Tenths reserves were leased and built on, and rents were paid, as the Bishop's correspondence shows.[1006] This was undertaken even though the land was still in Maori customary title as the investigation of the Company's purchases had not been completed.

[1006] Above at [746].

[782] The Crown's decision to accept Commissioner Spain's recommendations and allow the Company to obtain cleared title (albeit only to the extent of his award) crystallised the Company's obligations to Maori. Given the role that the Government assumed in relation to the Tenths reserves prior to the Spain award (for example, by appointing trustees) and its acceptance of the terms of that award, it is fair to say that the Crown stood in the Company's shoes, in the sense that it took it upon itself not only to ensure that the terms agreed by the Company were honoured (in particular, that land be reserved as agreed) but also to hold the Tenths reserves for the benefit of Maori in fulfilment of the Company's long-term obligations. Moreover, when the Company wished to advance the trustees £5,000 against the security of the Tenths reserves at Nelson and Wellington, the Government referred the matter to the Bishop, who opposed it. The Government agreed with the Bishop's recommendation that the proposal should not be accepted because the Company required a power of sale over lands that were intended to be "inalienable" and the proposed rate of interest was too high.[1007] In other words, the Government accepted the view of its appointee that the proposed loan was incompatible with the long-term interests of Maori.

[783] Despite the appointment of the "trustees" in 1842, it seems clear from Governor Hobson's letter of instruction to them,[1008] the Bishop's letter of instructions on their behalf to Henry Thompson[1009] and Attorney-General Swainson's note on the Chief Justice's resignation as a trustee[1010] that all concerned understood that further steps had to be taken to formalise any trust.[1011] This is confirmed by later reports and correspondence, for example those surrounding the establishment of the Board of Management of Native Reserves in mid-1848 and the March 1848 letter from the Bishop to Alexander McDonald, who had replaced Henry Thompson as the trustees' agent for the reserves:

> Among the rents remaining uncollected [for reserve lands] is the pound rent of the acre upon which the Clergymen of Nelson have resided from the first. The two houses on that section were built by me, as Trustee of the Native Reserves, for a Native School & Hospital but the failure of Funds, *and the general uncertainty of the constitution of the Trust*, prevented me from incurring any further expense in the maintenance of Native Institutions.

[1007] Above at [747].
[1008] Above at [744].
[1009] Above at [745].
[1010] See above at n 973.
[1011] Quite apart from anything else, the land had still to be cleared of customary title at this point.

(emphasis added)

By 1848, the administration of the Tenths reserves appears to have fallen into some disarray, partly from a lack of any formal structure.

[784] But the essential point is that the Crown's assumption of responsibility, from an early stage, for the oversight and implementation of the Company's obligations to Maori in relation to the Tenths reserves is clear from the historical record. We consider that it brings into operation the *Guerin* analysis.[1012]

[785] It follows from what we have said that we do not see the Crown's conduct in relation to the Tenths reserves as properly explained on the basis that the Crown was simply performing a broad governmental or political function. We see the Crown as having acted in two capacities. In its governmental capacity the Crown was concerned to ensure that pre-1840 purchases were fair. It established an investigative process to assess that. As noted, the Tenths reserves were intended, from the Company's perspective, to be the most important element of the consideration to Maori for the purchases. Spain's award effectively confirmed that. By accepting the award, the Crown must be taken to have acknowledged the importance of the Company's obligations in respect of the Tenths reserves to the fairness of the transactions. The promised consideration had two dimensions – the initial allocation of the Tenths reserves and their subsequent administration for the benefit of local Maori. The Crown took it upon itself to provide the promised consideration in both dimensions. In doing so, the Crown was not called upon to balance the interests of settlers and Maori or to take any decision of a political or governmental nature – it was simply performing, or ensuring the performance of, promises made to the original customary owners by the Company in the context of land sales. To put it colloquially, the Crown was delivering on the deal. In this respect, then, the Crown was effectively acting on the Company's behalf.

[1012] We acknowledge that, on the basis of *Guerin*, it can be argued that the Crown has fiduciary duties to Maori arising from the Treaty of Waitangi and/or from the Crown's right of pre-emption. We base the duty in this case on the particular dealings between the Company and Maori and the Crown and the Company and to express no view about a broader basis for such a duty.

[786] In relation to the Occupation lands, we make two points. First, to the extent that the complaint is that Occupation lands were wrongly swapped for Tenths sections, it falls within our earlier analysis. We understand that this is the substantial complaint about Occupation lands. Second, to the extent that the complaint is that some Occupation lands were wrongly taken by the Crown and became part of its demesne lands, the analysis is rather different. From an early stage, the Crown acknowledged that Maori would not have alienated their pa, burial grounds or cultivations (despite assertions from Company representatives to the contrary) and insisted that any claimed alienation was based on clear proof of consent.[1013] The Crown accepted that the Occupation lands in the Nelson area should be excluded from the 1845 and 1848 grants as they had never been sold. Given the Crown's acceptance that Maori had not sold the Occupation lands and given that full title to land could only come through the Crown, we consider that the Crown was under fiduciary duties to local Maori in relation to any Occupation land to which it wrongly took title.

[787] A question now arises as to the effect of any failure by the Crown to fulfil its fiduciary obligations: (a) to set aside Tenths reserves in trust for the original customary owners and administer them for their benefit; and (b) to ensure that Occupations lands were excepted from sale transactions.

[788] The appellants argued that there were breaches of these duties in that:

(a) the rural Tenths were never reserved;

(b) 47 of the reserved town sections were removed and never replaced; and

(c) there was a failure to reserve all the Occupation lands from sale, which led to a number of exchanges which had the effect of reducing the tenths reserve.

1013 For a fuller discussion of the background to this, see the Chief Justice's judgment at [121]–[124] and [127].

[789] The appellants sought a declaration that breaches of the Crown's fiduciary duties had occurred.[1014] While there appear on the face of it to have been breaches by the Crown of the fiduciary duties owed to the original customary owners, we do not consider it appropriate to undertake a detailed consideration of the question of breach, much less make any findings. This is because the Courts below made no findings as to breach (having held that the Crown owed no fiduciary obligations to the appellants) and because the evidence before us is incomplete. This has implications for some of the remaining issues, as we explain below. The appellants asked that the matter be remitted to the High Court for the consideration of remedies. We consider that the High Court should also deal with the question of breach in light of this Court's decision.

Does Wakatu have standing?

[790] Both the High Court and Court of Appeal found that Wakatu did not have standing. Their reasons are summarised in the judgment of Glazebrook J.[1015]

[791] As noted by Glazebrook J,[1016] the claim as originally framed in the High Court has evolved as the case has proceeded through the appellate courts. The claim began as a claim that there was a trust in favour of the descendants of those on the 1893/1895 Maori Land Court lists that created vested rights in those named on those lists in the proportions specified in the lists, and their lineal descendants.[1017] This changed to a claim that the Tenths were held on trust for the original customary owners. This was essentially therefore a claim of a discretionary trust pursuant to which the trustee had discretion to apply the income for the benefit of the beneficiaries.[1018]

[792] In the appellate courts the claim has been advanced on the basis that any trust is for the original customary owners as a collective, not for individual members of those collective groups and their individual descendants. The fiduciary duties claim is advanced on the same basis.

[1014] The declarations sought by the appellants in this Court are set out in Glazebrook J's judgment at [606]. Both the Chief Justice (above at [436]) and Glazebrook J (above at [586]) make findings of breach in relation to the failure to reserve the rural Tenths, based on their express trust analysis.
[1015] Above at [621]–[624] and [625]–[629].
[1016] Above at [644]–[645].
[1017] *Wakatu* (HC), above n 967, at [31].
[1018] *Wakatu* (HC), above n 967, at [200].

[793] Our analysis begins from the premise that the claim as we see it is a claim that the Crown owed fiduciary duties to a collective group. Wakatu says it claims as the representative of the descendants of the members of the collective group. The claim as now advanced is more clearly a representative claim than that originally pleaded in the High Court. But, even as the claim was originally pleaded, Wakatu's interest could only have been as a representative of the class of those claiming to be beneficiaries of any trust or as descendants or parties to whom a fiduciary duties were owed by the Crown.

[794] Mr Galbraith argued that we should distinguish between who has sufficient interest to bring a proceeding and who is entitled to relief, citing *Paki v Attorney-General*.[1019] Mr Galbraith argued that Wakatu had standing due to its historical connection with the Tenths and as reflected in its status as trustee of the remnant Tenths. He noted that the Wakatu beneficiaries are, in a large part, descendants of the 254 tupuna.

[795] We acknowledge the historical connection between Wakatu and the Tenths. The evidence given by Mr Morgan about his and his father's efforts to achieve a resolution of grievances relating to the Tenths shows the important role played by Wakatu and those closely associated with it in relation to the identification and protection of the Tenths and the researching and conduct of the claim relating to the Tenths in the Waitangi Tribunal and, later, the present proceedings. However, we do not see this historical connection as itself providing Wakatu with standing to bring a representative claim.

[796] We agree with the Court of Appeal that Wakatu is not a successor trustee and does not have standing on that basis.[1020] However, Mr Galbraith suggested that as trustee of the remnant Tenths, it could establish sufficient historical connection to allow it to be a representative of the collective group to which the Crown's fiduciary duties are owed. Even if the Crown had been a trustee of a trust said to have come into being as a result of the 1845 grant and/or the Spain award, we would not see

---

[1019] *Paki v Attorney-General (No 1)* [2012] NZSC 50, [2012] 3 NZLR 277.

[1020] *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 (Ellen France, Harrison and French JJ) [*Wakatu* (CA)] at [16].

Wakatu as a successor trustee in relation to such a trust. As accepted by Mr Galbraith, the owners of Wakatu are not all descendants of the 254 tupuna. It is for this reason that Mr Galbraith accepted that Wakatu would not be an appropriate body for the vesting of property obtained as redress in relation to the present claim.

[797] Mr Galbraith also argued that Wakatu was an appropriate claimant because it had been the kaitiaki of the Wai 56 (Tenths) aspect of the negotiations with the Crown in relation to the settlement that has now been agreed and legislated for. However, we do not see that alone as a basis for standing in separate court proceedings.

[798] Mr Galbraith said Wakatu sought the status of a party because, unlike Mr Stafford, it could fund the present claim. However, that does not give it status as a party and the funding of the claim does not require Wakatu to have party status. It is not in any event seeking relief for itself in relation to the present claim.

[799] We acknowledge the Chief Justice's point that there may be a case for a more relaxed approach to standing in relation to claims by collective groups of indigenous owners.[1021] But we see the present case as unusual (and unsuitable for the adoption of a more relaxed approach). The history of the claim has been recited in the judgment of Glazebrook J.[1022] We accept that the claim pursued in these proceedings is a claim for the enforcement of equitable duties said to be owed to the descendants of the original customary owners, which if established, is clearly enforceable in the courts. That is different in nature from the settlement process undertaken following the report of the Waitangi Tribunal in direct negotiations between Tainui Taranaki ki te Tonga Limited (TTKTT).

[800] However, the present claim was commenced against the Crown when a process was underway involving mandated representatives of those whom Wakatu now claims to represent negotiating with the Crown towards a settlement of claims, including those relating to the Tenths and the occupation lands. In those unusual circumstances, we believe it would have been preferable for Wakatu to have sought a representation order.

1021 Above at [491].
1022 Above at [591]–[601].

[801] If Wakatu has applied for a representation order, the process of consideration of the application may have provided a framework for resolving the competing claims to represent the collective group. It may have avoided the situation under which different representatives of the same claimants have pursued claims against the Crown relating to the same allegations of breach of duty on the part of the Crown in different processes.

[802] We conclude that Wakatu does not have standing to bring the present representative claim.

Does Mr Stafford have standing?

[803] In our view, for essentially the same reasons, it would also have been preferable for Mr Stafford to have applied for a representation order. Again, in saying that we do not mean any disrespect to Mr Stafford or to his role in the pursuit of claims against the Crown, in particular his position as one of the named claimants in Wai 56 and in the conduct of that claim through the Waitangi Tribunal process. A representation order could have made provision to protect Mr Stafford from the consequences of adverse costs awards if Wakatu had agreed to bear that burden. However, no representation order was sought and we must deal with the case now before us.

[804] We acknowledge that there is precedent for a rangatira of a claimant group involving rights of indigenous people to bring the claim on behalf of the claimant group, as the Chief Justice notes in her judgment and as was noted by the Court of Appeal.[1023] Mr Galbraith argued that this practice was also consistent with tikanga.

[805] The matter is not clear cut in the present case because Mr Stafford is a kaumatua of Ngati Rarua and Ngati Tama, but not of all of the collective group whom he seeks to represent. It does, therefore, call for some extension of the principle that a rangatira may sue on behalf of a collective group which appears to be founded on the basis that the rangatira, as leader of the collective group itself, is mandated by tikanga to pursue a claim on its behalf. That is not the case in relation to Mr Stafford.

[1023] See above at [494] and n 604; and *Wakatu* (CA), above n 1020, at [30].

[806] As Mr Goddard QC pointed out in his submissions, there are some risks involved in allowing a single rangatira to pursue a claim in circumstances where the Court is aware of other representatives (in this case, the iwi trusts and TTKTT) and potentially other parties not before the Court who also claim to represent the relevant collective customary groups on whose behalf the claim is brought, and who were already engaged in an alternative process for the settlement of such a claim. We acknowledge that risk arises in the present case.

[807] However, Mr Stafford clearly does have a significant historic role in relation to the Tenths and is recognised as a leader in relation to the claim, both through his involvement in Wai 56 and his leadership roles within Wakatu and at least some of the iwi claimants represented by TTKTT. He was entitled to rely on the law as stated in the historic cases cited by the Chief Justice where a rangatira has been allowed to pursue a claim on behalf of a collective group. We would, therefore, find that Mr Stafford does having standing to pursue the present claim as representative of the collective group, the descendants of the original customary owners, and to obtain declarations in the event that the claim is made out. If the making of those declarations leads to further proceedings seeking redress, there will no doubt be an opportunity for the iwi trusts to be involved in those further proceedings. Mr Castle on behalf of Ngati Rarua emphasised that the iwi trusts saw themselves as the proper vehicles for the conduct of these claims and, having settled them, did not wish to pursue an alternative process. He said this was a question of honour for Ngati Rarua.

Do the trustees of the Te Kahui Ngahuru Trust have standing?

[808] Both Clifford J and the Court of Appeal found that the trustees of the Te Kahui Ngahuru Trust did not have standing. Their reasoning is summarised in the judgment of Glazebrook J.[1024]

[809] Although the appellants formally appealed against this aspect of the Court of Appeal decision, Mr Galbraith did not advance any argument in relation to the Te Kahui Ngahuru trustees at the hearing. He did not formally abandon this point of appeal, however. Nor did the appellants advance the position of the Te Kahui Ngahuru

---

1024 Above at [624] and [629].

trustees in their written submissions, beyond stating that the Te Kahui Ngahuru Trust was established with the intention of representing those entitled to any redress that may be awarded in the event that any of the claims made by the appellants are upheld.

[810] In these circumstances we do not see any proper basis for interfering with the decision of the Court of Appeal upholding Clifford J's finding that the Te Kahui Ngahuru trustees lack standing. We do not consider that the trustees of a trust can gain representative status merely because the trust's beneficiaries are members of the class for whom the trustees claim to be representatives.

Limitation

[811] The Crown argues that it has a limitation defence to any claim for breach of fiduciary duties in relation to Tenths reserves or Occupation lands. The fact that the events founding the appellants' claims happened more that 170 years ago gives obvious cause for consideration of the application of limitation defences in the Limitation Act 1950 (the relevant statute that was in force when the claims were made).

[812] In their analysis based on the Crown being an express trustee of the reserve land, the Chief Justice and Glazebrook J conclude that there is no limitation defence to a claim by a representative of the descendants of the customary owners who sold land to the Company for the recovery of land that was subject to such a trust that is still held by the Crown or of the proceeds of the Crown's disposal of it.[1025] The Chief Justice and Glazebrook J find the same analysis applies to Occupation lands.[1026] William Young J concludes to the contrary, essentially because he does not consider the Crown was trustee of, or had a fiduciary obligation in relation to, any reserve land apart from the reserves actually identified in the 1848 grant and that the Crown's obligation arose from a remedial constructive trust.[1027]

[813] On our analysis the Crown was under a fiduciary duties to the customary owners of the land sold to the Company to ensure reserves were set apart and

---

[1025] See above at [453]–[454] per Elias CJ; and at [685]–[688] per Glazebrook J.
[1026] See above at [452] per Elias CJ; and at [689] per Glazebrook J.
[1027] See below at [937]–[950] per William Young J.

maintained in accordance with the terms of the Spain award. We consider that the Limitation Act does not preclude the possibility of a remedy for breach of such a duty.

[814] In their written submissions, the appellants argued that the Limitation Act does not bar fiduciary duty claims. This was not developed in their oral submissions. We do not consider that we are in a position to rule on that submission at that level of generality and in the absence of detail about the breaches of duty, the consequences of breach and the nature of the remedy sought. We confine ourselves, therefore, to consideration of the application of the Limitation Act to an action for recovery of property to which a fiduciary duty applied that is in the possession of the Crown or the proceeds of disposal of such property.[1028]

[815] Under s 21(1)(b) of the Limitation Act, no period of limitation applies to an action for recovery from a trustee of trust property in the possession of the trustee or the proceeds of the disposal of such property by a trustee who has converted the property to its own use.[1029] In *Paragon Finance Plc v DB Thakerar and Co*, Millet LJ distinguished between a trustee who has acquired property when he or she is already a trustee or fiduciary in relation to that property and those upon whom an obligation to account as if a trustee is imposed as a result of wrongful conduct. Section 21(1)(b) applies to the former but not the latter.[1030] Later in the same judgment, Millet LJ said the same analysis applies in relation to those who have a fiduciary duty. In such cases, the distinction is between those whose fiduciary obligations preceded the acts complained of and those whose liability in equity was occasioned by the acts of which complaint was made.[1031] On our analysis, the Crown is in the former category, that is,

---

[1028] The third amended statement of claim contains claims for what amounts to equitable compensation, although they did not feature in the argument before us. If such claims are pursued, whether or not limitation applies to them will have to be considered when there are findings of fact relating to the allegations of breach of duty and after full argument on the difficult issues that arise.

[1029] Section 21 is reproduced above at [446]. As noted by William Young J at [930], the test under the Real Property Limitations Act 1833 (UK) 3 & 4 Will IV c 27, which was in force in New Zealand in the 1840s, is substantially the same as that under the Limitation Act 1950.

[1030] *Paragon Finance Plc v DB Thakerar and Co* [1999] 1 All ER 400 (CA) at 408–409, discussed by Elias CJ above at [450]–[451].

[1031] At 414. Breach of fiduciary duty claims may be treated as analogous to breach of trust claims in this context: *Gwembe Valley Development Co Ltd (in rec) v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131 at [74] (quoting William Swadling "Limitation" in Peter Birks and Arianna Pretto (eds) *Breach of Trust* (Hart Publishing, Oxford, 2002) 319 at 319) and at [89]–[96].

a fiduciary whose fiduciary obligations preceded the impugned acts. This leads us to the same result as that reached by the Chief Justice and Glazebrook J: to the extent the appellants claim recovery of land that came into the hands of the Crown that should have been part of the Tenths reserves as envisaged by the Spain award but was not included in those reserves, no limitation defence is available to the Crown. This includes the land that became vested in the Crown as a result of the failure to set aside the rural reserves. The same can be said in relation to any claim for the proceeds derived by the Crown from the disposal of any such land.

[816] Without knowing more of the nature of any claim that will now be pursued when the case is remitted to the High Court, we do not think it would be helpful to say more than this. We agree with Glazebrook J that it is not clear that the Crown benefitted from some of the land lost to the tenths.[1032] We do not think it can be assumed the Crown benefitted (in the sense of receiving proceeds of sale or disposal that could be amenable to an action for recovery) from land it received with native title cleared as a result of the Spain award but that was wrongly excluded from the tenths. We think that is a matter that will need to be determined on the basis of the available evidence by the High Court when the case is remitted to that Court. Allegations of breach in the period after the New Zealand Native Reserves Act 1856 came into effect may also raise issues on which we did not hear argument. We leave any such issues for determination by the High Court as well.

Laches

[817] We agree with the Chief Justice and Glazebrook J that the historical record is relatively intact.[1033] We also consider that there is no proper basis to establish the defence of laches based on any prejudice to the Crown from its inability to adduce evidence of what was and what was not promised in the 1840s or about the circumstances giving rise to the fiduciary duties that we have found the Crown owed to the original customary owners.

[1032] See above at [687].

[1033] See above at [459] per Elias CJ; and above at [690] per Glazebrook J.

[818] However, there is more to laches than just forensic prejudice, as the quotation from the judgment of Lord Selborne LC in *Lindsay Petroleum Company v Hurd* that appears in the judgment of the Chief Justice makes clear.[1034] We agree with the Chief Justice that it will be necessary to revisit the issue when the precise nature of the specific claims made by the appellants is known.[1035] We also agree with Glazebrook J that there may be shortcomings in the historical record in relation to particular allegations of breach, which may provide a basis for the Crown to claim a laches defence.[1036] Ellen France J said that if any matters could not be resolved, that would mean the appellants had not met their onus.[1037] The Chief Justice expresses doubt about that[1038] and Glazebrook J considers it is wrong.[1039] In the absence of argument on the point, we prefer to leave that issue for resolution by the High Court. Ellen France J's conclusion that the Crown had not suffered evidential prejudice is based, in part, on her view as to onus. If that view is wrong, the assessment of evidential prejudice will need to be reconsidered.

[819] In addition, we think it will be necessary to consider carefully the impact of the settlement effected with the iwi trusts under the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 (the Settlement Act) before determining whether a laches defence is available to the Crown. It may be, for example, that the Crown has transferred tenths land to one of the iwi trusts as part of that settlement. If a claim for the proceeds to the Crown of the disposal of that land were made, there would be an obvious concern that the Crown is being required to give two remedies for a single claim, pursuant to different processes involving different representatives of the same claimants. That is but one example, and it would not be helpful to say more at this stage. Whether the change of position arising from the settlement is best seen as a laches issue, as an issue in relation to the interpretation of the Settlement Act or simply as giving rise to a change of position defence cannot productively be determined in the absence of detail as to what is claimed and what remedy is sought.

1034 *Lindsay Petroleum Company v Hurd* (1874) LR 5 PC 221 at 239. See the judgment of Elias CJ above at [456].

1035 Above at [462]–[482].

1036 Above at [690]. See also the judgment of Elias CJ at [461]–[462].

1037 *Wakatu* (CA), above n 1020, at [195].

1038 See above at [464].

1039 See above at [688].

[820] We conclude therefore that any declaration the Court makes should not say that laches is unavailable as a defence. Apart from our conclusion that the Crown has suffered no forensic prejudice from an inability to adduce evidence relating to events in the 1830s and 1840s giving rise to its fiduciary duties to the original customary owners, the issue should be left at large, to be dealt with by the High Court when the matter is remitted to that Court.

Effect of Settlement Act

[821] In a settlement reflected in the Settlement Act, the Crown settled various historical claims including claims relating to the Nelson Tenths lands. This settlement, the Crown argued, prevents any further relief in relation to claims concerning the Nelson Tenths lands.

[822] The terms of the Settlement Act and the Crown's submissions based on them are set out in the judgments of the Chief Justice[1040] and of Glazebrook J.[1041] We will not repeat them.

[823] In the Court of Appeal, Ellen France J rejected the Crown's submissions, considering that had the appellants otherwise succeeded, they could have obtained relief despite the Settlement Act.[1042] By contrast, Harrison and French JJ appear to have considered that the Crown extinguished its liabilities in respect of the creation and administration of the Nelson Tenths land in the Treaty settlement, as was reflected in the Settlement Act.[1043]

[824] We agree with Ellen France J on this point, for the reasons she gives. Like Ellen France J, we give particular weight to the extract from the report of the Select Committee considering the Settlement Bill.[1044] The Select Committee said:[1045]

> The current orthodox position is that the Treaty of Waitangi does not give rise to directly enforceable legal obligations without specific statutory authority.

1040 Above at [63]–[66].
1041 Above at [705]–[709].
1042 *Wakatu* (CA), above n 1020, at [31]–[41].
1043 At [214]–[215]. We note, however, that the headnote to the report states that the Judges were unanimous that the Settlement Act did not bar the appellants' claims.
1044 At [41].
1045 Te Tau Ihu Claims Settlement Bill 2013 (123–2) (select committee report) at 3.

> In the Wakatū proceedings the claims are based around the same factual grievances that are the subject of the settlement, but primarily raise private law claims based in trust and fiduciary duty, not based on the Treaty breach. The ability to prosecute certain private law claims raised in Wakatū may be impacted by extinguishment provisions of the Tainui Taranaki Treaty settlements and their extinguishment clause, unless expressly preserved. Crown Law advice was sought on this matter and ultimately, it was considered … improper to obstruct final determination in the appellate courts. Legislative drafting was developed to specifically apply a preservation clause only to the current litigation and specific parties to that litigation.

[825] As this passage indicates, there were two distinct processes at work – the Treaty settlement process and litigation involving private law claims. It is clear that the intention was to allow the appellants to continue to pursue their private law claims despite the settlement. In preserving the opportunity to pursue the alternative litigation process, Parliament must have intended that the opportunity be a meaningful one. We think it inconceivable that Parliament would have preserved in the Settlement Act the opportunity to pursue a process which it considered could not lead to any meaningful outcome because of the settlement. That would be an empty gesture.

[826] This is not to say that the settlement is irrelevant to the present proceedings, however. Like Glazebrook J, we consider that when determining the nature and extent of any remedy for any established breaches, the Court should attempt to ensure that there is no double recovery.[1046] The Crown is entitled to proper recognition in the present proceedings for any redress which it has provided as part of the settlement of the historical claims (as defined in the Settlement Act) to the extent that such redress was provided for any established breaches. This reflects the fact that settlements were entered into with duly mandated representatives of those claiming under Wai 56, being the same collective group that Mr Stafford is representing in the present proceedings. It enables an appropriate balance between s 25(2) of the Settlement Act (which releases the Crown from "all obligations and liabilities" in respect of the historical claims) and s 25(6) (which allows the present proceedings to continue nevertheless and which must, as we have said, be given real meaning).

[1046] See above at [716].

Result

[827] In the result, then, we agree with the orders contained in the judgment of the Court.

WILLIAM YOUNG J

Table of Contents

	Para No.
An overview	[828]
The legal and constitutional context	[830]
Waste land theory	[830]
The key statutory provisions and the 1840 Charter	[835]
The Queen v Clarke	[842]
Regina v Fitzherbert	[845]
The promises made by the New Zealand Company	[853]
Implementation of the New Zealand Company's settlement plans, 1840–1844	[864]
The Spain Commission and the 1845 award and grant	[872]
The 1848 grant	[881]
Events leading up to the 1848 grant	[881]
New Zealand Company Loans Act 1847	[887]
The 1848 grant	[891]
The legal basis of the grant	[895]
Was the 1848 grant open to challenge?	[901]
The reversion of the land to the Crown	[904]
Alleged maladministration of the reserves after 1848	[905]
Analysis of the appellants' claims	[906]
Identifying what is in issue	[906]
The trust claim	[908]
The position of the Crown under the 1847 Act	[916]
The accounting for profits claim	[917]
The compensation claim	[925]
Limitation	[926]
The relevant statutory provisions and the corresponding equitable principles	[926]
Application of s 25 of the 1833 Act and s 21(1)(b) of the 1950 Act	[932]
Can the appellants satisfy the express trusts exception in s 25 of the 1833 Act and s 21(1)(b) of the 1950 Act?	[937]
Claims for breach of fiduciary duty	[942]
General considerations	[947]
Standing and the Settlement Act	[951]
Disposition	[954]

An overview

[828] Although I see most of the claims advanced on behalf of the appellants as unsound, my primary basis for dismissing the appeal is limitation. In the case of breach of trust claims, the Real Property Limitations Act 1833 (UK)[1047] and the

[1047] Real Property Limitations Act 1833 (UK) 3 & 4 Will IV c 27.

Limitation Act 1950 bar relief, and in the case of the claims for breach of fiduciary duty those statutes apply by analogy to bar relief. This approach enables me to deal with the case rather more succinctly (if that is the right word given the length of these reasons) than I would otherwise. As well, because I see limitation as a defence, I do not address laches and acquiescence at all and deal only briefly with the standing and Settlement Act issues. I should also note that my discussion of the facts presupposes a general awareness of the more detailed history provided by the Chief Justice.

[829] Given the broad sweep of the case, an explanation of the framework around which these reasons are structured may be of assistance:

(a) I start with the legal and constitutional framework. It is difficult to follow the way in which events unfolded without a reasonable grasp of this framework and particularly an understanding of associated contemporary thinking. I see such contemporary thinking as fundamental to an understanding of the 1848 grant and what it signifies. See: "The legal and constitutional context".[1048]

(b) The commitments made by the New Zealand Company[1049] to Maori encompassed promises to create appropriate reserves and that Maori would retain the land they occupied.[1050] But beyond that, there is a lack of clarity and, with the exception of Massacre Bay, I am not persuaded that the New Zealand Company should be taken to have bargained with Maori on the basis that there would be reservations encompassing *both* occupied land and separately allocated tenths. See: "The promises made by the New Zealand Company".[1051]

(c) Both the New Zealand Company and the Crown took various interim steps ahead of the anticipated acquisition by the Company of title in respect of the reserves which they envisaged would be created. Such

---

[1048] Below at [830]–[852].

[1049] This company was known both as the New Zealand Land Company and the New Zealand Company. In my reasons I will refer to it as the New Zealand Company but quotations will retain the name used in the source material.

[1050] For the purposes of these reasons I treat occupied land as including urupa and cultivations.

[1051] Below at [853]–[863].

steps did not amount to the establishment of a trust save as to the money collected. See: "Implementation of the New Zealand Company's settlement plans, 1840–1844".[1052]

(d) The 1845 award and the 1845 grant lack clarity as to: (a) elevenths or tenths given the apparent inconsistency between the 15,100 acres (which suggests tenths) and the maps (which indicate elevenths); and (b) whether the reserves in respect of occupied land were to be cumulative to the 15,100 acres. Despite this lack of clarity, I accept that the award and grant should be construed as providing for tenths and cumulative exclusions for reserves and occupied land. This, however, is of no legal moment as the 1845 grant was not accepted and therefore did not take effect. In any event, it was declared to be of no effect whatsoever by the Crown Grants Amendment Act 1867. A conclusion that it crystallised trust obligations would be flatly inconsistent with that Act. See: "The Spain Commission and the 1845 award and grant".[1053]

(e) The 1848 grant had the practical effect of extinguishing (or confirming the extinguishing of) Maori customary title and identifying the reserves in respect of which there was to be a trust. Under it, the land designated as reserves did not pass to the New Zealand Company and the Company took the balance of the land as a legal owner subject to its obligations under the New Zealand Company Loans Act 1847 (the 1847 Act). It subsequently acted accordingly. It did not take the land as a trustee for Maori. The basis upon which the grant was made is unclear. There was an inconsistency between the grant and the promises which had been made to Maori and for this and other reasons the grant may have been challengeable. See: "The 1848 grant".[1054]

1052 Below at [864]–[871].
1053 Below at [872]–[880].
1054 At [881]–[903].

(f) In 1850, when the Crown took title under the 1847 Act, it too did not accept land on the basis that it was doing so as a trustee for Maori. See: "The reversion of the land to the Crown".[1055]

(g) Claims of maladministration in relation to events which occurred after 1848 are so clearly barred by limitation as not to warrant evaluation. See: "Alleged maladministration of the reserves after 1848".[1056]

(h) The claims in relation to the events of 1848 which proceed on the basis that the Crown or the New Zealand Company were subject to trust obligations by reason of the 1845 award and grant or otherwise are unsound. I am also of the view that the claims for breach of fiduciary duty fail. See: "Analysis of the appellants' claims".[1057]

(i) Any claims which might be available to the appellants are barred by limitation. See: "Limitation".[1058]

(j) Of the appellants, only Mr Stafford has standing to seek relief and, in light of the Settlement Act, such standing is confined to relief which is personal to him rather than relief on behalf of other persons. See: "Standing and the Settlement Act".[1059]

The legal and constitutional context

Waste land theory

[830] In these reasons I will use the expression "waste land theory" as encompassing a range of related views as to the nature of Maori customary title which were to the general effect that Maori customary title was usufructuary in nature and confined to areas of occupation and use.

1055 At [904].
1056 At [905].
1057 At [906]–[925]
1058 At [926]–[950].
1059 At [951]–[953].

[831] The waste land theory achieved a good deal of currency in the 1840s.[1060] It was, for instance, supported by the House of Commons Committee's 1844 report on New Zealand and for a time it found favour with the Imperial Government, particularly when Earl Grey became Colonial Secretary in December 1846.[1061]

[832] Governor Grey favoured a variant of this theory. He saw Maori rights in waste land as "so intersecting, confused or inchoate" as not to be "valid".[1062] He considered, however, that either (a) sufficient land had to be reserved to Maori to enable them to practise a shifting style of agriculture and, as well, to engage in hunting, fishing and general foraging; or (b) they had to be afforded compensation for the loss of the opportunity to do so.[1063] The background to this is quite complex but is fully reviewed in the Waitangi Tribunal's *Te Tau Ihu o Te Waka a Maui* report.[1064]

[833] Although attracted to, and in a sense a proponent of, the waste land theory, Governor Grey was not willing to implement it directly. Governor Grey thought that such implementation would be: (a) unjust because it would cut Maori off from important sustenance; and (b) likely to provoke serious resistance from Maori. He explained this in letters to Earl Grey of 7 April 1847 and 15 May 1848. His preference was to pursue a purchase policy (based on the Crown right of pre-emption) which promised to secure all land which settlers might require and which would produce results not dissimilar to those hoped for by proponents of the waste land theory.[1065]

1060 See for instance the discussion in Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland University Press, Auckland, 1977) also available at <http://treatyofwaitangicollection.bwb.co.nz/>; Rose Daamen *The Crown's Right of Pre-emption and FitzRoy's Waiver Purchases* (Waitangi Tribunal Rangahaua Whanui Series, August 1998) at 27–55; and Michael Belgrave "Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase" (1997) 31 New Zealand Journal of History 23. I do not need to engage with the full depths of the debates regarding the theories of Swiss jurist Emmerich de Vattel and United States of America Chief Justice Marshall. For a summary of their theories see Daamen at 27; and Belgrave at 24–25.

1061 *Report from the Select Committee on New Zealand Together with the Minutes of Evidence, Appendix and Index* (House of Commons, 29 July 1844). Earl Grey chaired the Select Committee. As to the views of Earl Grey and their development see Adams, above n 1060, at 193–206; and Belgrave, above n 1060, at 30–31.

1062 Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) [Wai 785 Report] vol 1 at 300.

1063 Wai 785 Report, above n 1062, vol 1 at 301.

1064 At ch 5.

1065 Wai 785 Report, above n 1062, vol 1 at 304.

[834] The timing of the ebb and flow of the waste land theory is a little awkward. It relevantly reached its apogee when Earl Grey became Colonial Secretary in 1846. It was current when the 1847 Act was enacted but, by August 1848 (when the 1848 grant was issued) it no longer represented official policy.[1066]

The key statutory provisions and the 1840 Charter

[835] The New Zealand Government Act 1840[1067] (the 1840 Act) provided for the Queen, by letters patent, to create a colony in New Zealand and to establish a legislative council empowered to make laws for the peace, order and good government of the colony so established, but subject to conformity with instructions from the Queen or Privy Council and with its statutes to be subject to royal confirmation or disallowance.

[836] The 1840 Charter, issued under this Act, conferred on the Governor power:[1068]

> … to make and execute, in our name and on our behalf, under the public seal of our said colony, grants of waste land, to us belonging within the same, to private persons, for their own use and benefit, or to any persons, bodies politic or corporate, in trust for the public uses of our subjects there resident, or any of them.
>
> Provided always, that nothing in these our letters patent contained shall affect or be construed to affect the rights of any aboriginal natives of the said colony of New Zealand, to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony now actually occupied or enjoyed by such natives.

[837] The Land Claims Ordinance 1841 (the 1841 Ordinance) proceeded on the basis that:[1069]

> … all unappropriated lands within … New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants … , are and remain Crown or domain lands of her Majesty … , and that the

---

1066 Wai 785 Report, above n 1062, vol 1 at 303.

1067 The full title of this Act is "An Act to continue until the Thirty-first day of *December* One thousand eight hundred and forty-one, and to the End of the then next Session of Parliament, and to extend, the Provisions of an Act to provide for the Administration of Justice in *New South Wales* and *Van Diemen's Land*, and for the more effectual Government thereof, and for other Purposes relating thereto." However, it is more convenient and conventional to refer to this Act by this shorter title. The New Zealand Government Act 1840 (Imp) 3 & 4 Vict c 62.

1068 Charter and Letters Patent for erecting the Colony of New Zealand 1840.

1069 Land Claims Ordinance 1841 4 Vict 2.

> sole and absolute pre-emption from the said aboriginal inhabitants vests in and can only be exercised by her said Majesty … .

[838] The Ordinance provided for:

(a) a Crown right of pre-emption;

(b) the avoidance of all purchases from Maori which had not been or were not in the future allowed by the Crown; and

(c) a mechanism for the examination of land claims by commissioners based on agreements between settlers and Maori and for the commissioners to report on such claims and make recommendations as to whether they should be allowed or not.

The recommendatory power of commissioners was limited in various ways, including a limit of 2,560 acres as the maximum area of land in respect of which a grant could be recommended. This limit could be exceeded in the event of a special direction by the Governor. The Ordinance, however, did not, at least expressly, limit the prerogative power of the Governor to make grants otherwise than pursuant to a recommendation of commissioners. Nor was the Governor bound to act on a recommendation.

[839] The language of the Charter and the 1841 Ordinance is not inconsistent with the waste land theory.[1070] An associated point is that the Ordinance uses the expression "Crown or domain Lands of her Majesty" in a way that might suggest that land in respect of which Maori customary title had not been extinguished was, nonetheless, domain (or demesne)[1071] land of the Crown, albeit subject to Maori rights. The way in which the Ordinance was drafted is thus consistent with the view that the domain lands of the Crown encompassed either:

1070 This congruence with the waste land theory is perhaps not surprising given that one of the theory's main proponents Sir George Gipps was instrumental in the passage of the New Zealand Land Claims Act 1840 (NSW) 4 Vict 7. The Ordinance closely mirrored this Act. See Daamen, above n 1060, at 27–41.

1071 The primary sources use both spellings. For consistency, I will use "domain" unless quoting from original material.

(a) all land in New Zealand, being the land to which the Crown had obtained radical title; or alternatively

(b) all such land save for that which was actually used and occupied by Maori.

As I will explain similar considerations arise in relation to the 1847 Act.

[840] Those who subscribed to the waste land theory could be expected to have a broad conception of what constituted the domain land of the Crown and thus to interpret the 1841 Ordinance (and the 1847 Act too for that matter) accordingly – that is along the lines just suggested. With the demise of the waste land theory, such interpretations seem anachronistic and they now have little appeal. But in assessing the events which occurred in the 1840s, I think it is important to understand contemporary thinking.

[841] The 1841 Ordinance was not very particular as to the ways in which Maori customary title might be extinguished. It provided for commissioners' inquiries and for recommendations and land grants made pursuant to them. Where that process was followed, Maori customary title to the land which had been granted was undoubtedly extinguished. This, however, was not the only mechanism by which Maori customary title could be extinguished. Aspects of contemporary thinking as to this are revealed by two cases, *The Queen v Clarke* and *Regina v Fitzherbert*, to which I now turn.[1072]

The Queen v Clarke

[842] In *The Queen v Clarke*, the defendant/respondent was the George Clarke Senior who features in the narrative given by the Chief Justice. In issue was a grant to him of 4,000 acres based on the recommendation of a commissioner. This was in substitution for an earlier recommendation which had been confined to a grant of 2,560 acres (which was the maximum which could be recommended in the absence of a

[1072] *The Queen v Clarke* SC Auckland, 24 June 1848 available at <www.victoria.ac.nz/law/nzlostcases/> [*Clarke* (SC)]; and *Regina v Fitzherbert* (1872) 2 NZCAR 143.

special direction of the Governor[1073]). There having been no such direction, the second recommendation did not conform to the 1841 Ordinance. On this basis, the Attorney-General sought to set aside the grant.

[843] In the Supreme Court, Martin CJ and Chapman J upheld the validity of the grant. Martin CJ considered that the invalidity of the recommendation did not invalidate the grant. The 2,560 acre limitation applied to recommendations and not grants. The Governor was not bound to act on the recommendations made by commissioners. There was nothing in the statute to suggest that a grant made on the basis of an invalid recommendation was itself invalid. Chapman J was of the view that even though the first recommendation had been confined to 2,560 acres, it would have been open to the Governor to make a grant of 4,000 acres pursuant to the prerogative which had been preserved by the 1840 Act and was available to the Governor under the 1840 Charter. This decision was delivered 24 June 1848, a date which I regard as being significant because it precedes by a matter of only weeks the 1848 grant which was executed on 1 August.

[844] On appeal to the Privy Council, the decision of the Supreme Court was reversed, but this was on the narrow ground that as the terms of the grant recited that it had been made pursuant to the second recommendation and purported to be only by way of confirmation of the recommendation, the invalidity of the recommendation therefore invalidated the grant.[1074]

Regina v Fitzherbert

[845] In issue in *Fitzherbert* were reserves provided for as part of the settlement of Port Nicholson pursuant to arrangements made by the New Zealand Company which were contemporaneous with those in issue in this case and very similar in form. The land in issue was identified and initially treated as reserves in the same way as the Nelson town and suburban sections. As with the Nelson reserves, the Port Nicholson reserves were managed by persons (initially Edmund Halswell) appointed by the New

---

1073 See above at [838].
1074 *R v Clarke* (1851) NZPCC 516.

Zealand Company[1075] and later the Colonial Government.[1076] The land had also been identified as reserves in the Spain Port Nicholson award (issued at the same time as the Spain Nelson award) and in the 1845 Crown Port Nicholson grant (issued at the same time as the Nelson grant). As was the case with the Nelson grant, the New Zealand Company did not take up the 1845 Port Nicholson grant. There was a further grant to the New Zealand Company in 1848 in which the land was identified as reserves but,[1077] for reasons not fully explained in the judgment, the Court seems to have been of the view that this grant was invalid.[1078] In the meantime, in 1847, a hospital had been built on the land which was initially used primarily by Maori and in 1851, the Crown made a grant of this land to the trustees of the hospital.[1079]

[846] The prosecutors sought *scire facias* to set aside the 1851 grant. In support of this application, they advanced two propositions:[1080]

(a) the section was subject to a trust in favour of the Maori vendors; or

(b) Maori customary title to the section had not been extinguished.

[847] On the first issue, the result arrived at is summarised accurately in the headnote in the following way:

> That although the circumstances of the case might entitle the Native owners to consideration at the hands of the Crown, there was no implied trust in the Crown attaching to the sections in question … .

[848] If the 1848 Port Nicholson grant was invalid, I would see this conclusion is understandable. Indeed, as I will explain later, I reach a broadly similar conclusion in respect of the situation in Nelson before 1848 – a situation which was similar in some,

---

1075 Wai 785 Report, above n 1062, vol 1 at 190.
1076 Wai 785 Report, above n 1062, vol 2 at 793.
1077 Waitangi Tribunal *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wai 145, 2003) [Wai 145 Report] at 308.
1078 *Fitzherbert*, above n 1072, at 173. The reasoning appears to be that because the grant was made outside the six month period stipulated in the New Zealand Company Loans Act 1847. The purpose and effect of this limitation is unclear to me given that the general power of the Crown to make grants, including to the New Zealand Company, was expressly preserved, see below at [889].
1079 For this and other background material to the judgment, see Wai 145 Report, above n 1077, at ch 12.4 and 319.
1080 *Fitzherbert*, above n 1072, at 166.

but not all respects.[1081] If, however, the 1848 Port Nicholson grant was valid – as I think it was – it seems to me that the Crown held legal title to the land as trustee.

[849] On the second issue, the judgment was to this effect:[1082]

> The allegation that the lands have never been ceded to the Crown, and that the Native title thereto has never been extinguished, may be shortly disposed of. No formal act of cession to the Crown was necessary. From and after the purchase of these lands by the Company from the Natives, they became, by virtue of the alienation itself, part of the demesne lands of the Crown; insomuch that even if the purchase by the Company had been investigated by Commissioners under the [1841 Ordinance], and the same had been approved, and the Commissioners had recommended grants or a grant to the Company accordingly, it would have remained at the discretion of the Crown to make or refuse such grant. This title the Crown has always asserted; and although, after the selection by the officer of the Company of the lands in question, as reserves for the benefit of the Native chiefs, the Crown forbore to interfere with the lands thus selected, it has done no solemn act to encumber, much less to alienate, its estate; but in 1847 the Crown asserted its title by building a hospital on one of the sections, – in 1851 made the grant now impeached, – and has continued to maintain its title till the present time.

[850] The trouble with this aspect of the judgment is that the Court did not squarely address the terms of the agreements by which it held that Maori customary title had been extinguished. Assuming that the agreed extinguishing of Maori customary title was conditional (to use this word loosely) on the provision of reserves, I find it difficult to see how the Governor could act on the basis that Maori customary title had been extinguished unless the reserves were established as agreed. There may have been an answer to this problem but, if so, it is not apparent from the judgment.

[851] I am not alone in my reservations about the reasoning in *Fitzherbert*. From the outset, it was a controversial decision.[1083] As well, the complaints of the prosecutors were settled by payment in 1877. There are, however, two points which come out of the judgment which seem to me to be material:

(a) The Court thought it too obvious to require explanation that the 1845 Port Nicholson grant, corresponding closely to the 1845 Nelson grant,

---

1081 See below at [908]–[913].

1082 *Fitzherbert*, above n 1072, at 172–173.

1083 See, for example, Alexander Mackay "Memorandum by Mr A Mackay on Origin of New Zealand Company's "Tenths" Native Reserves" [1873] III AJHR G2b.

was of no legal effect because it had not been accepted by the New Zealand Company.

(b) It shows that the legal thinking of the 1870s was that extinguishing of Maori customary title did not solely depend upon a Crown grant made in conformity with a valid commissioner's recommendation.

[852] A little context for the second point is warranted. In the case of the New Zealand Company purchases, the Company and the Crown proceeded on the basis that the entire area acquired would vest in the Crown with only the land which was required by the Company being the subject of the Crown grant. This was consistent with the general approach taken by officials to pre-1840 purchases. There are a number of passages in *R v Symonds* which explain why the purchase by an individual from customary owners served to extinguish customary ownership in favour of the Crown.[1084] Even in the case of purchases which were not approved by commissioners, the Crown position was that Maori customary title had been extinguished. This is explained briefly by Paul Adams in this way:[1085]

> The Colonial Office decided, though not without a good deal of internal argument, that land claimed by settlers but not awarded to them by the Land Claims Commission should revert not to the Maoris who had sold it, but to the Crown.

The underlying thinking in relation to unapproved purchases is not easy to follow. Moreover there is scope for debate about the application of the principle that a purchase by an individual extinguished Maori customary title where the consideration for the purchase was executory, as in this case in respect of the creation of reserves. There is also the further difficulty that the 1839 agreements which were the ostensible focus and foundation of the Spain Commission were not with the customary owners of the land in question.[1086]

[1084] *R v Symonds* (1847) NZPCC 387 (SC) at 389–390 per Chapman J and at 393–395 per Martin CJ.

[1085] Adams, above n 1060, at 192.

[1086] Wai 785 Report, above n 1062, vol 1 at 282–283.

The promises made by the New Zealand Company

[853] The 1839 instructions given by the New Zealand Company to Colonel William Wakefield included the direction that the contracts he was to enter into were to provide that:[1087]

> … a proportion of the territory ceded, equal to one-tenth of the whole, will be reserved by the Company, and held in trust by them for the future benefit of the chief families of the tribe.

[854] Consistently with this direction, the Port Nicholson deed provided that:

> … a portion of the of the land ceded by [the chiefs] equal to a tenth part of the whole, will be reserved by [the New Zealand Company] and held in trust ... for the future benefits of the said Chiefs, their families and heirs for ever.

[855] The corresponding provisions in the Kapiti and Queen Charlotte deeds provided:

> … a portion of the land ceded by [the chiefs], suitable and sufficient for the residence and proper maintenance of the said chiefs, their tribes and families, will be reserved by [the New Zealand Land Company] and held in trust by them for the future benefit of the said chiefs, their families, tribes, and successors, for ever.

[856] In giving evidence to the Spain Commission in relation to the Kapiti deed, William Wakefield said that he had told the vendors that a tenth of the land purchased was to be reserved for the benefit of the chiefs and their families. To the same general effect was the evidence of John Brook, save that he said he told Te Hiko that the reserve would be for the benefit of "all the Natives, not him alone", an assertion which is consistent with the text of the deed. As far as I am aware, no evidence was adduced in the current proceedings as to the negotiations in respect of the Queen Charlotte deed.

[857] There is no evidence that reserves were mentioned at, or in the immediate aftermath of, the Kaiteriteri hui of 29 October 1841. Indeed, the only Maori witness to address the topic, Te Iti, said that the issue of reserves had not been raised. On the other hand, it might be thought to be at least likely that Arthur Wakefield would have

[1087] Enclosed in a letter from William Hutt (Director of the Company) to Lord Normanby (Secretary of State for the Colonies) (29 April 1839).

explained the Company's then reserves policy.[1088] By this time the policy of the New Zealand Company, as manifested in its prospectus of 15 February 1841, was that: (a) the reserves would be created in respect of land on-sold by the Company (rather than land acquired by the Company); and (b) such reserves would consist of one-eleventh of the land appropriated for the purpose of the settlement. The limited evidence suggests that discussions at the Kaiteriteri hui about land to be retained by Maori focused on cultivated land in the vicinity of the Big Wood, or Te Maatu, near Motueka.

[858] The 1844 Motueka, Wakapuaka and Te Atiawa deeds of release do not mention reserves but there are acknowledgements that relinquishment of title did not extend to "our pahs, cultivation, burial-places and wahi rongoa". The discussions associated with these deeds occurred as part of the proceedings of the Spain Commission and it seems likely that reserves as then proposed were discussed. But it is far from clear, at least to me, that such discussions were as explicit as to exclusions for: (a) occupied land; and (b) separately one-tenth of the land to be acquired. The contemporary plans on which some reserves encompassed occupied land and which were presumably the subject of discussion would not have been consistent with such an understanding.

[859] The documentary record indicates that the New Zealand Company initially envisaged that reserves of one-tenth of the land acquired would be set aside and that Maori would retain the land they occupied (that is "pahs, cultivation, burial places and wahi rongoa" and so on). What is not so clear is whether the policy developed such that the reserves would be used as an endowment only and therefore not be used by Maori.[1089] Such a policy would preclude occupied land forming reserves. It is not, however, consistent with the understanding that Maori might make use of some of the reserve sections, in particular the pepper-potted town sections.

[1088] In a diary entry of 11 November 1841, Arthur Wakefield recorded having explained the policy to two chiefs from Wakapuaka.

[1089] The most specific evidence in favour of the appellant's position on this is the diary entry made by a surveyor in 1842 in relation to a discussion which he had with a chief in which he recorded his understanding of what was proposed (being cumulative allowances in relation to occupied land and tenths); see the reasons of the Chief Justice above at [128].

[860] By the early 1840s, the New Zealand Company's plan was that:

(a) the reserves would be calculated by reference to the land on-sold (or to be on-sold) by the Company rather than what it acquired;

(b) the reserves would amount to elevenths and not tenths; and

(c) the reserves might encompass occupied land.

[861] As far as I can see, there was no governmental opposition to the shift from reserves calculated on land acquired to reserves calculated on the basis of what was to be sold. The shift from tenths to elevenths and the policy that reserves might encompass occupied land were, however, opposed by the Crown. Thus in a letter of 27 July 1842, Willoughby Shortland[1090] instructed Halswell that "native residences" should not be included in reserves unless they had been "indisputably sold",[1091] in which case they should be selected as reserves. And in a letter of 18 April 1844, Lord Stanley[1092] instructed Governor FitzRoy that the reserves were to be one-tenth, and not one-eleventh, of the land acquired.

[862] At this point I should mention the Massacre Bay deed, which involves some jumping ahead as this deed was executed after the release of the Spain award. The background is as follows:[1093]

(a) Negotiations with Massacre Bay Maori were carried out at the time of the Spain Commission hearings, but they did not accept the £290 offered as part of that process and did not sign a deed of release. That money was set aside and held in a separate bank account.

(b) The Spain award encompassed what were thought to be 45,000 acres in Massacre Bay; this despite the non-acceptance of the £290 and the absence of a deed of release signed by Massacre Bay Maori.

1090 Colonial Secretary of New Zealand at the time.

1091 The letter refers to "pahs" being "indisputably sold" but I take it from the context of the letter that this was intended to encompass "native residences".

1092 Secretary of State for War and the Colonies at the time.

1093 Wai 785 Report, above n 1062, vol 1 at 213–215.

(c) These deficiencies were remedied shortly after the award when the principal chiefs of Massacre Bay accepted the £290 and signed a deed of release.

This deed records that it was executed in "pursuance of the award of William Spain Esquire Commissioner of Land Claims". The deed was thus premised on the provisions of reserves – tenths and occupation – as envisaged in the Spain award.

[863] To my way of thinking the Massacre Bay deed provides the best and perhaps the only[1094] evidence of promises made to Maori which are precise as to the reservation cumulatively of tenths and occupied land, an effect achieved, perhaps oddly, only by language used in what might be regarded as the attestation clause.

Implementation of the New Zealand Company's settlement plans, 1840–1844

[864] In June 1839, the Company offered for sale land within the proposed Port Nicholson settlement. The first ships containing New Zealand Company immigrants arrived at Port Nicholson between January and March 1840. In the meantime the Company began negotiations with the Imperial Government with a view to regularising its colonising ambitions. These negotiations resulted in the agreement of 18 November 1840 under which the Company was to receive land grants in respect of its purchases based on a formula and would surrender to the Crown the balance of the land it had purchased. The agreement also provided:

> It being also understood that the Company have entered into engagements for the reservation of certain lands for the benefit of the Natives, it is agreed that, in respect of all the lands so to be granted to the Company as aforesaid, reservations of such lands shall be made for the benefit of the Natives by Her Majesty's Government, in fulfilment of, and according to the tenor of, such stipulations; the Government reserving to themselves, in respect of all other lands, to make such arrangements as to them shall seem just and expedient for the benefit of the Natives.

[865] What became the Nelson settlement got underway with the Company issuing the prospectus on 15 February 1841 which I have already mentioned; this despite the

[1094] The qualification is because of the surveyor's diary entry which I would hesitate to regard as a promise for these purposes as it was not made in the context of purchase negotiations. See above at n 1089.

location of the settlement not having then been identified. Under the prospectus, the Company offered for sale 201,000 acres of land, consisting of 1,000 allotments of 201 acres, each made up of a town section of one acre, a suburban section of 50 acres and a rural section of 150 acres. The prospectus also provided:

> The Company engages, subject to an arrangement with Her Majesty's Government, to add to the 201,000 acres offered for sale, a quantity equal to one-tenth thereof as native reserves so that the quantity of land to be appropriated will in fact consist of 221,100 acres, and the town of 1,100 acres.

[866] In September and October 1841, the Company chose: (a) the location of the settlement at what is now Nelson; and (b) to provide suburban and rural sections in the surrounding districts. There was enough land in and around Nelson (that is Wakapuaka, Waimea, Moutere and Motueaka) to enable town and suburban sections to be surveyed and these (1,100 in total) were allotted by ballot in 1842. One hundred of each were chosen as reserves. This was consistent with the plan in the prospectus which assumed a settlement (including reserves) of 221,100 acres of which one-eleventh would be reserves. The suburban reserves which were selected included the primary areas of Maori occupation, cultivation and use, particularly in the Big Wood area.

[867] With the suburban sections provided for, there was no suitable land in reasonable proximity to Nelson for rural sections. There was land in Massacre Bay, but this was insufficient for the 1,100 rural sections contemplated. This led to the surveying of the Wairau district which resulted in the Wairau affray on 17 June 1843. Surveying ceased in the aftermath of the affray. By July 1844, sales made by the Company totalled approximately 88,000 acres and the population of Nelson was in the order of 3,000.

[868] As the reasons of the Chief Justice indicate, the government position (that is the policy of the Imperial Government as implemented by colonial officials) was that: (a) the reserves allocated were to be one-tenth of the settlements established and not one-eleventh; and (b) in the absence of express agreement by Maori to the contrary, land occupied and used by Maori was not to form part of the reserves.[1095] This policy

---

[1095] See above at [124], [127]–[128] and [154].

was adopted by Commissioner Spain in his recommendations, albeit in a rather clumsy way. What is important to recognise however is that Spain's recommendations – to which I am about to come – represented government policy rather than findings of fact as to the promises made by the New Zealand Company to Maori.

[869] Two features of what happened during 1840–1844 warrant particular mention:

(a) the allocation (either by initial selection or swapping) of occupied land for reserves; and

(b) the collection of rent.

[870] I accept that the allocation of occupied land for reserves was contrary to, at least, the tenor of the pre-1845 policy of the Imperial Government and thus New Zealand colonial officials. The relevant material is discussed by the Chief Justice in her reasons.[1096] I am not, however, persuaded that such allocation was inconsistent with the overall tenor of New Zealand Company promises to Maori; this for reasons already explained.

[871] I accept that money received by Crown-appointed trustees for rent in respect of allocated reserves sections was held on trust. But, beyond that, I do not regard the identification of reserves by the New Zealand Company and Crown agents as going beyond putting in place on the ground practical arrangements which were intended to have legal effect if and when a Crown grant in the terms anticipated was made and accepted. As it turned out, the 1845 award and later Crown grant were not in the terms which had been anticipated. As well, the New Zealand Company did not have title to the land in question. Until it obtained title to the land, it was not in a position to put in place trust arrangements in relation to it. There was, however, a need to put in place practical arrangements to ensure that the position of Maori in relation to the proposed reserves was protected in anticipation of their creation. This encompassed management of the reserves (in terms of letting them) and the administration of money received as rent.

1096 See above at [156]–[165].

The Spain Commission and the 1845 award and grant

[872] In the course of the proceedings before the Commission, eight reserve suburban sections were swapped for others with the result that more of the reserve sections included occupied land. This swap was recorded on one of the plans submitted to the Commissioner. As is apparent from the reasons of the Chief Justice, the 1844 Motueka, Wakapuaka and Te Atiawa deeds of release were the result of negotiations that were initiated in the context of the Spain Commission's proceedings.[1097] As I have recorded, negotiations with Massacre Bay Maori also occurred in that context but Massacre Bay Maori did not accept the additional payment of £290 which had been agreed (or at least proffered) and likewise they did not sign a deed of release (at the time). Despite this, Spain's award encompassed around 45,000 acres in Massacre Bay.

[873] Spain found against the Company in relation to the Wairau district. In other words, he concluded that it had not been acquired.

[874] Spain's positive recommendations (expressed as an award) were in these terms:

> I, William Spain, Her Majesty's Commissioner for investigating and determining titles and claims to land in New Zealand, do hereby determine and award that the Directors of the New Zealand Company and their successors are entitled to a Crown Grant of 151,000 acres of land, situate, lying, and being in the several districts of the settlement of Nelson, in the southern division of New Zealand, which said districts are divided as follows, that is to say:—Wakatu or Nelson district, 11,000 acres, already surveyed; Waimea district, 38,000 acres, already surveyed; Moutere district, 15,000 acres, already surveyed; Motueka district, 42,000 acres, partly surveyed—the remaining quantity required to be selected from the portions of land coloured red in the Plan No. 1, hereunto annexed, and hereinafter more particularly referred to; and Massacre Bay district, 45,000 acres, partly surveyed; the remaining quantity required to be selected from the portions of land coloured red on the said plans; which said several districts and the quantity of land contained in each is particularly described and referred to in the enclosed schedule of the land required for the settlement of Nelson, as put into my Court at Nelson by the Agent to the New Zealand Company, and which said lands are more particularly delineated and described upon the accompanying plans, marked No.7, saving and always excepting as follows:—All the pas, burying-places, and grounds actually in cultivation by the Natives, situate within any of the before-described lands hereby awarded to the New Zealand Company as aforesaid, the limits of the pas to be the ground fenced in around their Native houses, including the ground in cultivation or occupation around the

1097 See above at [130]–[132].

> adjoining houses without the fence; and cultivations, as those tracts of country which are now used by the Natives for vegetable productions, or which have been so used by the aboriginal Natives of New Zealand since the establishment of the Colony; and also excepting all the Native reserves upon the plans hereunto annexed, marked No. lA, No. 1B, coloured green, the entire quantity of land so reserved for the Natives being one-tenth of the 151,000 acres hereby awarded to the said Company; and also excepting any portions of land within any of the lands hereinbefore described, to which private claimants have already or may hereafter prove before the Commissioner of Land Claims a title prior to the purchase of the New Zealand Land Company.

[875] There are a number of apparent problems with the way in which the award was expressed and the underlying logic:

(a) The reserves to be created were to be one-tenth and not one-eleventh of the settlement; this despite the award incorporating plans which proceeded on the one-eleventh basis.

(b) A total settlement of 151,000 acres would have allowed for only 750 total allotments, but the 100 town and accommodation sections already selected as reserves represented more than one-tenth of the settlement.

(c) The selection of the suburban sections had been on the assumption that they would include occupied land and, in it, Spain recorded that the promises made to Maori had been "in great measure complied with" by allotment of reserves in respect of "the 'Big Wood'". Despite this, the recommendations proceeded on the basis that occupied land was to be in addition to the reserves.

[876] There were the further problems for the Company that first, the definitions in relation to occupied land meant that recently established cultivations (that is those established after the Nelson settlement had been set up) were to be excluded; and secondly the award contained a saving in respect of other claims, with the result that a title issued on the basis of the award would not have been secure.

[877] The 1845 grant generally followed the terms of the award.[1098] Unsurprisingly, it was not accepted by the New Zealand Company.

[878] As I have already noted, in *Fitzherbert*, a case which was at least reasonably contemporaneous, as it was decided only 26 years after 1845,[1099] it was accepted without apparent question that the corresponding 1845 grant in respect of the Port Nicholson section was ineffective for non-acceptance.[1100] Although I have reservations about the result arrived at in that case, I see no sound basis for rejecting this aspect of the reasoning. The text of the 1847 Act also suggests that grants which had not been accepted were not valid.[1101] Such conclusion also accords with common sense. The reserves which the Spain Nelson award envisaged would be created were to be part of the Nelson settlement as developed by the New Zealand Company. Unless the Company accepted the grant and developed the Nelson settlement as envisaged, the recommendations were not capable of practical implementation.

[879] Finally, I consider that any debate as to the effectiveness of the 1845 grant is superseded by s 10 of the Crown Grants Amendment Act 1867:

> … Be it enacted … that every grant purporting to have been cancelled under the authority of any Governor of New Zealand and every grant whether formally cancelled or not of the land comprised in which a new grant has been duly issued … shall be deemed to be and to have been absolutely void *ab initio* to all intents and purposes whatever.

There can be no escape from the conclusion that the 1845 grant (being in respect of land comprised in the 1848 grant) is "absolutely void *ab initio* to all intents and purposes whatever". I can thus see no legitimate basis for concluding that the 1845 grant had the effect of crystallising trust obligations (whether on the part of the Company or the Crown). Significantly, the *Fitzherbert* judgment is completely consistent with this view.

1098 An exception is that the 1844 suburban sections swap was not on the plan which was attached to it.

1099 Especially compared to our 170 odd years after 1845. The judgment was delivered on 4 December 1871.

1100 *Fitzherbert*, above n 1072.

1101 See below at [889].

[880] As I have indicated, I do not regard the recommendations of Commissioner Spain as representing a finding of fact as to the promises made to Maori. Rather, they reflect the then-policy of the Crown as to the basis upon which grants would be made to the New Zealand Company. In short, I see the 1845 award and grant as proposals which were never implemented.

The 1848 grant

Events leading up to the 1848 grant

[881] As recorded in the reasons of the Chief Justice, the Company took its complaints about the 1845 award and grant to the Imperial Government.[1102] That government in turn went back to the new Governor, George Grey, who was sympathetic to the Company's complaints, particularly as to occupied land.

[882] The twists and turns of what followed are set out in the Chief Justice's reasons.[1103] What I see as primarily significant are the following aspects of it:

(a) the reconfiguration of the Nelson township which resulted in the "surrender" of 47 town sections;

(b) the completion of the Massacre Bay purchase and the surveying of the land acquired; and

(c) the abandonment by the Colonial Government of a requirement for the selection of reserve rural sections.

[883] The reconfiguration of the Nelson township was consistent with the view that the reserves to be allotted were to be a percentage of the land on-sold by the New Zealand Company, rather than the land acquired. I think it unrealistic, some 170 years later, for us to attempt to form a view as to the merits, from the point of view of contemporary Maori, of this reconfiguration. The surviving documentation is scanty, to say the least, and while it reveals what happened and what appears to have

[1102] See above at [170]–[171] and following.
[1103] See above at [172] and following.

been the primary rationale, it does not provide a safe basis for us to form a view of the prudence of the arrangement. As it turns out, however, I see no need to do so as, for reasons I have already explained, I am of the view that there was, at the time, no trust to be breached.

[884] The apparent logic of the reconfiguration exercise would have suggested that the number of reserve suburban sections should have been likewise reduced. Although this reduction was suggested, it did not happen, presumably reflecting the realities of the situation on the ground and likely Maori opposition. This resulted in further disconnect between the original plans of the New Zealand Company and the way in which the Nelson settlement was developing.

[885] I have mentioned already the post-Spain award Massacre Bay release and the reference in it to the award. Despite the reference to the award in the release, Governor Grey did not provide for tenths in Massacre Bay. Instead some 1,563 acres of occupation reserves were provided.

[886] The abandonment by colonial officials of the requirement for tenths to be allocated was not confined to Massacre Bay. Indeed no rural tenths were ever allocated. There is scope for doubt as to why this was so. The Chief Justice has discussed this at some length in her reasons.[1104] As will become apparent, I remain uncertain as to the rationale for this non-allocation.

New Zealand Company Loans Act 1847

[887] Under this Act "the Demesne Lands" of the Crown in New Munster (which encompassed Nelson) were to be vested in the Company in trust for the "purposes" of the Act.[1105] Proceeds of sale of the land so vested were to be applied as stipulated in the Act which included the provision of compensation "to the aboriginal Inhabitants … for the Purchase or Satisfaction of their Claims, Rights, or Interests in the said Demesne Lands".[1106]

[1104] See above at [199]–[228].
[1105] New Zealand Company Loans Act 1847 (Imp) 10 & 11 Vict c 112 [the 1847 Act], s 2.
[1106] Section 6.

[888] I think it worth pausing at this point. As I have explained, the idea that the domain land of the Crown included land in respect of which there were unextinguished Maori claims was not inconsistent with the language of the 1841 Ordinance. The same idea seems to have been adopted in the 1847 Act because land in respect of which compensation had not been paid to Maori for the purchase or satisfaction of their rights was treated under that Act as domain land of the Crown. In *R v Symonds*, Chapman J commented that although the expression "'waste lands of the Crown' may seem to import lands the title to which was complete" the particular context in which it was used in the Australian Land Claims Act 1842[1107] (Imp) meant that it was "sufficient to include that interest which the Crown has in all the lands of the Colony".[1108]

[889] Section 14 referred to doubts as to the validity of grants to bodies corporate and then provided that:

> … all Grants of Land to the *New Zealand* Company … by the Governor … which have been or shall be made … before the Expiration of Six Calendar Months after the passing of this Act, *and which have been or shall hereafter be accepted by the said Company* …, shall be deemed good and valid Grants in manner and on the Terms, if any, therein stated and declared; and further; that it shall be lawful for the Governor-in-chief … at any Time or Times hereafter to grant … to the said Company … any Lands to which the said Company, … now is or may at any Time or Times hereafter be or become entitled.
>
> (emphasis added)

The language of this provision strongly suggests that an unaccepted grant (such as the 1845 grant) was not seen as a "good and valid" grant.

[890] The Act provided that the Company could surrender its charter to the Queen, together with all claim or title to the lands granted or awarded to the Company.[1109] In that case the lands were to "revert to and become vested in Her Majesty as Part of the Demesne Lands of the Crown in *New Zealand*", subject to subsisting contracts.

[1107] Australian Land Claims Act 1842 (Imp) 5 & 6 Vict c 36.
[1108] *Symonds*, above n 1084, at 392–393.
[1109] 1847 Act, s 19.

The 1848 grant

[891] The grant recited that the Company was "entitled" to a grant but does not explain the basis of the entitlement. I think it probable that the assumed basis of entitlement was the vesting in the Company by the 1847 Act of the "Demesne Lands" of the Crown in New Munster. Indeed, I cannot see any other basis for the Company's assumed entitlement.

[892] The land subject to the grant included all the land comprised in the 1845 grant, additional land in Blind and Massacre Bays (which had not been independently acquired), and most of the Wairau purchase. The incorporation of land which had not been the subject of purchase agreements suggests that those responsible for the 1848 grant assumed that the Crown had power to dispose of land in respect of which Maori customary title had not been extinguished – that is that such land could be seen as the domain lands of the Crown – and that the New Zealand Company would be responsible for settling associated claims and was to do so from the proceeds of sale of the land vested in it.

[893] Excepted from the grant were:

> … all the pahs, burial places, and Native reserves situated within the said block of land hereby granted to the New Zealand Company as aforesaid which are more particularly delineated and described upon the plans annexed hereto, numbered [2–7] and the schedules respectively attached to each of these plans, and coloured green; together with all and every the rights and appurtenances whatsoever thereto belonging … .

There was no exclusion for cultivated land, presumably on the assumption that all relevant cultivated land was encompassed by the identified Native reserves.

[894] The reserves provided for consisted of those identified in: (a) the 1847 survey plans for Massacre Bay and western Blind Bay (as occupied land); and (b) the plans of the reserves in the remaining Nelson districts which were attached to the 1845 grant including the adjustments for the 1844 exchanges of suburban sections but with recognition of the 1847 reduction in the number of town sections.

The legal basis of the grant

[895] The Chief Justice has expressed the view that the grant could only be justified on the basis of the 1845 Spain award.[1110] This view is not consistent with the approach in *Fitzherbert* and in particular the passage I have set out at [849].

[896] In any event, I do not think that this was the basis upon which the grant was issued. The terms of the 1848 grant were so different from the recommendations in the 1845 award as to make it clear – to me at least – that Governor Grey did not see himself as bound by that award. And in terms of contemporary legal thinking, there was respectable legal basis for this stance. The understanding at the time seems to have been that the 1845 grant was ineffective. Under the 1841 Ordinance, it was open to the Governor to accept or reject the recommendations of the Commissioner. In terms of the Supreme Court judgment in *Clarke* delivered just two months earlier, it was also open to the Governor to make a grant otherwise than in the terms recommended.[1111] There is also the point I have made as to the interpretation of the 1847 Act. As I have explained, this Act could be construed as proceeding on the assumption that the domain lands of the Crown encompassed land in respect of which Maori customary title had not been extinguished.[1112] The inclusion of land which had not been purchased as part of the Spain proceedings suggests that the 1848 grant may have been premised on this assumption.

[897] Given the terms of the 1847 Act, it may have been thought that outstanding – in the sense of still unsatisfied – claims by the Maori vendors would be dealt with under s 6 of the 1847 Act (under which money which came into the hands of the New Zealand Company was to be used for, inter alia, compensation for Maori in respect of the satisfaction of their claims).[1113] The compensation envisaged was not to be by way of the creation of additional reserves. The grant therefore cannot be seen as imposing on the New Zealand Company a trust to hold the land in question on trust to create such reserves.

[1110] See above at [188].
[1111] *Clarke* (SC), above n 1072.
[1112] See above at [888].
[1113] See above at [887].

[898] None of this satisfactorily explains why the unallocated reserves were not addressed and, in particular, why a mechanism was not put in place to ensure that they were established.

[899] As I have indicated, I accept that there was some merit to the New Zealand Company's position as to tenths and elevenths and the issues as to occupied land. But that said, the reserves identified in the 1848 grant are far more limited than what would have been required to fulfil the substance of the promises of the New Zealand Company. It seems likely that Governor Grey considered that reserves on such a scale were not appropriate and, perhaps, that the interests of Maori could be advanced in other ways. This would be consistent with his variant of the waste land theory.

[900] As for the legal rationale, it will be apparent from my comments about *Fitzherbert*, I find the mid-nineteenth century theories about the extinguishing of Maori customary title somewhat elusive.[1114] The underlying idea in *Fitzherbert* seems to have been that agreements between the Company and the vendors were to extinguish Maori customary title in favour of the Crown and that this occurred without the Crown incurring a legal responsibility for ensuring that the Company's promises as to reserves were honoured. This aspect of the judgment makes for uncomfortable reading. I am not sure whether this 1872 judgment reflects official thinking in 1848. If it does, however, it would provide an explanation – albeit not a very satisfactory one – for the structure of the 1848 grant.

Was the 1848 grant open to challenge?

[901] As is apparent, I see the 1848 Crown grant as inconsistent with the New Zealand Company promises to Maori which formed part and parcel of the processes which led to the extinguishment of Maori title. An argument to this effect is most strongly available in relation to Massacre Bay, as the attestation clause of the Massacre Bay Deed referred to the Spain award and, to my way of thinking, thereby incorporated a *cumulative* reservations requirement for tenths *and* occupied land.[1115] But more generally, the reserves provided for in the 1848 grant were less generous

---

[1114] See above at [845]–[852].
[1115] See above at [862]–[863].

than those which could fairly have been expected given the general tenor of the New Zealand Company's promises which might be thought to have extended at least to what had been contemplated in the 1841 prospectus.

[902] I consider that substantial inconsistency between the grant and the promises would have provided a basis for an application to set aside the 1848 grant albeit that such application would have depended on arguments which were similar to those which were to be rejected 24 years later in *Fitzherbert*.[1116] There are also other – although related – bases upon which the grant might have been challenged. By August 1848, there was comparatively little official support for the waste lands theory. With that theory put to one side – as I think it would have been had the grant been challenged – the interpretations of the 1841 Ordinance and the 1847 Act which I have discussed would have been difficult defend. If the grant was premised on those interpretations, it is probable that it would have been held to be legally unsound.

[903] I am thus of the view that if *scire facias* proceedings had been taken to challenge the grant, such proceedings may have been successful.

The reversion of the land to the Crown

[904] In July 1850 the New Zealand Company surrendered its charter and accordingly s 19 of the 1847 Act came into play:

> … all the Lands, Tenements, and Hereditaments of the said Company … shall thereupon revert to and become vested in Her Majesty as Part of the Demesne Lands of the Crown in *New Zealand*, subject nevertheless to any Contracts which shall be then subsisting in regard to any of the said Lands, and upon the Condition of satisfying any Liabilities to which the said Company may then be liable under their existing Engagements with reference to the Settlement at *Nelson*, or any Liabilities of the said Company … .

The machinery for settling claims against the New Zealand Company was provided for in the New Zealand Company's Land Claims Ordinance 1851, which provided tight time limits for making claims.[1117] The background to this is explained in some detail in the Privy Council judgment, *Riddiford v The King*, which makes it clear that

---

[1116] *Fitzherbert*, above n 1072.
[1117] New Zealand Company's Land Claims Ordinance 1851 15 Vict 15, s 4.

the reversion to the Crown was free of equitable interests.[1118] The appellants have not sought to rely on s 19 as grounding a claim to relief.

Alleged maladministration of the reserves after 1848

[905] Some complaints have been advanced by the appellants in relation to events which occurred in relation to the reserves recognised by the 1848 grant. I see such claims as so clearly barred by limitation as not to warrant discussion.

Analysis of the appellants' claims

Identifying what is in issue

[906] I regard any claims as to maladministration after 1848 as clearly barred by limitation. As well, I am not persuaded that there were areas of occupied land which were not, one way or another (including via the tenths reserves which were created, including by swaps) reserved to Maori. For these reasons, I propose to address only the arguments of the appellants addressed to the shortfall between the reserves recognised in the 1848 grant and those contemplated in the 1845 award. That shortfall results from:

(a) the selection (either initial or by way of swaps) for reserves of occupied land;

(b) the re-configuring of the Nelson township which resulted in the loss of 47 town sections; and

(c) the non-selection and reservation of rural sections.

I will refer to this cumulative shortfall as the "unallocated reserves".

[1118] *Riddiford v The King* [1905] AC 147 (PC) at 158–160.

[907] The appellants advance three claims in respect of the unallocated reserves:

(a) Land encompassed within the 1845 grant which the Crown acquired, either directly, or via the New Zealand Company, was impressed with a trust to provide for the unallocated reserves ("the trust claim").

(b) The non-allocation of the reserves resulted from a breach of fiduciary duty on the part of the Crown from which the Crown benefited and for which benefits the Crown should account ("the accounting for profits claim"). This claim might be met by the imposition of a constructive trust in respect of any particular properties acquired by the Crown which might be thought to represent such benefits.

(c) The non-allocation of the reserves resulted from a breach of fiduciary duty on the part of the Crown for which it should pay compensation ("the compensation claim").

The trust claim

[908] I accept that the reserves identified in the 1848 grant vested in the Crown which held the land in question on trust. To the extent that *Fitzherbert* suggests otherwise, I disagree with it. This view is consistent with the November 1840 agreement between the Imperial Government and the New Zealand Company, an agreement which I see as largely political in character but as indicating clearly that land designated as reserves for the purposes of satisfying the promises of the Company to Maori would be held by the Crown as trustee.[1119] It is also consistent with the actions of the Crown throughout.

[909] The claim in relation to the unallocated reserves proceeds primarily on the basis that the 1845 award and grant constituted the Crown a trustee of the reserves which were specifically identified and also in respect of the unallocated rural sections. As will be apparent, I do not agree with this analysis. I see the 1845 grant as devoid of effect and the 1845 award as thus being merely a set of recommendations. Unless

---

[1119] See above at [864].

and until the grant was accepted and the development of the Nelson settlement proceeded in accordance with it, there could be no legally effective trusts. The land encompassed by the grant and award was thus in a form of legal limbo. Arguably it remained in Maori customary title as the consideration promised by the Company in the form of reserves had not been provided. And, even if it is the case that customary title had been extinguished and the land vested in the Crown free of customary claims, I see the role contemplated for the Crown in relation to the reserves as so predicated on acceptance of the grant by the Company as to make it unrealistic to treat it, pending such acceptance, as a trustee.

[910] The argument in relation to the unallocated rural reserves is, in any event, a little elusive. I imagine that if the award had been accepted and implemented, rural sections would have been surveyed with rural section reserves being selected by ballot as part of the overall allocation of the rural sections and that, in a practical sense, the ability of the New Zealand Company to dispose of rural sections would have been deferred until the rural reserves were identified. But whether this would have involved trust obligations pending such surveying and selection is not clear. As it happens, I see no need to discuss this point in detail because I see the trust argument as failing for the more fundamental reason that the 1845 grant was not accepted.

[911] There may be scope for argument that a similar trust came into existence via a slightly different mechanism. Such argument would proceed along these lines: the purchases made by the Company served to extinguish Maori title and resulted in the land in question becoming the domain land of the Crown, free of any Maori claims to customary title, but with the Crown required to honour any unexecuted promises made by the New Zealand Company as part of the consideration for the acquisition of the land and not able to approbate the purchase (by taking or claiming title) but at the same time reprobate it (by not accepting the terms on which the purchase was made).

[912] Although I regard an argument along these lines as more convincing than those founded on the 1845 grant, there are a number of difficulties with it:

(a) It is not consistent with the approach taken in *Fitzherbert*.[1120] *Fitzherbert* is a difficult case and I disagree with the result as the land in question had been recognised in the 1848 grant as a reserve. But at this remove in time I am reluctant to reject out of hand the general understanding of the Judges as to how customary title might be extinguished. Recognising a trust of the kind postulated would be tantamount to such a rejection.

(b) The reserves contemplated were to be allocated as part of the development of the Nelson settlement and required the participation of the New Zealand Company. Unless the New Zealand Company was prepared to accept the grant and develop the settlement in accordance with it, establishment of the reserves contemplated by the 1845 award and grant was not practicably possible. The clear intention underpinning the grant and award was that the rural sections would be selected by ballots to be conducted by the New Zealand Company and as part of its continuing development of the settlement. But unless and until the New Zealand Company accepted the grant, such selection process could not take place. As will be noted, this is an elaboration of the consideration referred to above at [909]. Its relevance here is that it shows that the approbate/reprobate argument is not convincing.

(c) In any event, a trust of the kind contemplated would not be an express trust for the purposes of limitation, a point I will revert to shortly.

[913] I likewise do not see the New Zealand Company as a trustee. It did not accept the 1845 grant and never took title under it. The grant was legally ineffective for non-acceptance. As well, the provisions as to reserves could not practically be implemented unless the New Zealand Company accepted the grant and developed the Nelson settlement in the manner envisaged. Since it did not accept the grant, it did

---

[1120] *Fitzherbert*, above n 1072.

not obtain title and in particular it did not assume the role of a trustee in relation to the reserves, I can see no credible basis upon which the Company could have been a trustee during the period between 1845 and 1848.

[914] When the New Zealand Company later acquired – that is in 1848 – the 151,000 acres encompassed by the Spain award and 1845 grant, it did so on the terms of the 1848 grant. Those terms are entirely inconsistent with the view that it was acquiring the land as trustee in relation to the unallocated reserves. So too are the terms of the 1847 Act under which the grant was made.

[915] I likewise do not accept the submissions that the New Zealand Company acquired the land subject to a constructive trust to provide tenths in terms of the Spain award and 1845 grant. As I have explained, I do not see the Spain award as representing a finding as to the promises made to Maori. When the Company took title under the 1848 grant it was, by its actions, confirming its rejection of the 1845 award and grant. It would be irrational to suggest that the Company was accepting an obligation to provide for reserves other than those specified in the 1848 grant. Moreover, if there was a trust obligation – and I am not persuaded that there was – it would have been one imposed by law and would not be an express trust for the purposes of limitation.

The position of the Crown under the 1847 Act

[916] The conclusion that the New Zealand Company did not take the land conferred on it under the 1848 grant as a trustee means that, when the land reverted to the Crown in 1850 under the 1847 Act, it too did not take the land as a trustee.

The accounting for profits claim

[917] This claim, along with the compensation claim which I will discuss shortly, rests on the proposition that the Crown was a fiduciary for the Maori vendors who dealt with the New Zealand Company.

[918] In *Paki v Attorney-General (No 2)* I discussed, in some detail,[1121] the question whether the Crown could be said to have owed fiduciary duties to Maori. In the course of that discussion I touched on whether the Crown could be said to owe what, in this case, was described as a sui generis fiduciary duty in circumstances where there was no duty of loyalty or relational duty of good faith. Those comments were in response to the views of Hammond J in the Court of Appeal in *Paki v Attorney-General*.[1122] What I say here is very much by way of addendum to that discussion.

[919] The appellants' case is that the asserted fiduciary duty is in part predicated on the assumption that the 1845 award and grant left the Crown with what was said to be a fiduciary duty to protect the interests created under that grant in favour of Maori. If the grant was ineffective – as I conclude it was – this aspect of the argument falls away. This is perhaps the principal difference between my position and that of the majority. They approach the case on the basis that the music stopped in 1845 leaving the Crown with crystallised trust or fiduciary obligations. On this approach there were not the kind of conflicting public law obligations which make the imposition of such obligations awkward. On my approach, the critical events are those that occurred in 1848 and in particular the issue and acceptance of the 1848 grant. And, as I will explain, in relation to those events the government had public functions which I see as inconsistent with the imposition of a fiduciary duty.

[920] Once the 1845 grant was rejected, the critical actions taken by Governor Grey were in part referable to his role under the 1841 Ordinance and the Royal Prerogative. Under both he had responsibilities to look to the interests of Maori, but these were of a public law character and he was, in particular, required to balance the interests of the New Zealand Company with those of Maori. To be more particular, in the aftermath of the 1845 grant, I do not see how Crown officials could properly have declined to deal with the New Zealand Company's complaints – complaints which I consider had some substance – by invoking a higher legal duty owed to Maori.

[1121] *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [269]–[277].
[1122] *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [105]–[118].

[921] When it came to implementation of the 1847 Act, Governor Grey and his officials were required to form a view as to what was required. As I have endeavoured to explain, there was scope for the view that, for the purposes of that Act, the domain lands of the Crown included land in respect of which Maori customary title had not been extinguished. And for the reasons given, I think it at least possible that the 1848 grant was predicated on that view. For this reason (along with others) the grant was susceptible to challenge by *scire facias*. It would not, however, be in accordance with principle to conclude that the approach which Governor Grey (or any other representatives of the Crown) took in relation to the interpretation and application the 1847 Act was controlled by a fiduciary duty to Maori.

[922] If we assume, contrary to my opinion, that the Crown's actions, particularly in relation to the 1848 grant and more generally as to the unallocated reserves, were a breach of its fiduciary obligations, those affected by the breach would have been entitled to remedies in equity. To the extent to which the Crown could be said to have profited by its breach, those remedies could include an account of profits and, if those profits could be said to be represented by a particular property, a constructive trust could be imposed in the normal way.

[923] On the appellants' theory of this aspect of the case, what happened in 1848 is that land encompassed by the 1845 award which should have been subjected to a trust for the unallocated reserves passed, without the relevant restriction, to the New Zealand Company and this was a result of the breach by the Crown of the fiduciary duty contended for. The land in question was then granted to the New Zealand Company in 1848 and reverted to the Crown in 1850. The argument seems to be that in 1850 the land became impressed with a constructive trust as representing the profits of the breach of fiduciary duty.

[924] Because I do not accept that there was a fiduciary duty (and thus do not accept that there was breach) I do not accept the associated legal analysis. And for reasons I will come to shortly, even if the analysis were correct, the claim would still be defeated by limitation.

The compensation claim

[925] The compensation claim seems to proceed in part on the basis that the Crown should compensate the appellants for its failure to insist on the reserves contemplated by the 1845 award. For reasons already given, I do not accept that the Crown was subject to a fiduciary duty in this respect.

Limitation

The relevant statutory provisions and the corresponding equitable principles

[926] The statutes which are primarily relevant for present purposes are the Real Property Limitations Act 1833 (UK) (the 1833 Act) which was in force in New Zealand when the events giving rise to the litigation occurred[1123] and the Limitation Act 1950 (the 1950 Act).

[927] 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. Under s 25 of the 1833 Act, the s 24 limitation period did not apply in the case of "express trusts."

[928] Under the 1950 Act, the limitation periods for actions for the recovery of land were provided for in s 7:

> **7 Limitation of actions to recover land**
>
> …
>
> (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:
> ….

Because the s 2 definition of "land" in the 1950 Act encompassed equitable interests in land, s 7(2) imposed a 12 year limitation period for the recovery of equitable interests in land.[1124] In this respect, the practical effect of the 1950 Act was therefore to reduce the limitation period from 20 to 12 years.

[1123] 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 in: "The Limitation Act, 1950" (1951) 27 NZLJ 337.

[1124] See also s 10 of the 1950 Act.

[929] The limitation rules changed in 1891 as a result of s 13 of the Trustee Act 1883 Amendment Act 1891 (the 1891 Act) 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 six year limitation period for breach of trust was specified in s 21(2) and the exception in s 21(1)(b). For the purposes of these sections, the expressions "trust" and "trustee" were defined to include "implied and constructive trusts".[1125]

[930] To the extent to which the appellants are claiming an interest in land, their claim is barred by ss 2 and 24 of the 1833 Act and s 7 of the 1950 Act and to the extent that it is a claim for breach of trust, it is barred by s 21(2) of the 1950 Act. They can avoid the impact of the 1833 Act only if they can establish an "express trust" (so s 25 applies over s 24) and they can avoid limitation under ss 7 and 21(2) of the 1950 Act if they can invoke s 21(1)(b) by establishing a claim to "recover … trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use". As will be apparent, I think that the test under s 25 of the 1833 Act is substantially the same as under s 21(1)(b) of the 1950 Act.

[931] I will deal separately with limitation by way of analogy in respect of claims against the Crown as a fiduciary.[1126]

Application of s 25 of the 1833 Act and s 21(1)(b) of the 1950 Act

[932] The express trusts exception in s 25 of the 1833 Act enacted the principles by which courts of equity applied the Statute of Limitations by analogy. These principles are illustrated by *Soar v Ashwell*, a case which was not determined directly under s 24 because it concerned money and not land.[1127]

[1125] By reason of s 2 the definitions of Trust and Trustee for limitation purposes were those in the Trustee Acts of 1908 and 1956. Both Trustee Acts included implied and constructive trusts.

[1126] See below at [942]–[946].

[1127] *Soar v Ashwell* [1893] 2 QB 390 (CA).

[933] In *Soar v Ashwell* trustees had deposited money with a solicitor. He initially invested it appropriately but had, by the time of his death, only accounted for half of what he had received. The trustees sued and the issue was whether his estate could rely, by analogy, on the Statute of Limitations. Lord Esher MR explained the principles in this way:[1128]

> If there is created in expressed terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust, a Court of Equity, upon proof of such facts, will not allow him to vouch a Statute of Limitations against a breach of that trust. Such a trust is in equity called an express trust. If the only relation which it is proved the defendant or person charged bears to the matter is a contractual relation, he is not in the view of equity a trustee at all, but only a contractor; and equity leaves the contractual relation to be determined by the common or statute law. If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the Court of Equity allows Statutes of Limitation to be vouched.

He then applied the principles so stated to the facts of the case:[1129]

> The moment the money was in his hands, he was in a fiduciary relation to the nominated trustees; he was a fiduciary agent of theirs; he held the money in trust to deal with it for them as directed by them; he was a trustee for them. He was therefore a trustee of the money before he committed, if he did commit, the alleged breach of trust, and was in possession of and had control over the money before he committed, if at all, the alleged breach of trust.

[934] The English provision corresponding to s 13 of the 1891 Act was, from the outset, construed on the same basis.[1130] The English provision which corresponds to s 21(1)(b) of the 1950 Act was addressed by the Court of Appeal of England and Wales in *Paragon Finance Plc v DB Thakerar & Co*.[1131] In his much cited judgment, Millett LJ explained the subsection in this way:[1132]

> … 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.

1128 At 393. Bowen and Kay LJJ wrote separately but concurred in outcome.

1129 At 394.

1130 See for instance *Thorne v Heard* [1894] 1 Ch 599 (CA) at 609 per Kay LJ, aff'd *Thorne v Heard* [1895] AC 495 (HL).

1131 *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA).

1132 At 408.

He then went on to say:[1133]

> 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:[1134]

> 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 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 … .

[935] As I pointed out in *Paki (No 2)*, the policy reasons for excluding limitation in relation to express trusts apply to claims against constructive trustees in the first category but not to claims against constructive trustees in the second category.[1135]

[936] I note that the Supreme Court of the United Kingdom has recently approved Millet LJ's reasoning.[1136]

Can the appellants satisfy the express trusts exception in s 25 of the 1833 Act and s 21(1)(b) of the 1950 Act?

[937] Except in relation to the land identified as reserves in the 1848 grant, I do not accept that either the New Zealand Company or the Crown became either: (a) an express trustee for the purposes of s 25 of the 1833 Act; or (b) a trustee of the kind envisaged by s 21(1)(b) of the 1950 Act.

[938] As will be apparent from what I have already said, I do not accept that any Crown obligations by way of trust arose in respect of the unallocated reserves. The structure of the 1848 grant made it clear that the Crown was not setting out to create reserves other than those identified. It may be that in doing so it was acting wrongly

---

1133 At 408–409.
1134 At 409.
1135 *Paki (No 2)*, above n 1121, at [297].
1136 *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 at 1198–1199.

but if so, such wrongful actions did not constitute it as a trustee either under an express trust for the purposes of s 25 of the 1833 Act or a trust within the proper scope of s 21(1)(b) of the 1950 Act.

[939] From my point of view, what is relevant is that neither the Crown nor the New Zealand Company ever acknowledged that they held any of the land in issue in trust to create the unallocated reserves. If they were under an obligation to do so, this could only be because of an obligation imposed by law rather than an obligation which they expressly accepted. In this respect, their roles were not akin to those of a solicitor who receives money for investment and does not account for it or an agent who sells property on behalf of a vendor but does not account for the proceeds of sale. This puts the present case plainly in Millett LJ's second category of so-called "constructive trustees", and is therefore subject to limitation.

[940] For the same reasons, the Crown did not take the land it received back under the 1847 Act as an express trustee for the purposes of s 25 of the 1833 Act or s 21(1)(b) of the 1950 Act.

[941] It follows that all claims for breach of trust are barred by limitation.

Claims for breach of fiduciary duty

[942] As I have noted, and the discussion in *Soar v Ashwell* indicates, courts of equity have always been prepared to apply by analogy limitation periods to equitable claims.[1137] It would be odd if the courts were to permit limitation defences to breach of trust claims to be defeated by the simple mechanism of relabeling the claims as being for breach of fiduciary duty. In the leading cases in which limitation periods in respect of breach of trust claims were upheld, it seems to have been taken for granted that any overlapping claims for breach of fiduciary duty would likewise be defeated. This is illustrated by *Paragon Finance*[1138] and *Williams*.[1139]

[1137] See above at [932]–[933].
[1138] *Paragon Finance*, above n 1131.
[1139] *Williams*, above n 1136.

[943] There is clear and persuasive authority that in cases of this sort, the courts are to apply s 21(1)(b) of the 1950 Act by analogy to claims for breach of fiduciary duty. This was succinctly explained by Mummery LJ in *Gwembe Valley Development Co Ltd v Koshy (No 3)*, a case in which a director, in breach of the self-dealing rule, had made substantial profits which the company was entitled to recover, but subject to limitation.[1140] In dealing with the English provision equating to s 21(1)(b), he said:[1141]

> The starting assumption should be that a six-year limitation period will apply – under one or other provision of the Act, applied directly or by analogy – unless it is specifically excluded by the Act or established case law. Personal claims against fiduciaries will normally be subject to limits by analogy with claims in tort or contract (1980 Act, ss 2, 5 …). By contrast, claims for breach of fiduciary duty, [where the relief sought is of restitutionary or restorative character] will normally be covered by s 21. The six-year time limit under s 21(3), will apply, directly or by analogy, unless excluded by s 21(1)(a) (fraud) or (b) (class 1 trust).
>
> In the present case, it is clear that these principles were applicable to a director in Mr Koshy's position. He had 'trustee-like responsibilities' in the exercise of the powers of management of the property of GVDC and in dealing with the application of its property for the purposes, and in the interests, of the company and of all its members. In our view, accordingly, the claim for an account, if it was based on a failure in the exercise of those responsibilities, was within the scope of s 21. It was in principle subject to a six-year time-limit under s 21(3). The question is whether it was excluded under either of the two statutory exceptions in s 21(1)(a) and (b).

[944] When he came to apply this to the facts of the case, he said:[1142]

> … it is clear in our view that any trust imposed on Mr Koshy is a class 2 trust, within Millett LJ's classification. We agree … that liability to account for unauthorised profits may arise within a wide spectrum of factual situations. However, that does not alter the analysis under s 21(1)(a) and (b), each of which must be applied in accordance with its own terms. … Mr Koshy's liability to account for undisclosed profits, and any constructive trust imposed on those profits, do not depend on any pre-existing responsibility for any property of the company. They arose directly out of the transaction which gave rise to those profits, and the circumstances in which it was made. The fact that Mr Koshy was in a pre-existing fiduciary relationship with the company was not enough, by itself, to bring the case within class 1 … .

[945] The judgment leaves it at least open whether the same result would have been arrived at if Mr Koshy had diverted to himself property belonging to the company. I

[1140] *Gwembe Valley Development Co Ltd (in rec) v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131.
[1141] At [111]–[112].
[1142] At [119].

have in effect dealt with this issue already in relation to the breach of trust claims when I indicated that the Crown did not hold the land in question on behalf of Maori in a way which corresponds to the liabilities of the solicitor or agent for sale whom I postulated. I see any attempt to treat the Crown's position as analogous to such factors as forced and inconsistent with the more general considerations which I am about to mention.

[946] I consider that where an equitable claim is barred by limitation by analogy, the courts do not retain a discretion to permit the claim to proceed.[1143]

General considerations

[947] To the extent that this aspect of the case involves issues of policy, the overall context of the case seems to me to be relevant.

[948] The events primarily giving rise to this case occurred in or before 1850. In this context, the first, rather than the last, issue seems to me to be whether the claims of the appellants are sustainable and can be fairly assessed, given the 165-odd years which have now elapsed.

[949] Contrary to some of the views which have been expressed, I am of the view that we cannot do justice to a claim of this antiquity. Everyone involved in the events in question has now been dead for at least a century and probably much longer. The documentary record consists, of course, only of those records which were preserved. We simply do not know what records were once available. There is much which is now inaccessible; for instance the precise reasons why rural tenths were not allocated and more generally as to reasons why the principal protagonists acted as they did. We cannot – at least with any confidence – recreate all the relevant thinking of the time and we cannot even do so in relation to legal issues, for instance as to land acquisition and the extinguishing of Maori customary title. Since we do not understand the policy

[1143] There has been some debate about this but the views I prefer are those expressed in JD Heydon, MJ Leeming and PJ Turner *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, LexisNexis, Chatswood (NSW), 2015) at [36-085]; and *Gerace v Auzhair Supplies Pty Ltd* [2014] NSWCA 181, (2014) 87 NSWLR 435 at [70]–[71] by Meagher JA.

and legal rationales for the 1848 grant, we are not well-placed to form a judgment about it.

[950] On this basis, it seems to me that if there is a judgment call to be made as to the application of limitation defences, either directly or by analogy, it should be in favour of the Crown.

Standing and the Settlement Act

[951] Given that I see the claim as failing for more fundamental reasons, I was reluctant to engage with issues of standing and representation and what I see as a related issue under the Settlement Act. But, as there would otherwise be an equal division of opinion on the standing issue, I think it right to record my conclusions.

[952] As to standing, I agree with Arnold and O'Regan JJ that Wakatu and the Te Kahui Ngahuru Trust do not have standing, essentially for the reasons which they give.[1144] I accept that Mr Stafford has standing in his personal capacity only and not to pursue claims on behalf of anyone else. In particular, I see any claim by him to have breaches of trust or fiduciary duty made good in financial terms as one advanced on behalf of those who would benefit by such making good and thus precluded by s 25(7) of the Settlement Act.[1145] This point warrants brief explanation.

[953] A claim as just postulated would be within the Act's definition of "historical claims". My starting point is that to permit it to be advanced would be inconsistent with s 25(1), (2) and (4) which relevantly provide:

> (1) The historical claims are settled.
>
> (2) The settlement of the historical claims is final and, on and from the settlement date, the Crown is released and discharged from all obligations and liabilities in respect of those claims.
>
> …
>
> (4) Despite any other enactment or rule of law, on and from the settlement date, no court, tribunal, or other judicial body has

[1144] See their judgment at [790]–[802] and [808]–[810].
[1145] Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014.

> jurisdiction (including the jurisdiction to inquire or further inquire, or to make a finding or recommendation) in respect of—
>
> (a) the historical claims …

There is a carve out for this appeal in s 25(6) and in particular the reservation of the right of the plaintiffs in the present proceedings to obtain "relief ... to which the plaintiff is entitled". I doubt if Mr Stafford could be said to be "entitled" to relief which is due to others. So if the section had stopped there I would still have been inclined to the view that he had no standing to seek such relief. This is, however, by the by as the issue is put beyond doubt by s 25(7) which provides that s 25(6) "does not preserve any claim … on behalf of a person who is not a plaintiff" in those proceedings. I see this last subsection as meaning what it says and thus as excluding any ability which Mr Stafford might other have had to seek relief on behalf of any other person (or group of persons).

Disposition

[954] I would resolve this case on the basis that the appellants' claims are subject to limitation and therefore dismiss the appeal.

Solicitors:
Pitt & Moore, Nelson for Appellants
Crown Law Office, Wellington for Respondent
Lovell & Associates Ltd, Upper Hutt for Intervener