IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA144/2023
[2025] NZCA 677

BETWEEN	MERYL TAIMANIA CARTER, RAINA RAEWYN DOAR, RAYMOND PAUL EDMONDS, JONATHON PEARCE EDWARDS, ANITA LEE MARSH, TAIPARI BARRY PHILLIP MUNRO AND WHITIAO RAEWYN PAUL AS TRUSTEES OF WHATITIRI MĀORI RESERVES TRUST First Appellant
AND	NEW ZEALAND MĀORI COUNCIL Second Appellant
AND	ATTORNEY-GENERAL First Respondent
AND	NORTHLAND REGIONAL COUNCIL Second Respondent

Hearing:	7–8 August 2024 (further submissions received 4 November 2024)
Court:	Katz, Thomas and Palmer JJ
Counsel:	M S Smith and D T Haradasa for Appellants D A Ward and K Peirse-O'Byrne for First Respondent J V Ormsby and M J Doesburg for Second Respondent
Judgment:	18 December 2025 at 2 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order as to costs.

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] Te Uriroroi, Te Parawhau, and Te Māhurehure ki Whatitiri are three hapū of Ngāpuhi. The trustees of the Whatitiri Māori Reserves Trust (the Trustees), the first appellant, hold the land around the Poroti Springs (the Springs), which is Māori freehold land, for the benefit of the hapū. They claim long held and unextinguished customary rights to the wai (waters) of the Springs, consistent with their tikanga, as well as compensation for injury to their whenua (land) by the Northland Regional Council, including under the Resource Management Act 1991 (the RMA). It is common ground between the parties that the law allows the Trustees to pursue claims to customary rights in relation to the land and/or water of the Springs in the High Court. But, for reasons of cost, delay, funding, procedure and expertise, the Trustees, supported by the New Zealand Māori Council (the Māori Council), wish to pursue claims in the Māori Land Court to customary rights in the wai separate from the whenua, and damages for injury to their rights. The Attorney-General and the Northland Regional Council oppose the claims being considered in that jurisdiction.

[2] The parties sought declarations as to whether the Māori Land Court has jurisdiction to hear and determine the claims. The High Court determined that the Māori Land Court does not have jurisdiction to make orders for customary title in respect of freshwater or to order damages for injury to customary title to water.[1] The Trustees and the Māori Council appeal. This judgment does not determine the wider claims. It determines the narrow issue of the jurisdiction of the Māori Land Court.

[3] First, we agree with the High Court that the Māori Land Court does not have jurisdiction to hear a claim to water, separate from associated land, under either s 18(1)(a) or (h) of Te Ture Whenua Māori Act 1993 (the Act). Such jurisdiction is not consistent with the text, context, purpose or legislative history of the Act. The

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1 *Attorney-General v Trustees of Whatitiri Māori Reserves* [2023] NZHC 204, [2023] NZRMA 328 [judgment under appeal] at [3] and [133]. This judgment updates the spelling of te reo Māori words and use of tohutō (macrons) in historical sources when quoting or citing those sources, except in quoting legislation.

Māori Land Court's jurisdiction is centred on the legal status of land. As the Crown agrees, that can extend to interconnected waters. The position in te ao Māori that water is inherently interconnected with land does not support the Māori Land Court having jurisdiction to consider a claim relating only to water under the Act because there is no land with any legal status on which to ground the claim within the Act. Nor do the relevant authorities support such an interpretation.

[4] Second, consistent with the Privy Council's decision in *McGuire v Hastings District Council*,[2] neither does the Māori Land Court have jurisdiction under s 18(1)(c) to award damages for the lawful exercise of statutory powers under the RMA, which is what is sought. We dismiss the appeal.

What happened?

[5] The Trustees and the Crown each provided an affidavit that they consider sufficient to form the evidential basis for this declaratory judgment proceeding. The Crown provided an affidavit by the Historical Research Manager at Te Tari Ture o te Karauna | the Crown Law Office, Mr Brent Parker, exhibiting relevant documents relating to the proceedings, and the land title and water rights issues. The Trustees provided an affidavit by Mr Taipari Munro, a trustee whose affidavit is supported unanimously by the other trustees. He gives evidence about: the nature of, and relationships between, the hapū, the Trustees, the Springs and whenua; land title; litigation and other disputes over time; and relevant tikanga. He also exhibits relevant documents, including two reports by expert historians. There is little conflict in, or objection to, the evidence and we rely on both affidavits.

[6] Mr Munro starts his evidence for the Trustees, and they open their submissions, by saying:

Ko Whatitiri te maunga
E tu nei i te āo i te pō
Ko Waipao te awa i rukuhia,
i inumia e ōku mātua tupuna
Ko Maungarongo te marae
Hei tangi ki te hunga mate
Hei mihi ki te hunga ora

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2 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

Ko Te Uriroroi
Ko Te Parawhau
Ko Te Māhurehure ki Whatitiri ngā hapū
Ko Ngāpuhi-nui-tonu te iwi

Whatitiri is the mountain which stands by night and day
Waipao is the babbling brook where my ancestors dived and drank
Maungarongo is the Marae lamenting the dead, greeting the living
Te Uriroroi, Te Parawhau and Te Māhurehure ki Whatitiri are the hapū
The people of Ngāpuhi are the people.

Te wai me te whenua

[7] Mr Munro's evidence is:[3]

> [16] The water has always been an integral part of life on this whenua. The aquifer is 35km^2, based in Whatitiri maunga — a female maunga and nurturer of Whatitiri hapū. The stream of water has its own spiritual dimension, a power that emanates from beneath the mountain itself. A guardian spirit resided in Whatitiri and in the spring water. We see Whatitiri as the breast of Papatūānuku giving life and sustenance with flowing cool pristine waters and food resources. For these reasons, our marae, Maungarongo, sits close to — within 100 metres of — the springs.
>
> …
>
> [18] The springs in particular have great spiritual significance and value as a resource. They provide water for both physical and spiritual needs as well as food (in particular in the form of watercress, eel and kewai) and facilities for cleaning and bathing. Our children are blessed in the waters at birth. Our soldiers of the 28th Māori Battalion were taken to the Springs for blessing before departing New Zealand to fight in World War II. All thirteen of them returned alive. The waters heal the sick and ease the passage of the terminally ill into the afterlife. We still cleanse and sanctify tūpāpaku with the spring water, although under modern legislation, the practice today is to use water from the waterway rather than take the tūpāpaku into the waterway itself.
>
> …
>
> [20] … I view pages 24–29 [of Paul Hamer's report for the Waitangi Tribunal Te Paparahi o Te Raki inquiry][4] as confirming (consistently with my own knowledge and experience) that:
>
> [20.1] We and our tupuna have always viewed the whenua and wai of Whatitiri as an indivisible whole;
>
> [20.2] This holistic relationship of our people, water and land, goes back since time immemorial, at least two centuries before the signing of Te Tiriti o Waitangi; and

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3 Footnote added.

4 Paul Hamer *Porotī Springs and the Resource Management Act, 1991–2015* (April 2016).

> [20.3] This relationship has been unbroken, even under extreme pressure from the Crown and pākehā society to cease protecting the water and land.
>
> …
>
> [84] I turn now to some of the tikanga of Whatitiri whenua, with regard to the issue of what Court is best placed to determine cases like ours.
>
> [85] First, that Papatūānuku is not separable into 'soil' and 'water'. She is one whole. Our relationship with her land, her water, is one relationship.
>
> [86] That is why so much of the work we do to protect the water is through care for the riparian land.

[8] The water of the Springs flows in an underground aquifer from the Whatitiri Mountain, west of Whangārei. The headwaters surface at an 8,094 m^2 block of land designated by the then Native Land Court as Whatitiri 13Z4, and other downstream blocks of land. Mr Munro's evidence is that the Waipao Stream begins at the Springs.

[9] In September 1895, after an investigation, the Native Land Court made orders that converted the land now known as Whatitiri 13Z4 from customary tenure into freehold tenure confirmed by Crown grant.[5]

[10] In 1939, the Native Land Court stated a "Spring Reserve" should be created and set apart when consolidation of Māori land in the vicinity was completed. In 1958, the Māori Land Court recommended that Whatitiri 13Z4 be set apart as a Māori reservation under s 439 of the Māori Affairs Act 1953.[6] In 1960, an Order in Council was made that the land should be set apart for the purpose of "water supply" for "the common use and benefit of" Te Uriroroi, Te Parawhau, and Te Māhurehure hapū of Ngāpuhi.[7] In 2006, the Māori Land Court issued a status order under s 131 of the Act determining that Whatitiri 13Z4 has the status of Māori freehold land.[8] The Māori freehold land status is recorded on the titles issued under the Land Transfer Act 2017.

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5 See Native Land Court Act 1894, ss 14 and 73; and *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [44].

6 *Whatitiri 13Z4* (1958) 30 Whangarei MB 31 (30 WH 31).

7 "Setting Apart Māori Freehold Lands as Māori Reservations" (6 October 1960) 64 *New Zealand Gazette* 1557 at 1561. The reference in the 1960 Gazette notice to Mahurihuri was changed to Te Māhurehure in 2013: "Notice Redefining the Purpose for Which the Māori Reservation is Made" (16 May 2013) *New Zealand Gazette* No 2013 ln2882.

8 *Whatitiri 13Z4* (2006) 106 Whangarei MB 274 (106 WH 274).

In 2013, the Māori Land Court replaced the then-trustees with the current trustees and vested the land in them to hold and administer for the benefit of the beneficiaries, the three hapū.[9]

[11] Mr Munro and Mr Parker provided evidence of use of the spring water by others. A number of bores are located upstream of Whatitiri 13Z4. Mr Munro explains that, until 1967, the Trustees were the "primary decision-maker in relation to the use of the Waipao and [the] Springs". He outlines a number of decisions which were either made by or in agreement with the Trustees, exercising their rangatiratanga and kaitiakitanga. The Water and Soil Conservation Act 1967 then transferred many of the Trustees' "operative rights" over the waterways to local authorities. From 1973 to 2010, water rights or resource consents (including in relation to the upstream bores) were granted, renewed or otherwise transferred — including to the Whangārei City and District Councils, the Minister of Agriculture and Fisheries, Te Waipao Development Trust, Maungatapere Water Company Ltd, and Zodiac Holdings Ltd. The Trustees' opposition to rights, consents and renewals have generally failed. The Springs ran dry at times in the 1980s.

[12] The Waitangi Tribunal has canvassed issues, and heard from claimants, relating to the Springs in its National Freshwater and Geothermal Resources and Te Paparahi o Te Raki inquiries.[10] In 2018, Te Arawhiti | the Office for Māori Crown Relations purchased the bore site above the Springs and relevant consents for $7.5 million for use in settlement negotiations under te Tiriti o Waitangi | the Treaty of Waitangi. Mr Munro explains the complications of this in his evidence.

Ngā tangata whenua

[13] As noted above, the Trustees hold the whenua, being Māori freehold land, including to Whatitiri 13Z4, on trust for the benefit of three hapū of Ngāpuhi: Te Uriroroi, Te Parawhau, and Te Māhurehure ki Whatitiri. Mr Munro's evidence is that Te Uriroroi is the paramount hapū at Whatitiri, Te Parawhau has one centre there,

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9 *May – Whatitiri Blocks* (2013) 52 Taitokerau MB 130 (52 TTK 130).

10 See: Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, 2019); and Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry Part 1* (Wai 1040, 2023).

and a number of Te Māhurehure names are listed among the tūpuna in the Native Land Court title order for Whatitiri of 1894. His evidence is:

> [13] Known Māori occupation of Whatitiri extends back several centuries. Whatitiri the mountain is the central recognised landmark of the area and Poroti Springs, surfacing in block 13Z4, are recognised in tribal histories and song as the main water source for the people of our area throughout this time. The Trustees' claim to Poroti Springs and the Waipao Stream was uncontested by other claimants in the Wai 1040 Paparahi o te Raki Waitangi Tribunal District Inquiry.

The proceedings

[14] In December 2020, the Trustees brought proceedings seeking orders in the Māori Land Court under s 18 of the Act. The amended statement of claim dated 22 July 2021 seeks determinations on the nature and extent of the present-day rights and responsibilities "held in the freshwater that is intrinsically inter-connected to the whenua" in seven blocks of Māori freehold land, including Whatitiri 13Z4. They plead:[11]

> 4. In the tikanga of the hapū, the water was and is inseparable from the whenua.
>
> 5. The whenua is today held by the [Trustees] on trust for the hapū.
>
> …
>
> *Tikanga Rights and Responsibilities*
>
> 9. For well over 150 years before the creation of the reserves in 1895 and 1896, the hapū were sustained by the water, exercising tino rangatiratanga and kaitiakitanga rights and responsibilities to the water that included (inter alia):
>
> a) Use of the water, including in economic exchange with others;
>
> b) Authority to allow or withhold use of the water by others;
>
> c) Authority to set conditions on use of the water by others; and
>
> d) Responsibility to care for the water and to ensure the health of the water
>
> (collectively the "**customary title**" of the hapū to the water).

[11] Footnote added.

10. The hapū and its members have continued their rangatira and kaitiaki relationships with the whenua and the water through to the present day.

11. The customary title to the water has not been extinguished.

Ongoing Injury to the Customary Title

12. The [Northland Regional Council] has injured, and it continues to injure, the customary title by:

    a) Restricting and/or preventing the use of the water by the [Trustees] and the hapū to support and advance the cultural and economic rights and interests of the hapū, including by way of the over-allocation of the water to third parties, some of whose interests are commercial in nature;

    b) Restricting and/or preventing the [Trustees] and the hapū from exercising authority to allow or withhold the use of the water by others;

    c) Restricting and/or preventing the [Trustees] and the hapū from exercising authority to set conditions on the use of the water by others;

    d) Not providing to and/or sharing with the [Trustees] and the hapū any remuneration in connection with the allocation or use of the water; and

    e) Not compensating the [Trustees] and the hapū for allocations of the water where the third party recipient profited from water allocated to it.

13. As the water is, in tikanga, inseparable from the whenua, those injuries also constitute injuries to the whenua, to the [Trustees] and the hapū having rangatiratanga and kaitiakitanga rights and responsibilities for the whenua and for the water.

14. Those injuries have caused loss and damage, including:

    a) Damage to rangatiratanga and kaitiakitanga rights and responsibilities;

    b) Loss of ability to effectively care for, use, manage and develop the water;

    c) Loss of ability to effectively care for, use, manage and develop the whenua identified in paragraph 3 above, including Whatitiri 13Z4, using either the water or income derived from the water; and

    d) Mental and cultural distress consequent upon (a) to (c) above.

First Claim: Determination of Ownership Rights in the Water[12]

15. The [Trustees] seek orders under s 18(1)(a) and/or s 18(1)(h) of [the Act]:

    a) Declaring that the customary title in the water has not been extinguished;

    b) Specifying the full nature and extent of that customary title today, in whom it is vested and on what terms and/or subject to what requirements; and

    c) (Without limiting (b) above) declaring that, as incidents of the customary title, and in order to avoid future breaches of that title, [the Northland Regional Council] must provide the [Trustees] and the hapū with rights and responsibilities (as specified by the Court) that are commensurate with the nature and extent of the customary title that the Court finds to exist in the water.

Second Claim: Damages Against Northland Regional Council

16. The [Trustees] seek orders under s 18(1)(c) of [the Act]:

    a) Declaring that the [Northland Regional Council] has injured the whenua in one or more of the ways specified above;

    b) Awarding damages in respect of that injury; and

    c) (Without limiting (b) above) including amongst the damages awarded:

        (i) Damages of $100,000.00 for cultural and spiritual losses; and

        (ii) Damages for economic development losses in such sum, and payable on such terms or conditions, as the Court considers just.

[15] The Attorney-General and Northland Regional Council did not consider the Māori Land Court had jurisdiction to determine those claims or to make the orders sought. Accordingly, the parties agreed to resolve the question of jurisdiction by seeking a declaratory judgment in the High Court under the Declaratory Judgments Act 1908.[13]

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12 In oral argument in reply, Mr Smith stated that the "Ownership Rights" element of the heading should read "Tikanga Rights".

13 Judgment under appeal, above n 1, at [2]–[3].

The judgment under appeal

[16] In the High Court, Cull J considered that the Māori Land Court does not have jurisdiction to make orders for customary title over freshwater under s 18(1)(a) or s 18(1)(h) of the Act, or to award damages for injuries to customary title to water under s 18(1)(c) of the Act. We explain her decision in more detail below, in respect of each of those two issues. But, in summary:

(a) First, she held that, while the definition of "land" in the Act is not determinative, statutory interpretation of the definition and relevant authorities do not support such jurisdiction.[14] Customary title to the land here has been extinguished by a Crown grant and subsequent registration as Māori freehold land under the Land Transfer Act 2017.[15] That does not itself answer the question of customary title to water.[16] But the Māori Land Court does not have jurisdiction to exercise the powers of regulatory control of water under the RMA, which is what the claims primarily reflect.[17]

(b) Second, the Judge held that the Māori Land Court does not have jurisdiction to award damages for injuries to customary title to water under s 18(1)(c) of the Act. In *McGuire v Hastings District Council*, the Privy Council held the lawful exercise of powers under the RMA could not be an injury to land within the Māori Land Court jurisdiction, and thus the Māori Land Court lacks jurisdiction to award damages in respect of the Trustees' claims.[18]

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14 At [67]–[79].
15 At [94].
16 At [95].
17 At [111].
18 At [129]–[130], citing *McGuire v Hastings District Council*, above n 2.

[17] Accordingly, the Court held:[19]

> [133] A declaration is made on the following terms:
>
> **Question:** Does s 18 of Te Ture Whenua Māori Act allow the Māori Land Court to make orders for customary title in respect of freshwater?
>
> **Answer: No**
>
> **Question:** Does the Māori Land Court have the jurisdiction to order damages for injury to customary title to water under s 18 of the Act?
>
> **Answer: No**

The appeal

[18] The Trustees, supported by the Māori Council, appeal. The Attorney-General and the Northland Regional Council oppose the appeal.

Māori Land Court jurisdiction

Te Ture Whenua Māori Act 1993

[19] A succession of Native Lands Acts in New Zealand allowed land to be vested in individuals, which had the effect of alienating the land from ownership and control by hapū and iwi. For example, the Crown's "Red Book" about settlement of Tiriti o Waitangi | Treaty of Waitangi claims states:[20]

> There have been many criticisms of the effects of the Native land laws. These include: the interpretation of customary rights to land, the early limitation of the number of owners who could appear on a title (together with their ability to act as absolute owners rather than trustees for tribal land), the costs of the process, and its tendency to promote excessive sales and the fragmentation of remaining Māori holdings. The court system has been criticised by claimants and some historians for undermining the social structure of Māori society.
>
> These and other criticisms may prove valid when considering the operations of the Native Land Court system in particular districts. The long-term results of the system are clear. By the end of the 19th century, many hapū were left with insufficient lands for their subsistence and future development.
>
> Between 1865 and 1899, 11 million acres of Māori land in the North Island had been purchased by the Crown and European settlers …

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19 Judgment under appeal, above n 1.

20 Office of Treaty Settlements | Te Tari Whakatau *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* (June 2018) at 10. It is commonly referred to as the Red Book.

> The Crown acknowledges that the operation and impact of the Native land laws had a widespread and enduring impact upon Māori society. …

[20] So, for example, the Crown acknowledges in ss 7(5)(b) and 8(5)(b) of the Ngāti Awa Claims Settlement Act 2005:

> (b) nā te whakamahia me te whakapā o ngā ture whenua Māori, arā, te tuku whenua ki ngā tāngata takitahi o Ngāti Awa, āpā ki te iwi, te hapū rānei, i noho wātea te whenua ki ngā mahi tauwehe, wāwāhi, hoko hoki. Nā tēnei mahi i kaha ake te paheketanga o ngā tikanga a Ngāti Awa, he tikanga i takea mai i te kotahitanga ā-hapū, ā-iwi hoki mō te tiaki i te whenua. Kāore i āta tiakina aua hanga e te Karauna. Ko te otinga atu, ko te paheketanga o Ngāti Awa, me te takahitanga o Te Tiriti o Waitangi me ōna mātāpono.
>
> …
>
> (b) the operation and impact of the native land laws, in particular the awarding of land to individual Ngāti Awa rather than to iwi or hapū, made those lands more susceptible to partition, fragmentation, and alienation. This contributed to the further erosion of the traditional tribal structures of Ngāti Awa which were based on collective tribal and hapū custodianship of land. The Crown failed to take steps to adequately protect those structures. This had a prejudicial effect on Ngāti Awa, and was a breach of the Treaty of Waitangi (Te Tiriti o Waitangi) and its principles.

[21] The Act, passed in 1993, had a long gestation of over 15 years.[21] As Mr Paul East MP (as he then was) commented in the debate on its introduction,[22] the Bill reflected some, but not all, of the recommendations of the 1980 *The Māori Land Courts: Report of the Royal Commission of Inquiry*, chaired by the Rt Hon Sir Thaddeus McCarthy.[23] That report considered, and recommended against, restoration of the Court's jurisdiction over wills and administration, family protection and adoption, which had been removed.[24] It did not touch on the issues before us.

[22] In introducing the Bill in 1987, the Hon Koro Tainui Wētere, Minister of Māori Affairs, stated:[25]

> Land is a corner-stone of Māori identity and is the single greatest physical asset on which our economic development depends. For that reason I

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21 See: Maori Affairs Bill 1987 (124-1) (explanatory note), which explains the genesis of the Bill was in 1977.

22 (29 April 1987) 480 NZPD 8617.

23 "The Māori Land Courts: Report of the Royal Commission of Inquiry" [1980] IV AJHR H3.

24 At 74 and 127.

25 (29 April 1987) 480 NZPD 8610.

submitted a discussion paper on trusts and incorporations to the first conference of the Federation of Māori Economic Authorities in August 1985. The Bill is the first major legislation that is based on what our people have said they need. They have always said that legislation should have its foundation in the principles of the Treaty of Waitangi. Legislation should reflect the value that the land is a heritage that the living must preserve and pass on to those who follow and that should be retained within the ownership of the family. Such principles form the framework on which the Bill has been woven.

Like its predecessors, the Bill deals mainly with Māori land—with the structures and agencies to administer it, the Māori Land Court and its powers, what happens when an owner dies, and what owners can do with their land interests. The Bill is in a form that will be easy to use by those affected by it, and the language used is modern and much clearer. The Bill heralds a new era in the use of Māori land. The structures for this are familiar ones, but they have been greatly expanded in their scope and in the degree of internal management. For the first time the role of the Māori Land Court will be spelt out clearly. Historically its role has altered from an agency that alienated land to one that helps with the retention and the use of land. The matter is now put beyond doubt. The provisions that stated that customary title shall not avail against the Crown have been dropped because they were contrary to the principles of the Treaty of Waitangi.

[23] In its third reading, Mr Christopher Laidlaw MP noted:[26]

Part VIII very constructively provides for jurisdiction of the Māori Land Court on the basis of the status of the land and not the ethnicity of the owner, and that is a very significant and useful step forward.

[24] In relation to its purpose and interpretation, the Act provides, relevantly:

An Act to reform the laws relating to Maori land in accordance with the principles set out in the Preamble

Preamble

Nā te mea i riro nā te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: ā, nā te mea e tika ana kia whakaūtia anō te wairua o te wā i riro atu ai te kāwanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: ā, nā te mea e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua ki te iwi nōna, ki ō rātou whānau, hapū hoki, a, a ki te whakangungu i ngā wāhi tapu hei whakamāmā i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mō te hunga nōna, mō ō rātou whānau, hapū hoki: ā, nā te mea e tika ana kia tū tonu he Kooti, ā, kia whakatakototia he tikanga hei āwhina i te iwi Māori kia taea ai ēnei kaupapa te whakatinana.

Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of

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26 (9 March 1993) 533 NZPD 13762.

the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles.

…

2 Interpretation of Act generally

(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.

(2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

(3) In the event of any conflict in meaning between the Maori and the English versions of the Preamble, the Maori version shall prevail.

[25] Definitions, particularly of the different statuses of land, are important:

4 Interpretation

In this Act, unless the context otherwise requires,—

…

Crown land means land that, in terms of Part 6, has the status of Crown land

…

General land means land that, in terms of Part 6, has the status of General land

General land owned by Maori means General land that is owned for a beneficial estate in fee simple by a Maori or by a group of persons of whom a majority are Maori

…

land—

(a) means—

(i) Māori land, General land, and Crown land that is on the landward side of mean high water springs; and

(ii) Māori freehold land that is on the seaward side of mean high water springs; but

(b) does not include the common marine and coastal area

…

Maori customary land means land that, in terms of Part 6, has the status of Maori customary land

Maori freehold land means land that, in terms of Part 6, has the status of Maori freehold land

…

Maori land means Maori customary land and Maori freehold land

[26] Section 17 sets out the general objectives of the Māori Land Court:

17 General objectives

(1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—

(a) the retention of Maori land and General land owned by Maori in the hands of the owners; and

(b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori.

(2) In applying subsection (1), the court shall seek to achieve the following further objectives:

(a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:

(b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:

(c) to determine or facilitate the settlement of disputes and other matters among the owners of any land:

(d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority:

(e) to ensure fairness in dealings with the owners of any land in multiple ownership:

(f) to promote practical solutions to problems arising in the use or management of any land.

[27] This case turns particularly on the interpretation of s 18:

18 General jurisdiction of court

(1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:

(a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:

(b) to determine the relative interests of the owners in common, whether at law or in equity, of any Maori freehold land:

(ba) to determine whether a person is a member of a class of persons who are or will be beneficial owners of, or beneficiaries of a trust whose trustees are owners of, land that is or will become Maori freehold land:

(c) to hear and determine any claim to recover damages for trespass or any other injury to Maori freehold land:

(d) to hear and determine any proceeding founded on contract or on tort where the debt, demand, or damage relates to Maori freehold land:

(e) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified person is a Maori or the descendant of a Maori:

(f) to determine for the purposes of this Act whether any person is a member of any of the preferred classes of alienees specified in section 4:

(g) to determine whether any land or interest in land to which section 8A or section 8HB of the Treaty of Waitangi Act 1975 applies should, under section 338 of this Act, be set aside as a reservation:

(h) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified land is or is not Maori customary land or Maori freehold land or General land owned by Maori or General land or Crown land:

(i) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order.

(2) Any proceedings commenced in the Maori Land Court may, if the Judge thinks fit, be removed for hearing into any other court of competent jurisdiction.

[28] It is worth noting at this point that:

(a) Section 18(1)(a) was inherited with little change in language from predecessor legislation, including s 30(1)(a) of the Māori Affairs Act 1953, s 27(1)(a) of the Native Land Act 1931, and s 24(1)(a) of the Native Land Act 1909.

(b) The predecessor to s 18(1)(h), empowering the Court to determine whether any land was "Native land" or "European land", was originally added through an amendment effected by s 3(1)(b) of the Native Purposes Act 1939. The wording was amended to the current version by the introduction of the Māori Affairs Act 1953, except that s 30(1)(i) of that Act referred only to Māori freehold land and European land.

[29] The provisions of the Act requiring that all land has one of six legal statuses, and empowering the Māori Land Court to determine the status of land, are also relevant:

129 All land to have particular status for purposes of Act

(1) For the purposes of this Act, all land in New Zealand shall have one of the following statuses:

(a) Maori customary land:

(b) Maori freehold land:

(c) General land owned by Maori:

(d) General land:

(e) Crown land:

(f) Crown land reserved for Maori.

(2) For the purposes of this Act,—

(a) land that is held by Maori in accordance with tikanga Maori shall have the status of Maori customary land:

(b) land, the beneficial ownership of which has been determined by the Maori Land Court by freehold order, shall have the status of Maori freehold land:

(c) land (other than Maori freehold land) that has been alienated from the Crown for a subsisting estate in fee simple shall, while that estate is beneficially owned by a Maori or by a group of persons of whom a majority are Maori, have the status of General land owned by Maori:

(d) land (other than Maori freehold land and General land owned by Maori) that has been alienated from the Crown for a subsisting estate in fee simple shall have the status of General land:

(e) land (other than Maori customary land and Crown land reserved for Maori) that has not been alienated from the Crown for a subsisting estate in fee simple shall have the status of Crown land:

(f) land (other than Maori customary land) that has not been alienated from the Crown for a subsisting estate in fee simple but is set aside or reserved for the use or benefit of Maori shall have the status of Crown land reserved for Maori.

(3) Notwithstanding anything in subsection (2), where any land had, immediately before the commencement of this Act, any particular status (being a status referred to in subsection (1)) by virtue of any provision of any enactment or of any order made or any thing done in accordance with any such provision, that land shall continue to have that particular status unless and until it is changed in accordance with this Act.

…

131 Court may determine status of land

(1) The Maori Land Court shall have jurisdiction to determine and declare, by a status order, the particular status of any parcel of land, whether or not that matter may involve a question of law.

(2) Without limiting the classes of person who may apply to the court for the exercise of its jurisdiction, the Registrar-General of Land may apply to the court for the exercise of its jurisdiction under this section in respect of that land.

(3) Nothing in subsection (1) shall limit or affect the jurisdiction of the High Court to determine any question relating to the particular status of any land.

…

132 Change from Maori customary land to Maori freehold land by vesting order

(1) The Maori Land Court shall continue to have exclusive jurisdiction to investigate the title to Maori customary land, and to determine the owners of the land.

(2) Every title to and interest in Maori customary land shall be determined according to tikanga Maori.

(3) In any application for the exercise of the court's jurisdiction under this section, the applicant may specify—

(a) the class of persons who it is claimed are the owners of the land when the application is made; and

(b) any trusts, restrictions, or conditions to which it is proposed the land shall be subject.

(4) On investigating the title and determining the current owners under this section, the court must define the owners as a class of persons.

(5) The class of persons must include all descendants of the members of the class, and may or may not be an iwi or a hapu.

(6) The court may then make an order defining the area dealt with and vesting the land in—

(a) the trustees of an ahu whenua trust constituted under section 215 to hold in trust for the class of persons (who are the beneficial owners of the land); or

(b) if the class of persons is an iwi or a hapu, the trustees of a whenua topu trust constituted under section 216, to be used or applied for the general benefit of the class of persons (who are the beneficiaries of the trust).

(7) The vesting order may include any terms of trust that the court thinks fit.

(8) The court must not make a vesting order under this section unless it is satisfied that—

(a) the members of the proposed class of persons have had sufficient notice of the proposal, including the change of status to Maori freehold land, and sufficient opportunity to discuss and consider it; and

(b) there is a sufficient degree of support for the proposal among the members.

[30] Sections 139–142 of the Act provide for the registration and vesting of land under the Land Transfer Act 2017 and s 145 restricts the alienation of Māori customary land. Section 338 provides, relevantly:

> **338 Maori reservations for communal purposes**
>
> (1) The court may make an order to set apart as Maori reservation any Maori freehold land or any General land—
>
> (a) for the purposes of a village site, marae, meeting place, recreation ground, sports ground, bathing place, church site, building site, burial ground, landing place, fishing ground, spring, well, timber reserve, catchment area or other source of water supply, or place of cultural, historical, or scenic interest, or for any other specified purpose; or
>
> (b) that is a wahi tapu, being a place of special significance according to tikanga Maori.
>
> (2) The court may make an order to declare any other Maori freehold land or General land to be included in any Maori reservation, and thereupon the land shall form part of that reservation accordingly.
>
> (3) Except as provided in section 340, every Maori reservation under this section shall be held for the common use or benefit of the owners or of Maori of the class or classes specified in the order.
>
> (4) Land may be so set apart as or included in a Maori reservation although it is vested in an incorporated body of owners or in the Māori Trustee or in any other trustees, and notwithstanding any provisions of this Act or any other Act as to the disposition or administration of that land.
>
> (5) The court may make an order in respect of any Maori reservation to do any 1 or more of the following things:
>
> (a) exclude from the reservation any part of the land comprised in it:
>
> (b) cancel the reservation:
>
> (c) redefine the purposes for which the reservation is made:
>
> (d) redefine the persons or class of persons for whose use or benefit the reservation is made.
>
> (6) Land must not be set apart as a Maori reservation while it is subject to any mortgage or charge, and an order made under subsection (1), (2), or (5) does not affect any lease or licence.
>
> …
>
> (9) Upon the exclusion of any land from a reservation under this section or the cancellation of any such reservation, the land excluded or the

> land formerly comprised in the cancelled reservation shall vest, as of its former estate, in the persons in whom it was vested immediately before it was constituted as or included in the Maori reservation, or in their successors.
>
> (10) In any case to which subsection (9) applies, the court may make an order vesting the land or any interest in the land in the person or persons found by the court to be entitled to the land or interest.
>
> (11) While land is set apart as a Maori reservation,—
>
> (a) the land or an interest in the land cannot be alienated, or vested or acquired under an Act; but
>
> (b) the beneficial ownership of the land may continue to change by succession or otherwise (but this does not change the persons for whose common use or benefit the reservation is held, unless it is held for the beneficial owners).
>
> (12) However, the trustees in whom any Maori reservation is vested may, with the consent of the court, grant a lease or occupation licence of the reservation or of any part of it for any term not exceeding 14 years (including any term or terms of renewal), upon and subject to such terms and conditions as the court thinks fit.

Case law regarding the interpretation of the Act

[31] Since the hearing of this appeal, the Supreme Court issued its decision in *Nikora v Kruger*, which considered aspects of the Māori Land Court's jurisdiction over the Tūhoe Te Uru Taumatua Trust (TUT), a post-settlement governance entity.[27] We granted leave for the parties to file supplementary submissions about this decision, which they did. In considering the issue of whether the general landholdings of the TUT were "owned for a beneficial estate in fee simple by a Māori or by a group of persons of whom a majority are Māori",[28] the Court considered the context, structure and purpose of the Act.[29] It characterised the preamble and ss 2 and 17, quoted above, and the Act generally, in this way:[30]

> [51] It is necessary now to make a brief diversion into consideration of the context, structure and purpose of the [Act] to better understand how General land owned by Māori is relevant in contemporary terms. The Preamble of the [Act] is a lengthy narrative of key drivers of the Act's substantive provisions. It reflects an attempt to break from past assimilationist policies. It centres the Treaty exchange of kāwanatanga for the protection of rangatiratanga as the

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27 *Nikora v Kruger* [2024] NZSC 130, [2024] 1 NZLR 608.

28 At [38], quoting Te Ture Whenua Māori Act 1993, s 4 definition of "General land owned by Māori".

29 *Nikora v Kruger*, above n 27, at [51]–[59].

30 Footnotes omitted.

> Act's constitutional foundation; affirms that land is a taonga tuku iho (treasured inheritance) of special significance to Māori; and declares that land subject to the Act should be retained, occupied, and utilised for the benefit of owners, their whānau and hapū. …
>
> [52] Section 2 grounds the working provisions of the [Act] in that narrative [the Preamble]. It provides that the Act should be interpreted so as to further the principles in the Preamble and in particular that the powers, duties, and discretions under the Act must be exercised, as far as possible, to facilitate and promote the retention, use, development and control of Māori land as taonga tuku iho: …
>
> [53] Reflecting these purposes, the general objectives of the Māori Land Court and Māori Appellate Court [in s 17] are outcome-focused. They emphasise for the first time in Māori land legislation that those courts must support land retention and owner empowerment: …
>
> [54] In a sense, the [Act] straddles two very different views of the kind of legal relationship individuals within a community should have with their land. On the one hand, the Act conserves, as it must, the colonially-inspired native land tenure system of individualised undivided interests under which most land still held by whānau and hapū is now owned. On the other hand, it is very much a reform measure. Its intention is to preserve Māori ownership of their ancestral land and, to the greatest extent possible, to facilitate its management according [to] tikanga Māori. Put another [way], the Act seeks to enable re-collectivised and re-tribalised management of what remains of whānau and hapū land without turning on its head the legacy system of individual undivided interests. Unsurprisingly, the fit between these deeper purposes is not always comfortable or tidy.
>
> …
>
> [58] Both in its original form and as a result of amendments in the early 2000s, the [Act] gave the Māori Land Court additional functions to address the marked revival of tribal political, economic and legal activity during that period. These functions were designed to facilitate progress in Treaty settlements, the allocation of iwi fisheries assets following the Sealord settlement, allocation of commercial aquaculture space following settlement in 2004 of those claims, and to assist the expanding participation of iwi and hapū in matters of environmental regulation and social programmes. The Act thus developed into a mosaic comprising the legacy land tenure system, collectivised land management reforms, settlement asset allocation, and systems to facilitate tribal engagement with public agencies, including with the mainstream courts where appropriate.

[32] The Court then observed that, in tikanga, land ownership would be in Tūhoe, rather than individuals,[31] and stated:

> [63] The question then is whether it is appropriate to construe the definition of General land owned by Māori (and its expanded description in s 129(2)(c) of the [Act]) consistently with these tikanga notions, or whether, as the

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31 At [62].

> Court of Appeal found, the invocation in these provisions of English concepts of real property indicates this was not intended.
>
> [64] We have already mentioned relevant aspects of the Preamble and statutory purpose, and the Māori Land Court's role in promoting a tribal approach to land administration within the limits allowed by the quasi-individualised legacy tenure system. These suggest, as a general proposition, that the courts should approach the definition of General land owned by Māori with caution and with an eye to that wider statutory context. Part of that context is, undeniably, the ongoing effect of the transformation from tribally-held customary land into individual undivided interests in Māori freehold land, achieved by the Native Land Court under the [Act]'s predecessors. But another part is the extensive provision in the [Act] for new legal forms of tribal ownership.

[33] The Court also considered institutional arguments regarding the Māori Land Court and stated:[32]

> [84] … The Māori Land Court is, by statutory direction and long experience, sensitive to the challenges of communal asset administration. Its jurisdiction is expressly informed by the preambular direction in the [Act] to affirm the Treaty guarantee of tino rangatiratanga and to "assist the Māori people to achieve [its] implementation". The High Court is neither institutionally focused on these matters, nor subject to Treaty-based directives in the exercise of its supervisory jurisdiction over trusts.
>
> [85] In addition, Māori Land Court judges must have knowledge and experience of te reo Māori, tikanga Māori and the Treaty. High Court judges are not so required, and are much less likely in fact to be experienced or expert in these matters.
>
> [86] A consideration that might be said to cut both ways is that the Māori Land Court is an accessible forum. On the one hand, the cost of filing an application in that Court is very small compared to the cost of bringing proceedings in the High Court. It is also a forum with which Māori are familiar. On the other hand, TUT is understandably concerned that it could become bogged down in responding to repeated applications brought by dissentient members for collateral purposes.
>
> [87] We agree that this must be avoided. But this problem was not apparent here. …

[34] Counsel referred also to Cooke J's judgment in the High Court in *Mercury NZ Ltd v Māori Land Court.*[33] One of the issues in that case was whether the Māori Land Court had jurisdiction to determine a question of ownership to water. The Judge relied on Cull J's decision in the judgment under appeal here,[34] and held:[35]

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32 Footnote omitted.
33 *Mercury NZ Ltd v Māori Land Court* [2023] NZHC 1644.
34 At [88].
35 Footnote omitted.

> [90] It follows that it is not possible for there to be a claim to water that is an alternative to the customary land claim. It is also not within the Māori Land Court's jurisdiction to make orders (or to declare or find) that certain rights attach to water other than in the fulfilment of its jurisdiction to make the determination on the status and ownership of the land under ss 18 and 129 of the [Act]. Rights associated with water, and more particularly the rights to use water, are regulated in other ways, including under [RMA], which have independent limits associated with the rights of Māori. The Māori Land Court's jurisdiction is ultimately limited to making prescribed orders in relation to the land.

[35] This judgment is currently under appeal to this Court and the appeal was heard by the same panel which heard this one. We say no more about it in this judgment.

Issue 1: Does the Court have jurisdiction to consider claims to water separate from land?

Decision under appeal

[36] First, the Judge considered the statutory definitions of "land" and relevant authorities. She held:

(a) The statutory definitions are not determinative of jurisdiction to determine customary title to water.[36] There is no support in the definitions for the proposition that "land" includes water.[37] It could not be right that the Māori Land Court could grant customary title in resources attached to or connected to Māori freehold land but not, pursuant to s 18(1)(a), in respect of Māori customary land or general land.[38]

(b) Similarly, s 18(1)(h) relates to the status of land and has no application here, given the land has been determined to be Māori freehold land.[39]

(c) Neither a purposive interpretation nor the authorities assist the Trustees' position.[40] This Court's decision in *Ngāti Apa* was consistent with the Māori Land Court's jurisdiction to determine the status of land under

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36 Judgment under appeal, above n 1, at [68].
37 At [69].
38 At [69].
39 At [71].
40 At [73] and [74].

s 18(1)(h). *Tamihana Korokai* did not extend to determining that the freehold owners of the lakebed owned the water itself. Neither did other authorities.[41]

(d) But the definition of "land" is not necessarily determinative of jurisdiction, because a "clear indication" is needed to oust the Māori Land Court's jurisdiction to hear a native title claim.[42]

[37] Second, the Judge held that the extinguishment of customary title to the land in Whatitiri 13Z4 occurred with the initial Crown grant and subsequent registration as Māori freehold land.[43] But that left open the question of whether customary title to the water in the Springs had been extinguished and whether the Māori Land Court could determine customary title to the Springs.[44]

[38] Third, the Judge considered whether the Māori Land Court has jurisdiction to determine "rights" or an "interest" in water associated with Māori freehold land, under s 18(1)(a) of the Act.[45] She noted that a claim to a proprietary interest or ownership right in water has been "problematic" at common law and that ownership of water, particularly running water, has not been available.[46] The issue of native title to natural water has yet to be determined.[47] But common law rights are now greatly altered or regulated by statute.[48] The registration of freehold interests may not inevitably extinguish all customary rights associated with land, but the rights must be consistent with the registered interests.[49] Then, she stated:[50]

> [110] In their claim, the Trustees assert the rights and responsibilities to:

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41 At [73]–[76], citing *Attorney-General v Ngāti Apa*, above n 5; *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA); David Alexander *History of the Kemp Block Reserves* (1988) at 8–10, as described in David Alexander *Lake Ōmāpere* (18 May 2012); *Ōmāpere Lake* (1929) 11 Bay of Islands MB 253 (11 BI 253); *Tangonge Lake* (1934) 65 Northern MB 348 (65 N 348); and *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

42 Judgment under appeal, above n 1, at [77]–[78], citing *Attorney-General v Ngāti Apa*, above n 5, at [178]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151].

43 Judgment under appeal, above n 1, at [94].

44 At [95].

45 At [97].

46 At [101]–[104].

47 At [104].

48 At [105].

49 At [109].

50 Footnotes omitted.

(a) use the water, including in economic exchange with others;

(b) allow or withhold the use of water by others;

(c) set conditions on the use of the water by others; and

(d) to care for the water and ensure its health.

> [111] On the pleading alone, the claims in (b) to (d) reflect the controls vested in the Crown under the RMA to regulate and control freshwater. The specific statutory jurisdiction conferred on the Māori Land Court does not permit the Court to exercise powers under the RMA. As Judge Harvey warned, the Māori Land Court cannot intervene to determine customary rights where it does not possess the statutory jurisdiction to do so.
>
> [112] The timing of the legislative reforms into water management in New Zealand overlapped with the time it took [the] Act to be enacted. There is weight in Mr Ormsby's submission for the Council, that if Parliament had intended that the Māori Land Court should have the ability to determine rights in respect of water (including water flowing through Māori and non-Māori land), then it would have been explicitly provided in the Act, particularly as the RMA was introduced and received Royal Assent in 1991, with a "comprehensive framework for the management of water in New Zealand" during the five year period between the Bill's introduction in 1987 and 1993 when the Act was passed.
>
> [113] Without a clear indication in the Act that Parliament intended the jurisdiction of the Māori Land Court to include customary rights over resources, such as water, I find the Māori Land Court does not have the jurisdiction to do so. The jurisdiction is specific. There is therefore no legal basis or jurisdiction then remaining for the Māori Land Court to determine customary title in Poroti Springs.

[39] The Judge also noted that the Māori Land Court's jurisdiction to set aside a spring as a Māori reservation, now under s 338 of the Act, is distinct from the jurisdiction required to determine the Trustee's claim to water.[51]

Submissions

[40] Mr Smith, for the Trustees and the Māori Council, submits:

(a) The references to "land" in the Act, which is a translation of "whenua", are not determinative. Te ao Māori, and the tikanga of the hapū, see land and water as interconnected and inseparable: "one holistic entity".[52] This understanding fits comfortably within the Act, given its

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51 At [120].

52 Citing Jacinta Ruru *The Legal Voice of Māori in Freshwater Governance: A Literature Review*

statutory objectives and purpose, and the explicit references to Te Tiriti o Waitangi guarantees. A series of older cases recognise the jurisdiction of the Native Land Court and Māori Land Court to determine interconnected customary rights in land and water under predecessor statutes. Alterations of common law rights by statutory controls on water, such as by the RMA, do not impede a claim to customary rights or interests in freshwater.

(b) The Māori Land Court has jurisdiction under s 18(1)(a). The terms "right" and "interest" in Māori freehold land, construed purposively and consistently with Te Tiriti and tikanga, consistent with *Nikora v Kruger*, and in light of the power to reserve water rights under s 338, can accommodate customary rights and interests in the wai. "[I]nterests" under the Act are different from under the Land Transfer Act and are being sought by the registered owners of the relevant whenua. The term "land" as "whenua" can include interconnected waters. The starting point is not Anglocentric conceptions of narrow riparian rights but tikanga-based proprietary interests in the wai. The appellants are not arguing for a riparian right that flows separately out of the raising of title, but for a tikanga right that predates that. It necessarily follows from Mr Ward's concession that common law riparian rights could be the subject of inquiry that, at least for that species of water rights, "land" includes associated water rights, and the basis of such rights is conceptually the same as at tikanga.

(c) The Māori Land Court has jurisdiction under s 18(1)(h) because the claim is to Māori customary land as defined in s 129(2)(a). Water is included in that definition when the whenua and wai are viewed through a te ao Māori lens as an indivisible whole. This is supported by policy reasons, reinforced by the Supreme Court in *Nikora v Kruger*: an efficient and effective regime underpinned by the expertise and fluency of the Māori Land Court in tikanga; the avoidance of delay and

(Landcare Research | Manaaki Whenua, October 2009) at 81.

cost; and access to justice for Māori claimants through the Special Aid Fund of the Māori Land Court, under s 98 of the Act.

(d) The freehold status of Whatitiri 13Z4 is not a bar to jurisdiction because the nature of the original Native Land Court investigation into title is a trial issue. Transmuting customary title into formal title does not necessarily or inevitably extinguish all of the customary rights, though it might modify them. Customary rights cannot be extinguished through a sidewind because they were not inquired into or recorded, and the Court should strive to interpret the Act so as to avoid that. Registration under the Land Transfer Act does not necessarily extinguish customary rights,[53] particularly when the registered title has always been held by those claiming the customary rights.

(e) Neither does the RMA extinguish customary rights. It channels how they are exercised and might impact the scope of the present-day right. Their extent would need to be investigated by the Māori Land Court and then compared with the regulatory landscape of the RMA. The RMA would have to be interpreted and implemented consistent with any customary title as well as the principle of legality, which protects Te Tiriti and tikanga. The RMA cannot render a reservation under s 338 of the Act meaningless.

[41] Mr Ward, for the Attorney-General, acknowledges the High Court has jurisdiction to hear claims for tikanga-based rights, as part of its inherent jurisdiction. But he submits that the Act does not give jurisdiction to the Māori Land Court to determine customary property rights to water separately from the rights to Māori freehold title:

(a) The words of s 18(1)(a) and its statutory context are inconsistent with conferring jurisdiction on the Māori Land Court to determine claims to customary rights to water. The Court may adjudicate on water rights to the extent they are incidents of freehold title, but s 18(1)(a) is concerned

[53] Citing *Attorney-General v Ngāti Apa*, above n 5, at [58].

with rights, titles, estates or interests in Māori freehold land. The Act does not confer jurisdiction to make orders solely about water rights or title separate from the freehold estate, as customary rights under tikanga. The Trustees' claim to the ownership of flowing water under extant customary title, independent of and pre-dating the existing freehold title, falls outside this jurisdiction. The cases of freehold orders being issued over lake or river-beds relate to rights to water associated with the freehold title, as with riparian rights. Tikanga may be relevant to a particular right in relation to freehold land. But that is not what is claimed here on the pleadings. A Crown grant of fee simple land, especially once registered under the Land Transfer Act, does not permit customary title to survive. There would need to be careful consideration of what lesser rights claimed were legally consistent with the fee simple estate.

(b) The Māori Land Court's jurisdiction is not overridden by policy arguments which are not sound in any case. Neither is the principle of legality engaged in relation to jurisdiction where other mechanisms exist in the High Court and Environment Court. The Supreme Court's judgment in *Nikora v Kruger* did not determine the issue under appeal because it did not concern the Māori Land Court's jurisdiction to determine customary rights and interests in water. The tikanga-consistent position reached by the Supreme Court in relation to jurisdiction over a beneficial interest, in fee simple by Māori, was available because it aligned with the context, scheme and purpose of the Act.

(c) Section 18(1)(h) provides that the Court may determine the status of land and s 129 provides that land can only have one status under the Act. Section 18(1)(h) is not concerned with customary title to water separate from the existing status of the land. The Court has already determined the Māori freehold status of the relevant blocks and this section is not a means of reversing those decisions.

[42] Mr Ormsby, for the Northland Regional Council, submits any jurisdiction of the Māori Land Court over water must stem from the Act itself, and it is insufficient to allege that land and water are inseparable in tikanga. The language of the Act deals solely with land. It does not refer to "water" other than in relation to Māori community purposes, landlocked Māori land, and Māori reservations for communal purposes. The Native Title Act 1993 (Aus) was also passed in 1993 and defined native title to relate to land or waters. The implication is that the New Zealand Parliament must have been aware of the issues but designed the Act so as to preclude the sought jurisdiction. It is beyond doubt that the Act here was not intended to determine rights to water or other resources and it does not contemplate granting "title" in respect of water or other resources. A designation as a Māori reservation under s 338 does not vest rights in water and the RMA controls how any rights are exercised. The grant of freehold title extinguishes any customary title. Rights under tikanga are not capable of a customary title under s 18, which does not permit a claim in respect of water rights. The Trustees' submission that freehold title granted under the Act encompasses title to water is inconsistent with their submission that customary title to water survives the extinguishment of customary title to land. The RMA is a complete code which does not leave room for claims to water. Māori can assert customary rights in relation to water and other resources through the High Court. The Supreme Court's interpretation of the Act in *Nikora v Kruger* did not read any new words or concepts into the Act. It was entirely orthodox, within the bounds of the statutory language, context and purpose of Parliament, and entirely accords with the Northland Regional Council's approach.

Māori Land Court jurisdiction over this claim

[43] This is a narrow jurisdictional issue that depends on the interpretation of the Act, because it governs the jurisdiction of the Māori Land Court. If an issue does not fall within the jurisdiction conferred by the Act, either explicitly or by necessary implication, the Māori Land Court may not consider it. The meaning of the Act "must be ascertained from its text and in light of its purpose and its context".[54]

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54 Legislation Act 2019, s 10(1).

The text of the Act regarding jurisdiction

[44] Section 18 of the Act confers general jurisdiction on the Māori Land Court. It refers to land. Neither s 18, nor the definitions of land in s 4, refer to "water" in any sense that is useful to interpretation here.[55] Section 18 is drafted on the basis of s 129's requirement that all land in New Zealand must have one of six statuses, which are also reflected in the definitions in s 4:

(a) Paragraphs (a)–(d) of s 18(1) refer to Māori freehold land. In summary, they confer jurisdiction upon the Māori Land Court to:

(i) determine claims to the ownership and possession of, and rights, titles, estates and interests in, Māori freehold land;

(ii) the relevant interests of its owners;

(iii) the identities of its beneficial owners or beneficiaries of a trust in relation to it; and

(iv) claims for damages for injury to, or claims founded on contract or tort relating to, it.

(b) Paragraphs (e) and (f) confer jurisdiction upon the Māori Land Court to determine who is Māori or who is a member of a preferred class of alienees as defined in s 4.

(c) Paragraph (g) confers jurisdiction upon the Māori Land Court to determine whether certain land or an interest in land should be set aside as a reservation under s 338 of the Act.

(d) Paragraphs (h) and (i) confer jurisdiction upon the Māori Land Court to determine whether specified land is or is not Māori customary land, Māori freehold land, General land owned by Māori, General land or

[55] The only mention of "water" is found in the definition of "land", which refers to "mean high water springs". That is discussed below at [45].

> Crown land; and whether specified land is held by a person in a fiduciary capacity or not, and to make appropriate vesting orders if so.

[45] The only geographical aspect of a definition of land in the Act is where "land" is defined to mean Māori land, General land and Crown land on the landward side of mean high water springs, and Māori freehold land on the seaward side of mean high water springs, but not to include the common marine and coastal area. This case is not governed by that exception. There is no other relevant reference to water in the text of the Act determining the Māori Land Court's jurisdiction.

[46] So, the text of the Act alone does not provide a propitious basis on which to find that the Māori Land Court has jurisdiction over water alone.

The purpose, context and interpretation of the Act

[47] The text, context and purpose of the Act are clear, and aligned in terms of how the Act is to be interpreted, particularly through the long title, the Preamble and ss 2 and 17 of the Act.[56]

[48] The long title provides that the Act is to reform the laws relating to Māori land "in accordance with the principles set out in the Preamble". Section 2(1) provides that its provisions are to be interpreted "in a manner that best furthers the principles set out in the Preamble". Section 2(3) provides that the Māori version of the Preamble prevails in the event of any conflict between the two language versions.

[49] The Preamble recognises the special relationship between Māori and the Crown established by te Tiriti o Waitangi | the Treaty of Waitangi. Te Tiriti | the Treaty itself protects tikanga.[57] The Preamble expresses particularly the desirability of recognising land as a taonga tuku iho of special significance to Māori and, for that reason, to promote retaining that land in the hands of its owners, their whānau and

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56 See: Nin Thomas "Me Rapu Koe te Tikanga Hei Karo mō ngā Whenua: Seek the Best Way to Safeguard the Whenua" (2000) 9 BCB 49 at 51–52.

57 See, for instance: *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [247]; and *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [66] and [582]. See also *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [50], which noted that the guarantee of exclusive and undisturbed possession of whenua naturally includes tikanga associated with that whenua.

hapū. That is expressly and particularly reinforced by Parliament's interpretive instruction in s 2(2).

[50] The Preamble also expresses the desirability of maintaining a court and establishing mechanisms to assist Māori to achieve implementation of the principles set out in the Preamble. Promoting and assisting the retention, effective use, management and development of Māori land, and General land owned by Māori, is expressly stated by s 17(1) to be the primary objective of the Māori Land Court.

[51] On the basis of the text, context and purpose of the Act, including particularly Parliament's interpretive directions in s 2, a central purpose of the Act is to facilitate and promote "the retention, use, development and control of Māori land as taonga tuku iho by Māori owners, their whānau, their hapū and their descendants" and in a manner that "protects wāhi tapu".[58] As context relevant to the purpose of the Act, tikanga and te ao Māori will often be important to its operation and interpretation. Having said that, the Supreme Court's approach to the Act in *Nikora v Kruger* acknowledges that the fit is "not always comfortable or tidy" between its purposes of conserving "the colonially-inspired native land tenure system" with preserving "Māori ownership of their ancestral land and, to the greatest extent possible, to facilitate its management according [to] tikanga Māori".[59] That is illustrated by the centrality of the six legal statuses of land to the Māori Land Court's jurisdiction under s 18, as we discuss below. And the Act needs to be read in its statutory context as well, including other statutes such as the Land Transfer Act and the RMA, according to the Supreme Court's "general proposition" in *Nikora v Kruger*:

> [64] We have already mentioned relevant aspects of the Preamble and statutory purpose, and the Māori Land Court's role in promoting a tribal approach to land administration within the limits allowed by the quasi-individualised legacy tenure system. These suggest, as a general proposition, that the courts should approach the definition of General land owned by Māori with caution and with an eye to that wider statutory context. Part of that context is, undeniably, the ongoing effect of the transformation from tribally-held customary land into individual undivided interests in Māori freehold land, achieved by the Native Land Court under the [Act]'s predecessors. But another part is the extensive provision in the [Act] for new legal forms of tribal ownership.

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58 Te Ture Whenua Maori Act, s 2(2).

59 *Nikora v Kruger*, above n 27, at [54]. See also [62]–[64] and [77]–[80].

[52] We do not consider the principle of legality, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[60] or s 20 of the New Zealand Bill of Rights Act 1990 add anything to this approach to the interpretation of the Māori Land Court's jurisdiction in the Act in the context of this case, though they would probably reinforce it.

Land and water at tikanga

[53] We accept that in te ao Māori, and at tikanga for Te Uriroroi, Te Parawhau and Te Māhurehure ki Whatitiri, whenua is inherently and holistically interlinked with the rest of the environment, including wai. Mr Munro's expert evidence, supported by the Trustees, is clear about that. He says:

> [20.1] We and our tupuna have always viewed the whenua and wai of Whatitiri as an indivisible whole;
>
> [20.2] This holistic relationship of our people, water and land, goes back since time immemorial, at least two centuries before the signing of Te Tiriti o Waitangi; and
>
> [20.3] This relationship has been unbroken, even under extreme pressure from the Crown and pākehā society to cease protecting the water and land.

[54] That is consistent with more generic sources discussing tikanga and te ao Māori. As the Law Commission | Te Aka Matua o te Ture explains, each of the concepts of whakapapa and whanaungatanga, which are "structural norms of foundational importance", "reflects the importance in te aō Māori of all things being connected".[61] As Professor Ruru states, "[a]ccording to the Māori worldview, land and water are seen as one holistic entity: Papatūānuku (earth mother)".[62] As the Waitangi Tribunal stated in *The Whanganui River Report*:[63]

> … Thus, it appeared to us that when Māori and Pākehā spoke of the 'Whanganui River' they were not necessarily talking of the same thing. For Māori, it included all things related to the river: the tributaries, the land catchment area, or the silt once deposited on what is now dry land.
>
> It follows that, in rendering native title in its own terms, the river is to be seen as an indivisible whole, not something to be analysed by the constituent parts

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60 *United Nations Declarations on the Rights of Indigenous Peoples* GA Res 61/295 (2007).
61 Law Commission | Te Aka Matua o te Ture *He Poutama* (NZLC SP24, 2023) at [3.22].
62 Ruru, above n 52, at 81.
63 Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 39.

> of water, bed, and banks, or of tidal and non-tidal, navigable and non-navigable portions, as may be necessary for the purposes of English law. …

[55] It is also consistent with previous dicta of this Court. Cooke P, writing on behalf of a full court in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, noted the concept of a river being "a whole and indivisible entity, not separated into bed, banks and waters", and suggested it was "odd" that concept had not been argued in quite that way in relevant cases.[64]

The claim here is to water only

[56] Section 18(1)(a) confers jurisdiction on the Māori Land Court, relevantly, to hear and determine claims "to the ownership or possession of Maori freehold land, or to any right, title, estate or interest in any such land". Section 18(1)(h) confers jurisdiction to determine the status of land. Based on the text, context and purpose of the Act, the interconnected nature of whenua and wai in te ao Māori and underlying tikanga is clearly relevant to the interpretation of "land" and "Māori freehold land", as those terms are used in those provisions of the Act. But the effect of that relevance will depend on the factual context of the particular circumstances at issue. And we note there are more explicit references to tikanga Māori in other parts of the Act, such as in changing the status of Māori customary land to Māori freehold land in s 132 and setting aside Māori freehold land or general land, that is wāhi tapu, as a Māori reservation, under s 338.

[57] As the Crown acknowledges, the Māori Land Court has jurisdiction to adjudicate on water rights to the extent they are incidents of freehold title, under s 18(1)(a). That suggests that, depending on the particular contextual circumstances, if a claim is to rights or interests in wai that are interconnected at tikanga to whenua that is Māori freehold land, and those rights or interests are incidents of that title, the fact wai is part of the claim would not necessarily create a jurisdictional bar to the Māori Land Court considering the claim. Indeed, at times in his oral and written submissions, Mr Smith appeared to be approaching the issue from that angle.

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

[58] But, while Mr Smith notes that pleadings can be amended, that is not the basis of the Trustees' claim as currently pleaded. In their amended statement of claim of 22 July 2021, the Trustees claim the "'customary title' of the hapū to the water", which is a term defined in cl 9 as:

> … exercising tino rangatiratanga and kaitiakitanga rights and responsibilities to the water that included (inter alia):
>
> a) Use of the water, including in economic exchange with others;
>
> b) Authority to allow or withhold use of the water by others;
>
> c) Authority to set conditions on use of the water by others; and
>
> d) Responsibility to care for the water and to ensure the health of the water

[59] At cl 11, the Trustees plead, and at cl 15 they seek orders, that that customary title to the water has not been extinguished. Clause 12 pleads that it has been and continues to be injured by the Northland Regional Council, for which, in cl 16, they seek damages. According to its heading, the first claim is to "Ownership Rights in the Water", though Mr Smith stated orally that that should instead read "Tikanga Rights".

[60] The Court must deal with the claim as pleaded. This is a claim to water only, irrespective of the legal status of any land with which, at tikanga, it must be associated. It may not be difficult to interpret "land" and therefore "Māori freehold land" to include water associated with the land, or whenua, with reference to te ao Māori and tikanga. As such, depending on the factual circumstances, claims to water rights that are incidents of freehold title may be able to proceed in the Māori Land Court, as the Crown agrees.

[61] But it is difficult to interpret those terms in the Act as meaning water only, separate from the land with which it must, in te ao Māori and at tikanga, be associated. Accordingly, the emphasis the Trustees and Māori Council put on interconnectedness of wai and whenua in te ao Māori and at tikanga does not support the Māori Land Court having jurisdiction over water only, separate from associated land. The Act's focus as informed by the text, context and purpose is on the legal status of land. The position in te ao Māori that water is inherently interconnected with land does not support the Māori Land Court having jurisdiction to consider a claim relating only to

water under the Act because there is no land with any legal status on which to ground the claim within the Act.

Case law authorities

[62] The authorities relied upon by the parties do not support the Māori Land Court having jurisdiction over water only, separate from the land with which it is associated in te ao Māori and at tikanga.

[63] In 1912, in *Tamihana Korokai v Solicitor-General*, this Court held that the Native Land Court had jurisdiction to hear and determine a claim to customary title to the lakebed of Lake Rotorua.[65] Stout CJ stated that only a proclamation under a statute, a prohibition under the Native Land Act 1909, proof of cession, or issuance of a Crown grant could prevent the Native Land Court inquiring as to customary title.[66] The Court determined that it was a question for the Native Land Court to determine whether any particular piece of land is "Native customary land" or not and if Lake Rotorua was a navigable lake:[67]

> … whether according to Native custom the Māori were and are owners of the bed of such lake, or whether they had and have merely a right to fish in the waters thereof.

[64] Edwards J noted that rights to land "conserved to the [Māori] by the Treaty of Waitangi were fully recognised by the Native Lands Act, 1862".[68] He commented specifically on the question of whether a lakebed could be the subject of native title:[69]

> A lake in contemplation of the English law is merely land covered by water, and will pass by the description of land … Whatever rights were conserved to the [Māori] by the Treaty of Waitangi were fully recognized by the Native Lands Act, 1862, which recited the treaty, and was enacted with the declared object of giving effect to it. All the subsequent Native Land Acts have in turn given to the Māori the right to invoke the jurisdiction of the Native Land Court for the purpose of investigating their claims to lands alleged by them to be owned under Native customs and usages. If it can be established that under these customs and usages there may be a separate property in the bed of a lake, I cannot doubt that the jurisdiction of the Native

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65 *Tamihana Korokai v Solicitor-General*, above n 41.
66 At 345 and 358.
67 At 359.
68 At 351. See also at 348 per Williams J; and at 355–356 per Chapman J.
69 At 351 (citations omitted).

> Land Court with respect to Native lands extends as much to the land covered with water as it does to lands covered with forest.

[65] As can be seen, the Court was express in relating jurisdiction to the lakebed, and in Edwards J's case, explicitly as "land covered with water".[70]

[66] In 1929, in *Ōmāpere Lake*, a fuller consideration of lakes at tikanga, Judge Acheson in the Native Land Court recognised that Ngāpuhi applicants held customary land in Lake Ōmāpere, a non-tidal inland lake, in which the Crown recognised Māori had fishing rights.[71] The decision listed examples of precedents relating to lakes included or partly included in titles issued by the Court "in support of Native claims to the ownership of lakes and of the beds of lakes".[72] The Court then asked and answered a series of questions, the first of which was:[73]

> Question (1)
>
> Did the ancient custom and usage of the Māori recognise ownership of the beds of lakes?
>
> Answer (1)
>
> Yes: And this answer necessarily follows from the more important fact that Māori custom and usage recognised full ownership of lakes themselves.
>
> The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Māori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.
>
> A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream.
>
> All the old authorities are agreed that the whole surface of the North Island of New Zealand was held in definite ownership, according to ancient Māori custom and usage, by the various tribes and their component parts. …

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70 At 351 and 359.

71 *Ōmāpere Lake*, above n 41.

72 At 257–258 (Wairarapa Lake, Tarawera Lake, Rotokawau Lake, Rotorua and Rotoehu Lakes, Rotoaira Lake, Poukawa Lake and Waikaremoana Lake). Customary title in Rotorua and other Arawa Lakes, and fishing rights in Lake Taupō, were noted to have been the subject of specific legislation.

73 Emphasis in original.

…

> Now it happens that the Native Land Court Judge who is dealing with this Ōmāpere case has not only had a wide experience of Māori Tribes (and their customs) in many parts of New Zealand, but he has also been engaged for years past in a special study of ancient Māori Land tenures (for thesis purposes). He has perused his own records and more particularly his notes of old Native Land Court judgments and his notes of the opinions of practically all the old authorities whose views were worth having, …
>
> and nowhere throughout those judgments or opinions has he found the slightest suggestion by inference or otherwise that the ancient custom and usage of the [Māori] did not provide for the full ownership of lakes in exactly the same manner as for the ownership of mountains and forests. But he has found abundant support for the views expressed above to the effect that the [Māori] claimed and owned the whole surface of the North Island.
>
> Moreover, in his own personal experience among Tribes in whose territories lakes are situated, he has always noticed that it was taken for granted that the lakes were tribal property. Nor were the lakes regarded merely as sources of food supply or merely as places where fishing rights might be exercised.
>
> To the spiritually-minded and mentally-gifted Māori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped; always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a "mauri" or "indwelling life principle" which bound it closely to the fortunes and the destiny of his tribe. Gazed upon from childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people. …

[67] The Judge explicitly dissented from Edwards J's suggestion in *Tamihana Korokai* that it was "not improbable" that "there never was any Māori custom or usage which recognised any greater right in land covered by navigable non-tidal waters than this (right of fishery)".[74] After answering 11 questions, the Judge held that Lake Ōmāpere was customary land.

[68] In *Ōmāpere Lake*, the Native Land Court did not grant title to water separate from the land with which it was associated. The strong emphasis of its reasoning, consistent with te ao Māori and tikanga as explored above, was that the lake and associated land be seen as an indivisible whole.

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[74] At 262, citing *Tamihana Korokai v Solicitor-General*, above n 41, at 351.

[69] The other authorities relied upon by the Trustees also concern water only as it is associated with land, consistent with tikanga (or in the case of *Tūwharetoa Māori Trust Board v Taupō Waters Collective Ltd*,[75] concern only land):

(a) In *Tangonge Lake*, the Native Land Court, in finding that Lake Tangonge was customary land, held that the claimants:[76]

> … not only owned the beds but the lakes themselves, as a bed was only part of the lake, and if the bed were separated from the lake it would be like separating the soil from the rocks of a mountain.

It also stated that the authorities showed that "a lake was simply land covered with water".[77] Professor Richard Boast KC has stated that the approach taken in *Tangonge Lake* is "similar to that … in the Lake Ōmāpere case" and that the Judge found "there was no particular reason why Māori could not own lakebeds, a view which was entirely consistent with the Court of Appeal in *Tamihana Korokai*".[78]

(b) In *Lake Rotoaira*, the Māori Land Court ordered that the owners of Lake Rotoaira would be the same as the owners of the Blocks originally investigated by the Court.[79] That decision was made on the basis of the Native Appellate Court's decision in respect of Lake Waikaremoana.[80]

In *Lake Waikaremoana*, the Court held that ownership of a lake depends upon the ownership of surrounding lands:[81]

> It is clear that to establish occupation of a large body of water the Native Land Court must have found it necessary to associate the occupation of the Lake with occupation of adjoining lands.

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75 *Tūwharetoa Māori Trust Board v Taupō Waters Collective Ltd* [2021] NZHC 1871.

76 *Tangonge Lake* NLC Ahipara, reported in *New Zealand Herald* (9 March 1933) 11. See also: Richard Boast *The Native/Maori Land Court Volume 3, 1910–1953: Collectivism, Land Development and the Law* (Thomson Reuters, Wellington, 2019) at 935–944; and *Tangonge Lake*, above n 41.

77 *Tangonge Lake*, above n 76.

78 Boast, above n 76, at 938.

79 *Lake Rotoaira* (1949) 29 Tokaanu MB 347(29 ATK 347).

80 *Lake Rotoaira*, above n 79; and Boast, above n 76, at 1140–1154, citing *Lake Waikaremoana* (1947) 27 Gisborne ACMB 46, "Lake Waikaremoana — Appeal Notes and Court Minutes" Archives New Zealand, MA1, 5/13/78/1, and *Raupatu Document Bank* vol 59 at 22404–22416.

81 Boast, above n 76, at 1149.

> So as far as the Lake itself is concerned its occupation could only be by use or the right of use, and undisputed use of the Lake could only be enjoyed by the persons in occupation of the surrounding land.

Professor Boast has stated that the *Lake Waikaremoana* decision is "usually understood to mean that in Māori land law, lakebeds will usually belong to the owners of the riparian blocks".[82]

(c) In respect of Native Land Court orders made in favour of Ngāi Tahu, members of Ngāi Tahu were granted particular "pieces or parcels of land, rights, and easements" with a provision that:[83]

> … the several Crown grants of the weirs and easements shall contain a provision saving the rights of the owners of land to the undisturbed flow of water in the several streams running through the said parcels of land.

(d) In *Tūwharetoa Māori Trust Board*, the High Court noted that the Māori Land Court had jurisdiction to determine any claim to any "right, title, estate, or interest" in Māori freehold land pursuant to s 18(1)(a) of the Act.[84] The relevant Māori freehold land the Court was referring to comprised only the beds of bodies of water.[85]

[70] In 2003, in *Attorney-General v Ngāti Apa*, a full court of this Court was asked by the Attorney-General to consider the extent of the Māori Land Court's jurisdiction under the Act to determine the status of the foreshore, seabed, and related waters.[86] It held that the use of the word "land" in the Act encompassed the foreshore and seabed;[87] to decide otherwise would be to take an "unduly literal approach".[88] Keith and Anderson JJ, with whom Elias CJ agreed, stated:[89]

> [174] The respondents also have to accept that a purely literal approach does not apply in other respects to the work of the Māori Land Court nor to the Act.

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82 At 1141.
83 F D Fenton "Report on the Petition of Ngāi Tahu" [1876] I AJHR G7 at 5.
84 *Tūwharetoa Māori Trust Board v Taupō Waters Collective Ltd*, above n 75, at [49].
85 At [2].
86 *Attorney-General v Ngāti Apa*, above n 5, at [6] and [8].
87 At [55]–[57], [109]–[110], [171]–[180] and [187]–[188]. The respondents accepted that the foreshore constituted land.
88 At [187]; and see [174].
89 See also at [55].

> It has long been acknowledged (although in particular cases the executive may have resisted) that the Court has jurisdiction over rivers and lakes (in the absence, of course, of legislation to the contrary). They also accept that the Court in the present case may have jurisdiction over certain areas of the foreshore (although the extent of that jurisdiction is in dispute, given, among other things, that the facts are not yet settled). That acceptance is relevant, incidentally, to their predictions of the dire consequences of the recognition of Māori customary land in marine areas for the exercise of long established rights of other New Zealanders on the beach and in marine areas.
>
> …
>
> [178] Given the long history of Māori customary property and rights in areas covered by water, a much clearer indication would have had to appear in [the] Act for it to be a measure preventing the Māori Land Court from investigating claims in those areas. …

[71] The Court also held, relevantly, that statutory management under the RMA is not inconsistent with customary rights: that Act does not extinguish such property.[90] Freehold interests extinguish customary property rights to the extent that they are inconsistent with such interests.[91]

[72] The parties emphasised particular aspects of Elias CJ's judgment. She held that the Māori Land Court appeared to be the appropriate body to make the relevant determinations regarding property interests.[92] She also stated that dictionary definitions of "land" cannot be conclusive of the word's meaning, but noted that many appeared consistent with foreshore and seabed being "land" by contrasting the descriptions of "the solid portion of the earth's surface" with "water".[93] She said:

> [55] I am of the view that seabed and foreshore is "land" for the purposes of s 129(1) of [the Act]. … many dictionary definitions are wholly consistent with foreshore and seabed being "land" (thus, they fit readily within the description "the solid portion of the earth's surface" when contrasted with "water"). …

[73] That quotation itself draws a distinction between land and water. The same distinction exists in the Court of Appeal's collective answer to the first question it had to confront in *Ngāti Apa*, when contrasted with the question itself:

> [91] In accordance with the judgments of the Court, the appeal is allowed. The answer to question one is as follows:

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90 At [76], [123] and [192].
91 At [58].
92 At [56]–[57].
93 At [55].

> "**Question 1**
>
> What is the extent of the Māori Land Court's jurisdiction under [the Act] to determine the status of foreshore or seabed and the waters related thereto?"
>
> The Māori Land Court has jurisdiction to determine the status of foreshore and seabed.

[74] Immediately before giving this answer, Elias CJ noted that the answer was "in terms slightly different from the wide way in which [the question] was worded",[94] indicating the difference in wording was deliberate. She also said, as Mr Smith noted in oral submissions, that "[a]bstract answers will lack necessary context".[95] But that was in the course of explaining why the Court was not answering the other questions posed to it. In effect, this Court declined to affirm that the Māori Land Court had jurisdiction over water related to the foreshore and seabed.

[75] On the basis of the text, context and purpose of the Act, and the Parliamentary directions and the case authorities regarding its interpretation and application, we conclude that it is not within the jurisdiction of the Māori Land Court, under s 18(1)(a), to consider a claim to water that is separate from the land with which it is associated in te ao Māori and at tikanga.

[76] Neither does the Māori Land Court have such jurisdiction pursuant to s 18(1)(h). Mr Smith rightly acknowledged that that provision, in comparison to s 18(1)(a), is a less clear and obvious mechanism for an inquiry into water rights. The Māori Land Court has already determined whether the land here is Māori freehold land. The text, context, purpose and interpretation of s 18(1)(h) does not support the Māori Land Court having jurisdiction to investigate the legal status of the water, separate from the land with which it is associated in te ao Māori and at tikanga, for the same reasons. While this Court in *Ngāti Apa* identified that an investigation into the status of land will not necessarily eventuate in a changed status being ordered,[96] that does not obviate the fact that that case does not stand for the proposition that there is jurisdiction for water to be investigated separately to its associated land.

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94 At [90].
95 At [90].
96 At [196].

[77] The policy arguments offered by the Trustees and Māori Council do not affect that interpretation of the Act. There was also argument between the parties about several legal issues relevant to the extent to which customary title or an interest in water itself could exist:

(a) One set of issues is whether customary title or customary rights associated with the land has been extinguished by the issuing of a freehold order, Crown grant and registration. That includes an argument "that 'aboriginal servitudes' comprising non-territorial customary rights … may still remain unextinguished and subsist … possibly, even over Crown-granted Māori freehold [land]", as posited by Professor Paul McHugh.[97] This requires consideration of the effect of the indefeasibility of title that is central to the Torrens system, in light of the legal requirements for unambiguous extinguishment of pre-existing customary title or customary rights or interests.

(b) There was also argument about the effect of the RMA, for example in s 14 in regulating the use of water, on the existence and extent of any customary title, rights or interests in the water of the Springs.

[78] These issues pose serious challenges to the effective possible existence or extent of customary title or interests in water. But they do not impact the narrow question of the Māori Land Court's jurisdiction which is at issue here. Accordingly, we do not comment further on them because they would have to be traversed by the High Court in relation to this claim, if it is pursued there, and in any appeals.

[79] We dismiss the appeal on this issue.

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[97] Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at 70, referring to Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Oxford, 1991).

Issue 2: Does the Court have jurisdiction to award damages for injury to water?

Further law

[80] As a reminder, s 18(1)(c) of the Act confers jurisdiction on the Māori Land Court "to hear and determine any claim to recover damages for trespass or any other injury to Maori freehold land". Section 19(1)(a) empowers the Māori Land Court to issue an order by way of injunction "against any person in respect of any actual or threatened trespass or other injury to any Maori land or Maori reservation".

[81] Section 14 of the RMA provides, relevantly:

> **14 Restrictions relating to water**
>
> …
>
> (2) No person may take, use, dam, or divert any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):
>
> (a) water other than open coastal water; or
>
> (b) heat or energy from water other than open coastal water; or
>
> (c) heat or energy from the material surrounding geothermal water.
>
> (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
>
> (a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a wastewater environmental performance standard, a stormwater environmental performance standard, an infrastructure design solution, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or
>
> (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—
>
> (i) an individual's reasonable domestic needs; or
>
> (ii) the reasonable needs of a person's animals for drinking water,—
>
> and the taking or use does not, or is not likely to, have an adverse effect on the environment; or
>
> (c) in the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Māori for the

> communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or

[82] Section 21(1) of the Water and Soil Conservation Act 1967 similarly regulated rights in respect of natural water.

[83] Section 30(1)(e) of the RMA reinforces the allocation of lawful authority to control water by providing that regional councils have the function of:

> (e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—
>
> (i) the setting of any maximum or minimum levels or flows of water:
>
> (ii) the control of the range, or rate of change, of levels or flows of water:
>
> (iii) the control of the taking or use of geothermal energy:

[84] In 2001, in *McGuire v Hastings District Council*, the Judicial Committee of the Privy Council considered the relationship between the Act and the RMA.[98] The Hastings District Council had exercised powers under the RMA to designate a road through Māori freehold land. The issue was whether the Māori Land Court had jurisdiction to issue an interim injunction under s 19(1)(a) of the Act. Lord Cooke, for the Privy Council, noted that the Māori Land Court is "a specialised Court of limited (though important) jurisdiction".[99] He stated that the Board was "disposed to think" that activities other than physical interference could constitute injury to Māori freehold land, for example an affront to spiritual values or tikanga Māori; but he said it was unnecessary to decide the point.[100] He noted that "there are strong grounds for regarding the RMA as an exclusive code of remedies ruling out any ability of the Māori Land Court to intervene in this case".[101] But the more basic obstacle was the Māori Land Court's limited jurisdiction, and that the "pith and substance" of the proceeding was that express or implied consultation requirements in the RMA had not

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98 *McGuire v Hastings District Council*, above n 2.
99 At [7].
100 At [10].
101 At [11].

or would not be complied with.[102] That was a direct challenge to a public law act or decision.[103] Lord Cooke stated, for the Privy Council:[104]

> [17] As Their Lordships understand it, the present appellants also accepted in the Courts in New Zealand that the Māori Land Court could not question the lawful exercise of powers under the RMA. Goddard J said at p 19:
>
> > It is axiomatic that powers conferred under the RMA are lawful because they are legislatively provided. Therefore, a territorial authority cannot commit a "trespass" or "other injury" to land by the simple lawful exercise of its powers to notify requirements and propose designations. A prima facie unlawful exercise of powers, such as would merit injunctive relief and pose a serious question for trial, is therefore only likely if the Council's actions appear to be ultra vires. Conceivably, the appearance of ultra vires might arise if the process upon which the decision to notify or designate was based seemed demonstrably flawed. In the present case, however, the fact or adequacy of any consultation to date is specifically exempt as an issue and there is no evidence [before] me that the procedure is flawed in any other way.
>
> [18] With regard to Goddard J's reference to the possibility of a decision to notify or designate seeming demonstrably flawed, their Lordships likewise reserve the possibility of a purported decision under the RMA so egregiously ultra vires as to be plainly not justified by that Act and conceivably within the scope of the Māori Land Court's injunctive jurisdiction. But that is no more than a hypothetical possibility. It is certainly not the present case.
>
> …
>
> [20] While what has been said may be strictly enough to decide the case, it is desirable for two reasons to turn more particularly to the RMA. The first reason is that, with the possible exception of an extreme case such as the hypothetical one previously postulated, the [RMA] provides a comprehensive code for planning issues, rendering it unlikely that Parliament intended the Māori Land Court to have overriding powers. …
>
> …
>
> [25] … Thus the administrative law jurisdiction of the High Court (or the Court of Appeal on appeal), though naturally not totally excluded, is intended by the legislature to be very much a residual one. The RMA code is envisaged as ordinarily comprehensive. In the face of this legislative pattern the Board considers it unlikely in the extreme that Parliament meant to leave room for Māori Land Court intervention in the ordinary course of the planning process.

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102 At [12].
103 At [13], citing *Boddington v British Transport Police* [1999] 2 AC 143 (HL) at 172.
104 *McGuire v Hastings District Council*, above n 2.

Decision under appeal

[85] Given her conclusion in relation to the Māori Land Court's jurisdiction to consider customary rights to water, the Judge dealt with this issue briefly in the decision under appeal. She held that the Māori Land Court does not have jurisdiction to award compensation for injuries to customary title to water under s 18(1)(c) of the Act.[105] That is because: the injury is to water rather than to Māori customary land; the alleged injuries were the result of lawfully exercised statutory powers, with a determination of unlawfulness being outside jurisdiction; and the Māori Land Court has a limited jurisdiction to grant damages for injuries to Māori land.[106] She noted that the Privy Council decided in *McGuire* that "the lawful exercise of powers under the RMA could not be an injury to land within the Māori Land Court jurisdiction".[107] That means the Māori Land Court lacks the jurisdiction to determine the Trustees' claim against the Attorney-General and the Northland Regional Council.[108]

Submissions

[86] Mr Smith submits that damage caused by an affront to spiritual and cultural tikanga values to the customary rights of the hapū in the Springs constitutes injuries to the Whatitiri 13Z4 whenua under s 18(1)(c) of the Act, because they are inseparable. It is not at all clear that the Northland Regional Council's actions were lawful because they were purportedly authorised under the RMA, given that tikanga is law in New Zealand and the actions were contrary to tikanga. It would be anomalous if the Act could not provide a remedy for breaches of tikanga when tort law is capable of doing so.[109] Alternatively, s 18(1)(c) can be interpreted to capture damage caused by lawful action, as can the tort of nuisance. The claim is for compensable injuries to whenua and wai, not for a breach of the RMA, s 30 of which does not immunise the Northland Regional Council from damages liability.

[87] Mr Ward submits that s 18(1)(c), which is focussed on Māori freehold land, does not provide the Māori Land Court with jurisdiction to assess damages for the

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105 Judgment under appeal, above n 1, at [132].
106 At [128].
107 At [129].
108 At [130].
109 Citing *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 at [188].

Northland Regional Council's regulation of water under the RMA. As the Privy Council stated in *McGuire*, lawful exercises of power under the RMA, which is at the heart of the Trustees' concerns, are not "an injury" to Māori land. Māori Land Court jurisdiction is not a means of critiquing RMA processes. The statutory scheme and intent of the Act is not displaced by recent case law concerning tikanga. Any of the Northland Regional Council's liability falls to be assessed under other jurisdictions.

[88] Mr Ormsby submits that s 18 of the Act does not permit a claim for damages for lack of authority or control over water. Damages may not be awarded against the Northland Regional Council under the Act for carrying out intra vires statutory functions. The RMA was introduced and passed during the period Parliament considered the Act. The RMA is an exclusive code devolving all authority and control of freshwater to regional councils. It would be directly contrary to s 14 of the RMA for the Māori Land Court to make declarations providing the Trustees and hapū with the rights and responsibilities they seek in respect of water management. The Māori Land Court cannot fetter councils' discretion under the RMA.[110] Challenges to the exercise of the Northland Regional Council's statutory authority under the RMA must be brought by way of judicial review or through an Environment Court appeal. Claims to establish customary rights over resources must be brought before the High Court, against the Crown.

Māori Land Court jurisdiction over damages

[89] The Privy Council's decision in *McGuire* stands for the proposition that the simple lawful exercise of a territorial authority's powers under the RMA cannot constitute trespass or other injury under the Act. That is consistent with the Supreme Court of the United Kingdom's recent statement of general principle in *United Utilities Water Ltd v Manchester Ship Canal Co Ltd*.[111] The exceptions noted in *McGuire* are within the supervisory jurisdiction of the High Court on judicial review. But it is "unlikely in the extreme" that Parliament intended the Māori Land

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[110] Citing *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZHC 2016, [2014] NZAR 1217 at [61].

[111] *United Utilities Water Ltd v Manchester Ship Canal Co Ltd* [2024] UKSC 22, [2025] AC 761 at [16].

Court to have jurisdiction to intervene using injunctive powers under s 19(1)(a) "in the ordinary course of the planning process".[112] The only possible exception envisaged by the Privy Council is "a purported decision under the RMA so egregiously ultra vires as to be plainly not justified by that Act".[113] The same is true of Māori Land Court jurisdiction under s 18(1)(c).

[90] Clause 12 of the amended statement of claim pleads that the injuries caused by the Northland Regional Council to "the customary title", defined as discussed above at [14] and [58], are:

> a) Restricting and/or preventing the use of the water by the [Trustees] and the hapū to support and advance the cultural and economic rights and interests of the hapū, including by way of the over-allocation of the water to third parties, some of whose interests are commercial in nature;
>
> b) Restricting and/or preventing the [Trustees] and the hapū from exercising authority to allow or withhold the use of the water by others;
>
> c) Restricting and/or preventing the [Trustees] and the hapū from exercising authority to set conditions on the use of the water by others;
>
> d) Not providing to and/or sharing with the [Trustees] and the hapū any remuneration in connection with the allocation or use of the water; and
>
> e) Not compensating the [Trustees] and the hapū for allocations of the water where the third party recipient profited from water allocated to it.

[91] The essence of each of these pleaded injuries is concern about the Northland Regional Council's allocation to others of rights to use water from the Springs. The water rights were allocated under the functions and powers of regional councils provided by the RMA and its predecessors. If the allocations are lawful, then they are exercises of statutory power under the RMA and may not give rise to the injuries pleaded. Following the Privy Council in *McGuire*, as we must, the Māori Land Court does not have jurisdiction to award damages against the Northland Regional Council for injuries under s 18(1)(c) caused by the lawful exercise of its powers in regulating the use of water under the RMA. The Māori Land Court does not supervise the

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112 *McGuire v Hastings District Council*, above n 2, at [25].
113 At [18].

legality of actions of territorial authorities under the RMA. That is distinct from the High Court's jurisdiction to supervise allegations of illegality in the exercise of statutory powers by way of judicial review.

[92] The only exception would be activation of the Privy Council's identified possibility of actions "so egregiously ultra vires as to be plainly not justified by that Act",[114] and thereby within the Māori Land Court's jurisdiction. That is not pleaded and there is no evidence before us to suggest it would be soundly based. The only suggestion by Mr Smith to the contrary is that lawfulness is not clear because the actions were contrary to tikanga which is law in New Zealand. But he does not identify how tikanga renders the Northland Regional Council's exercise of its powers under the RMA "egregiously ultra vires".

[93] The effect of the appellants' submission is illustrated by Mr Smith's acknowledgement in oral submissions that its implication is that, even if the RMA is faithfully applied, there may still be a remedy in the Māori Land Court's jurisdiction arising outside the RMA. In the face of the text and purpose of the Act, and *McGuire*, there is little room for an alternative interpretation. That is particularly so in this case where the alleged injuries are to water only, irrespective of land or its legal status, which sits uneasily with the jurisdiction of the Māori Land Court under the Act. The right to effective remedies under UNDRIP does not overcome this barrier.

[94] We dismiss the appeal on this issue.

Costs

[95] The parties have agreed that costs will lie where they fall.

Result

[96] The appeal is dismissed.

[97] There is no order as to costs.

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[114] *McGuire v Hastings District Council*, above n 2, at [18].

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