IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA425/2023
[2026] NZCA 91

BETWEEN	MERCURY NZ LIMITED Appellant
AND	MĀORI LAND COURT First Respondent
	TUAHUROA TAMATI CAIRNS, TOHU RANGIKAUWHATA HAA, TAUHOPA TE WANO HEPI, TORIWAI ROTARANGI AND ANTHONY RALPH MATARA ROTARANGI Second Respondents
	POUĀKANI CLAIMS TRUST Third Respondent
	ATTORNEY-GENERAL Fourth Respondent
	RAUKAWA SETTLEMENT TRUST Fifth Respondent
	TE KOTAHITANGA O NGĀTI TŪWHARETOA Sixth Respondent

CA426/2023

BETWEEN	TUAHUROA TAMATI CAIRNS, TOHU RANGIKAUWHATA HAA, TAUHOPA TE WANO HEPI, TORIWAI ROTARANGI AND ANTHONY RALPH MATARA ROTARANGI First Appellants
	POUĀKANI CLAIMS TRUST Second Appellant
AND	MERCURY NZ LIMITED First Respondent

MĀORI LAND COURT
Second Respondent

ATTORNEY-GENERAL
Third Respondent

RAUKAWA SETTLEMENT TRUST
Fourth Respondent

TE KOTAHITANGA O NGĀTI TŪWHARETOA
Fifth Respondent

CA434/2023

BETWEEN	ATTORNEY-GENERAL Appellant
AND	MERCURY NZ LIMITED First Respondent
	MĀORI LAND COURT Second Respondent
	TUAHUROA TAMATI CAIRNS, TOHU RANGIKAUWHATA HAA, TAUHOPA TE WANO HEPI, TORIWAI ROTARANGI AND ANTHONY RALPH MATARA ROTARANGI Third Respondents
	POUĀKANI CLAIMS TRUST Fourth Respondent
	RAUKAWA SETTLEMENT TRUST Fifth Respondent
	TE KOTAHITANGA O NGĀTI TŪWHARETOA Sixth Respondent

Hearing:	21–22 November 2024
Court:	Katz, Thomas and Palmer JJ
Counsel:	J E Hodder KC, L L Fraser and M G Hay for Mercury NZ Limited D A Ward, M W McMenamin and U D Herath for Attorney-General M S Smith, A T I Sykes and D T Haradasa for

Tuahuroa Tamati Cairns, Tohu Rangikauwhata Haa, Tauhopa Te Wano Hepi, Toriwai Rotarangi and Anthony Ralph Matara Rotarangi and Pouākani Claims Trust
B R Arapere and F R R Cooke for Māori Land Court
J L Cole for Raukawa Settlement Trust
K S Feint KC and H Ranaweera for Te Kotahitanga o Ngāti Tūwharetoa

Judgment: 26 March 2026 at 10 am

JUDGMENT OF THE COURT

A The Pouākani claimants' appeal in CA426/2023, of the High Court's decision to strike out the water claim, is dismissed.

B The Pouākani claimants' cross-appeal in CA425/2023 and CA434/2023, of the High Court's decision to strike-out the fiduciary duty claim, is dismissed.

C Mercury's appeal in CA425/2023, and the Attorney-General's appeal in CA434/2023, of the High Court's decision not to strike-out the customary land claim are allowed to the extent that paragraphs [30(a)] and [30(b)] of the amended statement of claim are struck out but paragraphs [30(c)] and [30(d)] are reinstated.

D For the appeal in CA426/2023, the Pouākani claimants must pay one set of costs each to Mercury and the Attorney-General for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

E For the cross-appeal in CA425/2023 and CA434/2023, the Pouākani claimants must pay one set of costs each to Mercury and the Attorney-General for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

F We make no order as to costs for the appeals in CA425/2023 and CA434/2023.

Table of Contents

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] Twelve hapū and the Pouākani Claims Trust No 2 (together, the Pouākani claimants) claim tikanga rights, interests and responsibilities in relation to the bed and waters of the Waikato River and adjacent lands from Waipapa Stream to immediately downstream of the Waipapa Dam. The claim includes customary ownership of the bed of the Waikato River (the River Bed) and to the water flowing over that part of the River Bed. This section of the river is associated with the Waikato Hydro Scheme and includes the Maraetai, Waipapa and Whakamaru dams. There have been formal Māori claims to the River Bed since 1989. From 2002 to 2009, certificates of title in respect of parts of the River Bed associated with the Maraetai, Waipapa and Whakamaru dams were issued to the Crown. The titles are now held by Mercury NZ Ltd (Mercury), or the Crown for the benefit of Mercury. There was litigation in the High Court, this Court and the Supreme Court from 2008 to 2014 regarding the issuance of these titles.

[2] In 2019, the Pouākani claimants filed a claim in the Māori Land Court. Mercury applied to strike out the claim. The Māori Land Court declined the strike-out application.[1] Mercury applied for judicial review of that decision. The High Court partially allowed the application.[2] It held that the Māori Land Court has no jurisdiction to inquire into fiduciary duty claims to General land or Crown land and no jurisdiction to make declarations about the ownership of water. But it allowed the Māori Land Court to consider the customary land claim.

[3] The Pouākani claimants, supported by Te Kotahitanga o Ngāti Tūwharetoa (Tūwharetoa) and the Raukawa Settlement Trust (Raukawa), appeal and cross-appeal

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1 *Mercury NZ Ltd v Cairns – Pouākani River Bed* (2022) 277 Waiariki MB 174 (277 WAR 174) [Māori Land Court judgment]. The judgment of this Court updates the spelling of te reo Māori words and use of tohutō (macrons) in historical and other sources when quoting or citing those sources, except when quoting legislation.

2 *Mercury NZ Ltd v Māori Land Court* [2023] NZHC 1644 [judgment under appeal].

the High Court's decisions about jurisdiction regarding the water and the fiduciary duty claims, respectively. Mercury, and the Attorney-General, appeal the decision about the customary land claim.

[4] First, we dismiss the Pouākani claimants' appeal of the High Court's decision to strike-out the water claim. Strictly speaking, this is a claim to water only, irrespective of the legal status of any land with which, at tikanga, it must be associated. 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 Te Ture Whenua Māori Act 1993 (the Act), where there is no land with any legal status on which to ground the claim within the Act. The text, context, and purpose of the Act, including its interpretation in light of tikanga, and the case authorities, are not consistent with the Māori Land Court having jurisdiction under the Act to determine claims to water irrespective and independently of the status of associated land. It is common ground amongst the parties that the claim may be considered by the High Court.

[5] Second, we dismiss the Pouākani claimants' cross-appeal of the High Court's decision to strike out the fiduciary duty claim because the Māori Land Court lacks jurisdiction to consider it. This Court is ordinarily bound by its own decisions, subject only to rare exceptions in civil cases.[3] That principle serves the interests of certainty and stability in the law, which is a core element of the rule of law. We do not consider that the law governing this Court's ability to depart from its own decisions justifies us, as a panel of three, departing from the unanimous, longstanding decision of a full court of this Court in *Attorney-General v Māori Land Court* in the current circumstances.[4] And we are not convinced that decision is wrong. This claim can also be considered by the High Court.

[6] Third, we allow Mercury's appeal, and the Attorney-General's appeal, of the High Court's decision not to strike-out the customary land claim. Mercury's registered titles to the relevant land are indefeasible. Indefeasibility of registered title is a central tenet of the Torrens system as implemented in New Zealand and reflected in successive

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3 See *R v Chilton* [2006] 2 NZLR 341 (CA) at [83]–[90] and [100].
4 *Attorney-General v Māori Land Court* [1999] 1 NZLR 689 (CA).

land transfer legislation, including the Land Transfer Act 1952 (the LTA 1952) and the Land Transfer Act 2017 (LTA 2017) (generally, the LTA). There is no express statement in the Act, and no material indication in its lengthy legislative history, that, in passing the Act, Parliament intended to change the relationship between the LTA regime and the Māori land law regime to override the LTA 1952 or to set up the Act, or Māori customary land, as an exception to the doctrine of indefeasibility. The text, legislative history, and context of the LTA 2017 demonstrate that Parliament intended that Act to continue the existing relationship between the two statutory regimes where the LTA regime has primacy. To the extent that Māori customary title or interests are inconsistent with the nature and incidents of fee simple ownership, they have plainly and clearly been extinguished by necessary implication of the LTA regime, even if the land did not pass through the Act's required processes. Having the status of Māori customary land under the Act would not be an exception to that indefeasibility. The Act sets up compensation avenues instead.

[7] We reinstate the Pouākani claimants' alternative claims for declarations that, but for the issue of title or other registration of interests, the River Bed would have been Māori customary land and/or would have been vested in the first applicants (the individuals who represent the twelve claimant hapū) as trustees. It is not clear the High Court intended to strike out those claims, since the Court considered the primary claims were tenable and no reasoning for striking them out was provided. Nothing in the arguments before us makes those claims so clearly untenable they cannot possibly succeed.

What happened?

The Pouākani claimants

[8] As Elias CJ summarised in *Paki v Attorney-General (No 2)* (*Paki (No 2)*):[5]

> [1] The appellants claim on behalf of descendants of members of the hapū of Ngāti Wairangi, Ngāti Moe, Ngāti Korotuohu, Ngāti Ha, Ngāti Hinekahu and Ngāti Rakau who were awarded interests in land subdivided from the Pouākani block along the left bank of the Waikato River, by the Native Land Court in the late 19th century. Pouākani No 1 was vested

[5] *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 [*Paki (No 2)*] at [1] (footnotes omitted).

> immediately in the Crown by the Native Land Court for payment of survey and other costs on its partition from the larger Pouākani block in 1887. The remaining subdivisions were reinvestigated in 1891 following petitions by a number of hapū and chiefs who claimed to have been wrongly excluded or included in the wrong capacity in the titles. Following reinvestigation, Pouākani B8, B10, and C3 were purchased by the Crown from the Māori owners in 1892. Pouākani B6, which had been awarded to 242 owners, was subject to further subdivision in 1899, when the Crown failed to obtain the agreement of all owners to sale. Pouākani B6A was vested in the Crown when the Crown applied to the Native Land Court to award it a defined portion of B6 equal to the proportion of interests it had acquired. Pouākani B6A encompassed the northern half of B6, and took in the entire river frontage of B6 with the exception of B6E in the extreme east of the block, which was vested in Werohia Te Hiko of Ngāti Wairangi, with a restriction on alienation.

[9] In these proceedings 12 hapū, Ngāti Wairangi, Ngāti Moe, Ngāti Korotuohu, Ngāti Ha, Ngāti Hinekahu, Ngāti Rakau, Ngāti Whaita, Ngāti Parehinu, Ngāti Parehunuku, Ngāti Pakau, Ngāti Te Kohera, and Ngāti Moekino (ngā hapū) are represented by named kaumātua: Mr Tamati Cairns, Mr Rangikauwhata Haa, Mr Te Wano Hepi, Mr Toriwai Rotarangi, and Mr Tony Rotarangi (ngā kaumātua). They are the second respondents in CA425/2023, the first appellants in CA426/2023, and the third respondents in CA434/2023. They also cross-appeal in CA425/2023 and CA434/2023.

[10] Ngā kaumātua, on behalf of ngā hapū, claim tikanga rights, interests and responsibilities in relation to the bed and waters of the Waikato River and adjacent lands. The claim includes exclusive customary ownership of the bed of the Waikato River from Waipapa Stream, being 59 miles from the control gates of Lake Taupō, to immediately downstream of the Waipapa Dam, and customary title to the water to the extent it flows over that part of the riverbed.

[11] Ngā hapū are supported by the Pouākani Claims Trust No 2 (the Trust), a charitable trust established for the benefit of the Pouākani Trust. Its beneficiaries whakapapa to Ngāti Wairangi, Ngāti Moe, Ngāti Korotuoho, Ngāti Ha, Ngāti Hinekahu, Ngāti Te Kohera and Ngāti Rakau. The Trust is the third respondent in CA425/2023, the second appellant in CA426/2023, and fourth respondent in CA434/2023. It also cross-appeals in CA425/2023 and CA434/2023. We refer to ngā hapū and the Trust collectively as the Pouākani claimants, as they did in their submissions.

The claim, proceedings, and raising of title

[12] On 27 March 1987, John Hanita Paki lodged a claim with the Waitangi Tribunal on behalf of himself, the trustees and beneficial owners of the lands in the Titiraupenga and Pouākani B9B Trusts. On 27 April 1989, an "Addendum" to the amended statement of claim was submitted to the Waitangi Tribunal to advance, among other claims, claims in respect of the Waikato River.[6]

[13] The land and waters claimed are related to the Waikato Hydro Scheme. On 31 March 1988, as part of its corporatisation policy, the Crown entered into a Deed of Sale with the Electricity Corporation of New Zealand Ltd (ECNZ). The Crown transferred land and assets to ECNZ for electricity generation and supply. They agreed that, among other assets, ECNZ would acquire the Crown's interest in "Core Land Assets", which was defined to mean "land assets of the Crown as … held for the purposes of present or future electricity generation or supply … as are reasonably required … to operate [ECNZ's] business". That included buildings, structures and facilities affixed to leasehold land held by the Crown and being used or held for or in relation to present or future electricity generation or supply, and easements, profits à prendre, licenses, and rights of user and access held by the Crown relating directly to electricity generation, including leases, licences, easements, indemnities and covenants directly relating to electricity generation or supply.

[14] The "Core Land Assets" were subsequently specified in a memorandum of agreement dated 31 March 1989. The Court has not been provided with a full copy of that memorandum. A partial copy includes that the Whakamaru Power Station falls within the "Core Land Assets".

[15] In 1993, in *The Pouākani Report*, the Waitangi Tribunal found the ownership of the River Bed and rights to the resources of the Waikato River "remain unresolved".[7] It recommended "the Crown give urgent attention to addressing these matters in the national interest".[8] In subsequent negotiations between the claimants and the Crown, the claim to the River Bed was "parked", to be pursued in the future

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6 Waitangi Tribunal *The Pouākani Report* (Wai 33, 1993) at 1 and 3.
7 At 297 and 312.
8 At 297 and 312.

jointly with neighbouring Māori groups. That was reflected in the claim to the Waikato River being excepted from the settlement entered into by the Crown and Pouākani on 19 November 1999, with that exception enacted in s 10(2) of the Pouākani Claims Settlement Act 2000.

[16] In June 2000, an application was made to the Māori Land Court to determine ownership of the bed of the Waikato River between Huka Falls and the Karapiro dam, on the grounds that the applicants represent hapū who have traditionally exercised customary rights in respect of that part of the river, and the river is non-navigable and not vested in the Crown.[9] In July 2001, the Māori Land Court raised an issue as to whether, because the adjoining riverbanks were not in Māori ownership, it had jurisdiction to consider the application. The Trust subsequently indicated it did not wish to be further heard in the proceeding. In January 2004, it filed a claim in the High Court instead.

[17] In April 2003, in a deed with ECNZ and Mighty River Power Ltd (Mighty River), now known as Mercury, the Crown agreed to procure the issue of certificates of title for land which had not yet been transferred to Mighty River. Mighty River had taken over electricity generation and supply responsibilities from ECNZ pursuant to agreements dated 22 December 1998. Pursuant to the deed, the relevant interests in the land would then be transferred to Mighty River. From 2002 to 2009, certificates of title in respect of parts of the riverbeds associated with the Maraetai, Waipapa and Whakamaru dams were issued to the Crown. The relevant Maraetai and Waipapa titles were transferred to Mighty River on 5 January 2005 and 11 December 2009, respectively, and a further record of title associated with Maraetai was issued in the name of Mighty River in 2010. There are memorials on the titles to the land transferred to State-Owned Enterprises that put purchasers on notice of the risk of resumption of the land being ordered by the Waitangi Tribunal under the Treaty of Waitangi (State Enterprises) Act 1988.

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[9] The original application was filed on behalf of Ngāti Mahana, Ngāti Ha and the Rauhoto Land Rights Committee. Following a breakdown in the joint claimant approach, the application was amended to be solely in the name of the Pouākani Claims Trust.

[18] Mercury also has registered title to perpetual operating easements over lakes including Maraetai, Waipapa and Whakamaru. These easements were registered on 6 January 2011 in the name of Mighty River. When granted, the titles recording these easements did not include any memorials under s 27A of the State-Owned Enterprises Act. Memorials have since been added retrospectively to the Maraetai and Whakamaru records of title.[10] The position was not altered with respect to the Waipapa easement due to the effect of Treaty of Waitangi | te Tiriti o Waitangi settlement legislation.[11]

[19] Mercury holds all fee simple titles associated with the dams, except for some land related to Whakamaru dam which is held by the Crown for the benefit of Mercury, as well as the registered easements. But it is important to note that there is a very significant area of easements which do not have underlying land titles. That means the Māori Land Court has to investigate the status of, at least, the untitled River Bed land. One issue in these proceedings is whether it can also investigate the land with registered titles under the LTA.

[20] The proceedings commenced by the Trust in January 2004 were the subject of judgments by the High Court in July 2008[12] and the Court of Appeal in December 2009.[13] The Supreme Court granted leave for two appeals to be considered in succession:[14]

(a) On 27 June 2012, in *Paki v Attorney-General* (*Paki (No 1)*) the Supreme Court held that the Waikato River was not navigable within the meaning of the Coal-mines Act Amendment Act 1903.[15]

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10 *Pouākani Claims Trust v Attorney-General* [2023] NZHC 1336 at [151].

11 Sections 17 and 18 of the Raukawa Claims Settlement Act 2014 provide for the cancellation of resumptive memorials on land subject to a right of first refusal, which (pursuant to the deed of settlement) includes Lake Waipapa.

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

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

14 *Paki v Attorney-General* [2010] NZSC 88, [2010] BCL 517.

15 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 [*Paki (No 1)*] at [89] per Elias CJ, Blanchard and Tipping JJ. McGrath J disagreed about the correct approach to determining navigability but agreed with the majority that the relevant sections of the Waikato River were not navigable: at [118]. William Young J dissented, concluding that the relevant sections of the Waikato River were navigable and thus vested in the Crown: at [121] and [184]–[188].

Accordingly, the Waikato River was not vested in the Crown under s 14 of the Coal-mines Act Amendment Act.[16]

(b) On 29 August 2014, in *Paki (No 2)* the Supreme Court held that it had not been shown that, in acquiring title to adjoining riparian land from its Pouākani owners, the Crown had obtained ownership to the mid-point of the River Bed.[17] It held that the Pouākani claim that the Crown owed fiduciary duties to Māori vendors of the land was better left for a further case in which the issue squarely arose.[18]

These proceedings

[21] On 19 December 2019, the Pouākani claimants filed their current application in the Māori Land Court, along with a statement of claim which was subsequently amended on 1 April 2021. As explained in more detail in relation to each of the issues, they say they have ownership of the River Bed and the water flowing over the River Bed, on the basis of tikanga Māori. They seek determinations by the Māori Land Court to bind the Crown and Mercury, prevent further land alienation, and open up remedies to support their asserted rights.

[22] The amended statement of claim was distilled to three relevant claims by the Māori Land Court and the High Court:

(a) a claim that the River Bed land is Māori customary land and therefore is or should be vested in the Pouākani claimants (the customary land claim);

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16 At [2] per Elias CJ, Blanchard and Tipping JJ. Section 14 of the Coal-mines Act Amendment Act 1903 was re-enacted (without amendment) in s 3 of the Coal-mines Acts Compilation Act 1905. A further re-enactment in s 206 of the Coal-mines Act 1925 altered the definition of "navigable river", which definition was continued in s 261 of the Coal Mines Act 1979. The majority stated that while the section currently in force was that which was to be properly considered, changes to the wording of the definition did not change the meaning of the definition in s 14: at [33].

17 *Paki (No 2)*, above n 5, at [145]–[146] and [166] per Elias CJ, [179] and [181] per McGrath J and [318] per Glazebrook J. William Young J described the claim as being "at least doubtful": at [254].

18 At [30]–[31] per Elias CJ, [182] per McGrath J and [322] per Glazebrook J.

(b) a claim that the Crown holds title to the River Bed as a fiduciary for the true customary Māori owners, the Pouākani claimants (the fiduciary duty claim); and

(c) a claim that the Pouākani claimants own the river water flowing over the River Bed, and that the Māori Land Court can issue a declaration to that effect (the water claim).

[23] Paragraph 30 of the amended statement of claim said the applicants sought the following orders:

> 30. Wherefore [ngā kaumātua on behalf of ngā hapū and the Trust] seek orders:
>
> (a) A status order that the River Bed is still and always was Māori customary land;
>
> (b) Declaring that such Māori customary land (whether direct or via the Crown and/or Mercury NZ Limited) is or should be vested in the First Applicants as trustees for and on behalf of those who can whakapapa to the Hapū;
>
> (c) Alternatively, a declaration that, but for the issue of title or other registration of interests under the Land Transfer Act 2017, the River Bed would have been Māori customary land;
>
> (d) Alternatively, a declaration that, but for the issue of title or other registration of interests under the Land Transfer Act 2017, the River Bed would have been Māori customary land and would have been vested in the first Applicants as trustees for and on behalf of those who can whakapapa to the Hapū;
>
> (e) Alternatively, a declaration that the Crown or Mercury NZ Limited, as the case requires, hold the titles to such River Bed as a fiduciary for the first Applicants as trustees for and on behalf of those who can whakapapa to the Hapū;
>
> (f) Declaring that the first Applicants are the owners of the river water flowing across such River Bed as trustees for and on behalf of those who can whakapapa to the Hapū;
>
> (g) Reserving leave for applications for orders as to exactly on whose behalf the first Applicants hold the ownership of the River Bed and the river water flowing over such River Bed; and
>
> (h) Costs against any opposing party.

[24] Mercury applied to strike out the amended statement of claim insofar as it concerns the registered fee simple title to the River Bed, of which the Maraetai, Waipapa and Whakamaru dams and associated infrastructure form part, or the associated easements, or water adjacent to that land.[19] Mercury says it has registered fee simple title to the relevant parts of the River Bed under the first two dams and the Crown has fee simple title to, and Mercury has beneficial ownership of, the relevant parts of the River Bed under the third. Mercury argued:[20]

(a) the customary land claim is untenable because the registered fee simple title to the lands or easements is indefeasible;

(b) the Māori Land Court has no jurisdiction to inquire into fiduciary duty claims to General land or Crown land; and

(c) the Māori Land Court has no jurisdiction to make declarations about the ownership of water.

[25] On 1 July 2022, Judge C T Coxhead, in the Māori Land Court, declined the application for strike out in relation to all three issues, for reasons we explain further below in relation to each issue.[21]

[26] Mercury then applied to the High Court for judicial review of Judge Coxhead's decision. On 29 June 2023, Cooke J, in the High Court, granted Mercury's application for judicial review in respect of the fiduciary duty claim and the water claim but not in relation to the customary land claim, for reasons we explain further below.[22] He accordingly struck out the claims at [30(c)–(f)] of the amended statement of claim.[23] The effect of the High Court decision was that the Māori Land Court could consider the customary land claim but not the fiduciary duty claim or the water claim.

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19 Mercury's statement of claim filed in the High Court provides that the original strike-out application was made on 29 June 2021. The amended application was filed on 2 November 2021.
20 Māori Land Court judgment, above n 1, at [18].
21 At [107]–[108].
22 Judgment under appeal, above n 2, at [59], [78] and [95].
23 At [100].

The appeal

[27] The Pouākani claimants appeal against the High Court's decision to strike out the water claim and cross-appeal against the decision to strike out the fiduciary duty claim. Mercury and the Attorney-General oppose that appeal and cross-appeal and themselves appeal against the High Court's decision not to strike out the customary land claim, which the Pouākani claimants oppose. Tūwharetoa and Raukawa support the Pouākani claimants. The Māori Land Court abides the decision of the Court in respect of all three appeals.

[28] We consider the water claim first and the fiduciary duty claim second. They have both been struck out by the High Court on the basis that the Māori Land Court lacks jurisdiction to hear them. Jurisdiction is a legal issue. It either exists or it does not. If the Māori Land Court does not have jurisdiction in relation to a particular claim, the claim to the Māori Land Court will be untenable and must be struck out. We discuss the law governing the striking out of claims in more detail in relation to the customary land claim, which we consider last.

Te Ture Whenua Māori Act 1993

[29] All three issues on appeal involve interpretation of the Act. In *Carter v Attorney-General*, this Court recently reviewed the statutory provisions and case law relating to the jurisdiction of the Māori Land Court regarding water under the Act.[24] We rely on that analysis here. In particular, we rely on the observation that:[25]

> 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.

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[24] *Carter v Attorney-General* [2025] NZCA 677 at [19]–[35]. The present appeals and cross-appeals were heard by the same panel which heard the appeal in *Carter*.

[25] At [47].

[30] Those provisions state:

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 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.

…

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.

[31] Section 18 provides for the general jurisdiction of the Māori Land Court. Section 18(1)(h) and (i) are the focus of the water claim and the fiduciary duty claim, respectively:

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.

[32] Part 6 of the Act governs the status of land under the Act. In summary:

(a) Section 129(1) provides that, for the purposes of the Act, all land in New Zealand must have one of six statuses: Māori customary land; Māori freehold land; General land owned by Māori; General land; Crown land; or Crown land reserved for Māori.

(b) Section 131 confers jurisdiction upon the Māori Land Court to determine the particular status of any land, without affecting the High Court's jurisdiction.

(c) Section 132(1) continues the Māori Land Court's exclusive jurisdiction to investigate the title to Māori customary land.

(d) Sections 139–142 provide for the registration and vesting of land under the LTA 2017.

(e) Section 145 restricts the alienation of Māori customary land.

[33] In 2024, the Supreme Court decision in *Nikora v Kruger* considered aspects of the Māori Land Court's jurisdiction over the Tūhoe Te Uru Taumatua Trust (TUT), a post-settlement governance entity.[26] In considering the issue of whether the general landholdings of TUT were "owned for a beneficial estate in fee simple by … a group of persons of whom a majority are Māori",[27] the Court considered the context, structure and purpose of the Act.[28] It characterised the preamble and ss 2 and 17, quoted above, and the Act generally, in this way:[29]

> [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 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:
>
> …

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26 *Nikora v Kruger* [2024] NZSC 130, [2024] 1 NZLR 608.
27 At [38]; and Te Ture Whenua Māori Act 1993, s 4 definition of "General land owned by Māori".
28 *Nikora v Kruger*, above n 26, at [51]–[59].
29 Footnotes omitted.

> [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.

[34] The Court observed that, in tikanga, land ownership would be in Tūhoe, rather than individuals,[30] 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 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.

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30 At [62].

[35] The Court also considered institutional arguments regarding the Māori Land Court and stated:[31]

> [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. …

[36] In *Carter*, we considered whether the Māori Land Court has jurisdiction under s 18(1)(a) or 18(1)(h) of the Act to consider a claim of hapū to the customary title of water only, irrespective of the legal status of any land with which, at tikanga, it must be associated.[32] In summary, in relation to interpretation of the Act in general, we stated:[33]

> [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.
>
> <u>The purpose, context and interpretation of the Act</u>
>
> [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.
>
> …
>
> [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

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31 Footnote omitted.
32 *Carter v Attorney-General*, above n 24, at [60].
33 Footnotes omitted.

> 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". 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". 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 [LTA 2017] and the [Resource Management Act 1991], 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.
>
> [52] We do not consider the principle of legality, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 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.

Issue 1: Does the Māori Land Court have jurisdiction to consider the water claim?

The claim

[37] The Pouākani claimants submit that the River Bed is customary land, notwithstanding that registered fee simple titles to the riverbed land are held by Mercury and the Crown — which is addressed in Issue 3. In addition, the claimants seek a standalone declaration that they are also the owners of the water flowing across the River Bed. The orders they seek are that Mercury's and the Crown's titles to the riverbed land do not extinguish nga hapū's customary ownership of the flowing river water, independent of the status of, or title to, the land.

[38] Mr Cairns, kaumātua and chair of the Trust, provided evidence in the case of *Paki v Attorney-General*,[34] which he affirms and summarises in evidence in these proceedings:[35]

> 16. I filed a brief of evidence in that case which is relevant here because it sets out our connection to the Waikato River. It is a taonga tipua to the Pouākani people and a source of identity and sustenance. As Pouākani people exercised its mana we have an obligation to maintain the life force of the river and in doing so, able to reap the benefits of the river including using the river to gather food and using it for cultural, socio-economic and spiritual purposes.
>
> …
>
> 20. In that brief I described, at paragraph 59, the Waikato River as being a highly valued taonga of the Pouākani people. I remain of that view.
>
> 21. I note that the Waitangi Tribunal in its Pouākani Report said, at paragraph 16.2:[36]
>
> > The [Waikato] river was therefore a mahinga kai, a food gathering place. In local Māori terms it was, and still is, regarded as a taonga, a highly-prized resource, by the hapū who occupied the area … kaumātua present at the Pouākani hearings were adamant that the Waikato is regarded as taonga.
>
> 22. I was present at the Tribunal hearings and can confirm that kaumātua who, regrettably, are no longer with us did indeed give that evidence.
>
> 23. I can say, as the Tribunal indicated, that it is a taonga of all the people along the River, not just the Pouākani people who, incidentally are on both sides of the Waikato River in the area with which we are concerned in this claim.
>
> 24. The River as, a whole, is a highly valued taonga. It is and would always have been contrary to the tikanga of the people in the area to have thought of the River in sections out to the mid-point. That is simply not our custom.
>
> 25. The whole of the River as it flowed past our lands was a taonga and it was and is contrary to our world view to divide it up, out to an arbitrary point such as a mid-point.
>
> 26. We also exercised kaitiakitanga we also exercised our mana over the River in our area on behalf of all hapū along the River down to its mouth. It would be inconsistent with that to think of any one group (hapū, whānau or individuals) having an ownership right that could be voluntarily sold to say the Crown.

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34 *Paki* (HC), above n 12.
35 Footnote added.
36 Waitangi Tribunal, above n 6, at 289–290.

Relationships — a traditional way of life and the connection and balance of the physical and spiritual world

27. Everything is connected and everything has a relationship. It began with Ranginui and Papatūānuku. Everything that exists within that space is a relationship; of the sun and earth, earth and living things, water with us, air with us and so on. Everything works in duality, it can be said that most everything that exists has a relationship one way or another; both negative and positive. From a Māori perspective there has always been a relationship between the animate and inanimate.

28. We occupied certain parts of the landscape and in that occupation, we formed relationships with neighbours, inside of boundaries, the universe as it applied to where we were at the time, and the cycles that drove how we lived in those areas.

29. The very nature of relationships is whakapapa, intertwining people and their environment. By occupying an area for a period, you become connected to that area, it becomes a part of the people and their story. Those stories being then passed on to generations that follow, giving them a sense of connection to that area.

30 Understanding that we are the product of past relationships that have occurred before us, without those relationships we would not be in the locations that we are. Further to that, without knowledge of our connections we fail to know who we are and what has brought us here as people.

Waikato River

31. Rivers are living beings. They have a mauri (life-force) and weaves its way connecting the people to the water. In maintaining the mauri of the river, we had to use the resources of the river responsibly. This meant collecting and promoting food and other resources sustainably to ensure that it would remain for future generations. The rivers are our lifeline. They nurture and sustain us. Any damage done to the river harms the mauri of the river consequently harming the people.

32. The whakapapa of the Pouākani people to the Waikato River is significant and highlights the strong bonds that our people share with the waterways. Indeed, it is this whakapapa that demonstrates that our connection to the Waikato River is longstanding, establishing our tūrangawaewae, mana motuhake, tangata whenua, and mana ahi kaa resulting in traditional knowledge, cultural identity and belonging.

[39] Dr Robert Joseph, an associate professor at the University of Waikato | Te Whare Wānanga o Waikato, has also provided expert evidence for the Pouākani claimants, including a November 2020 report titled *Customary Interests and*

Relationships in the Riverbed of the Waikato River — Waipapa Stream Area: A Report in which he concludes:[37]

> **PART D: SOME BRIEF FORMATIVE CONCLUSIONS**
>
> 258. Māori possessed territory, or areas over which they had influence or mana, and the territory which they possessed was not just land but included the whole of the territorial resources of land, lakes, rivers, springs, swamps and inland seas.
>
> 259. Unlike English law, there was no concept of someone owning the bed of the river, lake or harbour but not the associated water. To Māori, the water was as much held or possessed as the associated bed, and it was held for so long as the water remained or flowed over the tribal territory.
>
> 260. The water bodies were held by or for the hapū, as the autonomous, political unit along with the related hapū along the water's edge, with whom associations were made from time to time for defence, trade and social intercourse. The water bodies were symbolic of the identity and authority of the hapū and of the iwi of the combined hapū. The evidence of occupation of the water's edge was also evidence of their authority over the water bodies.
>
> 261. Although there were private interests in the water, in the form of individual or whānau use rights, these were subordinate to the community of ownership represented by the hapū.
>
> 262. In tikanga Māori, Māori had the mana of their lands and waters that is, the absolute and exclusive power and authority thereover. That covers not only the private right to own but also the public right to control. It includes, but is not limited to kaitiakitanga. Kaitiakitanga is an incident of ownership, not an alternative to it.
>
> 263. What naturally should follow from shared whakapapa and whenua interests is shared mana whenua, mana whakahaere tōtika and kaitiaki interests in the lands and other natural resources including for the claimed section of the Waikato River bed for this report.
>
> 264. The concept of the owners of the riparian land also owning the river bed to its mid-point is contrary to general Māori tikanga (or, in the words of the Native Land Courts Acts, Māori custom and usage). I have found nothing that would suggest that the hapū in the Pouākani area had any different tikanga in this regard.

[40] In November 1999, the Pouākani claimants, represented by the Trust, reached a settlement with the Crown of historical claims under the Treaty of Waitangi | te Tiriti o Waitangi. As reflected in the deed of settlement and s 10(2) of the

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[37] Robert Joseph *Customary Interests and Relationships in the Riverbed of the Waikato River — Waipapa Stream Area: A Report* (November 2020).

Pouākani Claims Settlement Act, the Pouākani claims to the River Bed and water of the Waikato River were excepted from the settlement.

[41] The Pouākani claimants' amended statement of claim of 1 April 2021 in the Māori Land Court culminates in their seeking the following relevant orders (at [30]):

> (f) Declaring that the first Applicants are the owners of the river water flowing across such River Bed as trustees for and on behalf of those who can whakapapa to the Hapū; [and]
>
> (g) Reserving leave for applications for orders as to exactly on whose behalf the first Applicants hold the ownership of the River Bed and the river water flowing over such River Bed; …

The judgment under appeal

[42] The Māori Land Court declined to strike out the water claim, saying, briefly:[38]

> [102] As I have noted above, I do not agree with Mercury and the Attorney General's argument that the Pouākani claims should be struck out with regard to the land under fee simple title owned by Mercury or in which Mercury has beneficial interest, on the basis that the titles are indefeasible and Mercury's easements are also indefeasible. It follows that if the riverbed claims can be seen to be linked and dependent upon the issue of customary title, then Pouākani's water claim requires further consideration and is not clearly untenable.
>
> [103] Further, it is unclear as to whether the Māori Land Court's ability to inquire into customary water rights has been ousted by the [Act's] definition of land. This is an issue the Court will need to consider full arguments on.
>
> [104] Lastly, I agree with counsel for Pouākani that water ownership is a contentious topic in Aotearoa/New Zealand. The arguments of ownership are novel. This is a developing area of law which has tikanga elements at its core. The claim should be considered by the Court in full and not be struck out.

[43] In the High Court, the Judge accepted that the Māori Land Court had not engaged with the jurisdictional arguments focussed on the provisions of the Act.[39] He stated:[40]

> [88] Once again this issue turns on the correct meaning of the [Act]. It is important to identify precisely what orders the Māori Land Court is able to make. The Court has the function of determining in which category land is to be placed under s 129 of the Act. Section 129(1) provides that, for the

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38 Māori Land Court judgment, above n 1.
39 Judgment under appeal, above n 2, at [85].
40 Footnotes omitted.

purposes of the Act, all land in New Zealand must have one of the statuses that are listed. The ramifications of the classifications are then set out in the other provisions of the Act. Section 18(1)(h) describes the classification role as deciding "whether any specified land is or is not Māori customary land or Māori freehold land or general land owned by Māori or general land or Crown land". Under s 18(1) the Court then has the function of identifying the owners of the land that has been so classified. It is a closely prescribed statutory regime for classifying and determining ownership of land. As Cull J said in *Attorney-General v Carter*, given the definition of "land" this regime does not extend to making such determinations in relation to water. That forms no part of the prescribed regime. Neither are there any subsequent provisions explaining the ramifications of determining the status or ownership of water.

[89] That does not mean, however, that the concepts referred to by the Pouākani claimants are not relevant. On the contrary, when making assessments as to whether land is Māori customary land it may be important to understand the relationship with any water directly associated with that land, and to make its decisions accordingly. The Court is obliged to take into account tikanga, and accordingly the Māori world view. This could include the inherent interconnectedness that has been referred to. But ultimately that line of inquiry is only relevant to the extent that it informs the Court's function of making the determinations contemplated by the provisions of the [Act]. A line of analysis reflecting interconnectedness may be relevant, but only in the context of determining whether the bed of the Waikato River is and remains Māori customary land, and who the beneficial owners are.

[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 the Resource Management Act, 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.

[91] This role of the Māori Land Court is illustrated by the reasoning of the Court of Appeal in *Attorney-General v Ngāti Apa*. The Court of Appeal there held that the Māori Land Court had jurisdiction to consider claims to the foreshore and seabed as this fell within the scope of its jurisdiction to make status orders in relation to "land". When it did so Keith and Anderson JJ said:

> … 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). [The respondents] 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) …

[92] This was so because the beds of rivers and lakes fell within the concept of "land". A claim to land was not excluded because the land was covered by water. When reaching this view, they took into account the

customary interrelationship between land and water revealed by the Preamble. They explained:

> 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 …

[93] Elias CJ and Tipping J similarly separately concluded that the areas of foreshore and seabed fell within the definition of "land" under s 129(1). The decision of the Court therefore recognises that the jurisdiction to address claims to the land included land beneath water. But the jurisdiction necessarily proceeds on the basis that the resource to which claim is made is the "land" rather than the water at the foreshore itself. The suggestion that there is a jurisdiction to inquire into the status or ownership of water, or to make decisions on the status or ownership of the water, is inconsistent with the Court's analysis.

[94] For these reasons, I accept that the Māori Land Court erred by not striking out the Pouākani claimants' separate claim for orders in relation to the water. The relief sought in the amended statement of claim at [30(a)] is a status order that the riverbed is customary land, which is squarely within the Court's role. But it also seeks a declaration in the following terms:

> (f) Declaring that the first applicants are the owners of the river water flowing across such River Bed as trustees for and on behalf of those who can whakapapa to the Hapū.

[95] There is no jurisdiction of the Māori Land Court to make such a declaration. That claim should accordingly be struck out.

Relevant law

[44] In addition to the portions of the Act traversed above, s 18(1)(h) is particularly relevant to this issue:

> **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:
>
> …
>
> (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:

[45] In *Carter*, in relation to the water claim there, we accepted:[41]

> … 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.

[46] And we accepted "[t]hat is consistent with more generic sources discussing tikanga and te ao Māori",[42] and with the previous dicta of this Court.[43] We said:[44]

> 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.
>
> [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):

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41 *Carter v Attorney-General*, above n 24, at [53].

42 At [54], citing Law Commission | Te Aka Matua o te Ture *He Poutama* (NZLC SP24, 2023) at [3.22], Jacinta Ruru *The Legal Voice of Māori in Freshwater Governance: A Literature Review* (Landcare Research | Manaaki Whenua, October 2009) at 81 and Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 39.

43 *Carter v Attorney-General*, above n 24, at [55], citing *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 26.

44 *Carter v Attorney-General*, above n 24.

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.

[47] We reviewed the case law authorities relied upon by the parties and concluded they "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".[45]

Submissions

[48] Ms Sykes, for the Pouākani claimants, submits that the Māori Land Court's jurisdiction extends to recognising interconnected whenua and wai (land and water). The Pouākani claimants hold the customary lands and waters in accordance with

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45 At [62].

tikanga, as kaitiaki of taonga tuku iho, exercising mana whakahaere. Mana whakahaere is equivalent to, but not quite the same as, ownership in English: it is more imbued with the values that guide and inhibit behaviours to ensure that survival and identities are secure. Under s 18(1)(h) of the Act, the Māori Land Court can "determine" whether the Pouākani claimants have shown that the river water "is or is not Maori customary land". The meaning of whenua, described in the Preamble as "taonga tuku iho", must be considered and resolved by reference to te ao Māori, tikanga, and te Tiriti, according to *Nikora v Kruger* and consistent with ss 2 and 17 of the Act. Reading in "Māori customary land *and interconnected waters*"[46] to the Act would advance its "reforming" purpose,[47] provide substantive protections over the water resource, and entitle the customary owners to procedural benefits. Otherwise, the Māori Land Court would need to determine the customary land claim to the River Bed in accordance with tikanga but in circumstances where that claim is artificially severed from the tikanga-sourced proprietary rights to the river water. This would in effect "invisibilise" tikanga.

[49] Mr Smith, also for the Pouākani claimants, adds that the Native Land Court recognised interconnected rights to water in the *Ōmāpere Lake*, *Tangonge Lake* and *Lake Rotoraira* cases,[48] consistent with *Attorney-General v Ngāti Apa* and Parliament's vesting of the bed of Lake Taupō in the Crown in s 14 of the Native Land Amendment and Native Land Claims Adjustment Act 1926.[49] The ramification of a determination that specific property is Māori customary land would then have to be determined in relation to other laws, such as the Resource Management Act 1991 (RMA). The Māori Land Court has jurisdiction to determine whether untitled land, or land that is General land or Crown land, and its interconnected water, has the status of Māori customary land or whether there are interests in it relating to water rights (the scope of such rights being a trial issue), consistent with s 145(1) of the Act. That ensures native title is not lost by a sidewind. And investigation by the Māori Land Court of the water claim would facilitate accessibility, efficacy and efficiency and

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46 Emphasis in original.

47 Citing *Nikora v Kruger*, above n 26, at [51]–[54].

48 *Ōmāpere Lake* (1929) 11 Bay of Islands MB 253 (11 BI 253); *Tangonge Lake* (1934) 65 Northern MB 348 (65 N 348); and *Lake Rotoaira* (1949) 29 Tokaanu MB 347 (29 ATK 347).

49 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA). Mr Smith also referred to *Paki (No 1)*, above n 15, at [42]. See also *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General*, above n 43, at 23–24.

align with the Māori Land Court's institutional focus. It is significant that this is a strike-out context because the Court would have to be satisfied that there is no way the Māori Land Court could determine that holding the land in accordance with tikanga could embrace the interconnected waters, in a Māori customary land determination.

[50] Raukawa and Tūwharetoa support the written submissions of the Pouākani claimants:

(a) Ms Feint KC and Mr Ranaweera, for Tūwharetoa, submit that the Crown has repeatedly recognised the rights and interests of Tūwharetoa in te Awa o Waikato, which are protected by the guarantee in te Tiriti o Waitangi. A novel claim of customary title to a river according to tikanga does not reach the threshold for strike out. Failure to recognise customary title is effectively expropriation of the Pouākani claimants' customary rights protected under te Tiriti.

(b) Ms Cole, for Raukawa, submits that even if a claim for customary title cannot be made out on the law, the Māori Land Court can and should have jurisdiction to hear claims as to customary rights and interests in the riverbed land and waters because customary rights and interests are not, and cannot ever be, extinguished. The Māori Land Court remains the appropriate specialist forum in which to hear claims to customary rights and interests.

[51] Mr Ward, for the Attorney-General, submits the High Court was correct that the Māori Land Court does not have jurisdiction to make a declaration of ownership of flowing water. The appropriate lens is of statutory interpretation. The Māori Land Court's jurisdiction is concerned with land and Parliament did not intend to give it jurisdiction to declare ownership of water separate from ownership of land. The statutory scheme, and the practice of the Māori Land Court and its predecessors, do not indicate any intention to confer jurisdiction to determine water ownership as a separate subject of inquiry. Interpreting "land" to mean "whenua" and therefore "land and its associated waters" is inconsistent with the purpose, context and scheme of the

Act. Certain rights and interests to water may flow as incidents of an estate in fee simple. But it is contradictory to the inseparability of land and water at tikanga for the Māori Land Court to have jurisdiction to make an order that necessarily separates them. An estate in fee simple in flowing water is unknown to common law, to tikanga and to the statute book. Clearer definitions and mechanisms would have been used in the Act, and discussed in the parliamentary materials, if the Act was intended to confer general jurisdiction over water independently of land. The applicants may pursue a claim in the High Court.

[52] Ms Fraser, for Mercury, submits that the issue of LTA titles for the land comprising the River Bed is a conclusive answer to any standalone customary claim to the water flowing over the River Bed. Mercury's easements sitting broadly over hydro lakes and adjacent to dams, to use and take water, and its resource consent and associated license, mean that Mercury's interests in water arise from more than just the fee simple title. The easement rights were required to be granted by s 21 of the Water and Soil Conservation Act 1967 and its successor, s 354 of the RMA. They are essential to the operation of the three dams at issue here, which are situated on fee simple land. The Preamble to the Act needs to be viewed in the context of the Act as a land management statute, using the word "land" — in the Preamble and other places in the Act — rather than "whenua", "whenua and wai" or "land and interconnected waters".

[53] Ms Fraser submits determination of status under s 18(1)(h) must inevitably lead to a finding that the land is General land or Crown land. The Māori Land Court's prescribed and limited jurisdiction is essentially directed to "Māori land", with every indication that the concept of "land" is consistent with that in the LTA 1952, and with no indications that jurisdiction extends to any standalone treatment, customary or otherwise, of flowing water. Sections 29, 31 and 142 of the Act answer the water claim because if the land is General land or Crown land, there is no jurisdictional scope for the claims. Any rights or interests in water claimed to exist in parallel with a registered title are matters for the High Court. Mr Hodder KC adds that while *Smith v Fonterra Co-operative Group Ltd* provides that strike out is only appropriate where a case is "bound to fail", *Smith* is different to the present case as it concerns an unsettled area of tort law, while the present case concerns statutory interpretation and

settled, clear and fundamental law.[50] The rights sought in respect of water are simply inconsistent with the estate in fee simple.

Should the water claim be struck out?

[54] We proceed on the basis of the law set out in *Carter*. In essence:[51]

> [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.

[55] We accept here, as we did in *Carter*, that in te ao Māori, and at tikanga for ngā hapū, whenua is inherently and holistically interlinked with the rest of the environment, including wai.[52] That is clear from Mr Cairns' evidence that:

> 25. The whole of the [Waikato] River as it flowed past our lands was a taonga and it was and is contrary to our world view to divide it up, out to an arbitrary point such as a mid-point.
>
> …
>
> 31. Rivers are living beings. They have a mauri (life-force) and weaves its way connecting the people to the water. In maintaining the mauri of the river, we had to use the resources of the river responsibly. This meant collecting and promoting food and other resources sustainably to ensure that it would remain for future generations. The rivers are our lifeline. They nurture and sustain us. Any damage done to the river harms the mauri of the river consequently harming the people.

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50 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 at [85].
51 *Carter v Attorney-General*, above n 24.
52 At [56].

> 32. The whakapapa of the Pouākani people to the Waikato River is significant and highlights the strong bonds that our people share with the waterways. Indeed, it is this whakapapa that demonstrates that our connection to the Waikato River is longstanding, establishing our tūrangawaewae, mana motuhake, tangata whenua, and mana ahi kaa resulting in traditional knowledge, cultural identity and belonging.

[56] Similarly, Ms Kelly Te Heuheu concludes her evidence supporting the substantive claim in the Māori Land Court in this way:

> 170. We have long asserted that the English common law systems simply do not operate in a way that is consistent with tikanga Māori or a Te Ao Māori perspective. The river is a whole being and one that should never be divided. A river is seen as the veins of Papatūānuku, to consider that ownership could be to the midpoint of the river would be analogous to severing Papatūaāuku's veins which is a complete violation of the tapu, mauri and mana of the river.
>
> 171. The Waikato River as a whole protects us and our obligations to her is to protect all in that realm for the ways of life of the peoples now into the future just as the Te Heuheu ancestors that we have been guided by instilled us with the obligations and mana to protect our custom in the present.

[57] This is reinforced by Dr Joseph's expert evidence for the Pouākani claimants, that "[t]o Māori, the water was as much held or possessed as the associated bed, and it was held for so long as the water remained or flowed over the tribal territory".

[58] There are differences between *Carter* and this case. In *Carter*, the associated land had the status of Māori freehold land and was still owned by the hapū who were claiming rights to the water itself. Here, the associated land is in fee simple title under the LTA 2017 and is owned by Mercury or by the Crown for the benefit of Mercury. The claim to water in *Carter* was argued under s 18(1)(a) and (h), whereas here only s 18(1)(h) is relied upon. And there are differences in the way the claims are pleaded in the two cases.

[59] The Pouākani claimants' amended statement of claim is carefully drafted. Paragraph one defines the subject of the application by stating that the claim is "to the river bed of the Waikato River … and to the river water to the extent it flows over that River Bed". Under "Reasons for the Application", the first paragraph under the first heading "Ownership of the Bed" states that "the ownership of the River Bed and the river water that flows over that River Bed was and is that of the hapū". The primary

customary land claim at paragraph 14 states that ngā hapū are entitled to the "customary ownership of the River Bed and to the river water to the extent it flows over that River Bed". Alternatively, paragraph 28 pleads that the legal title to the land obtained by the Crown "did not and does not extinguish the [Pouākani claimants'] rights to ownership of the river water flowing over the River Bed".

[60] It is apparent from the pleadings that the claim is envisaged to be to both the River Bed — that is, the land underlying the water — and to the water itself. But the claim culminates in the orders sought at [30], which are worth quoting again in full for clarity:

> 30. Wherefore [ngā kaumātua on behalf of ngā hapū and the Trust] seek orders:
>
> (a) A status order that the River Bed is still and always was Māori customary land;
>
> (b) Declaring that such Māori customary land (whether direct or via the Crown and/or Mercury NZ Limited) is or should be vested in the First Applicants as trustees for and on behalf of those who can whakapapa to the Hapū;
>
> (c) Alternatively, a declaration that, but for the issue of title or other registration of interests under the [LTA 2017], the River Bed would have been Māori customary land;
>
> (d) Alternatively, a declaration that, but for the issue of title or other registration of interests under the [LTA 2017], the River Bed would have been Māori customary land and would have been vested in the first Applicants as trustees for and on behalf of those who can whakapapa to the Hapū;
>
> (e) Alternatively, a declaration that the Crown or Mercury NZ Limited, as the case requires, hold the titles to such River Bed as a fiduciary for the first Applicants as trustees for and on behalf of those who can whakapapa to the Hapū;
>
> (f) Declaring that the first Applicants are the owners of the river water flowing across such River Bed as trustees for and on behalf of those who can whakapapa to the Hapū;
>
> (g) Reserving leave for applications for orders as to exactly on whose behalf the first Applicants hold the ownership of the River Bed and the river water flowing over such River Bed; and
>
> (h) Costs against any opposing party.

[61] Mirroring the factual pleadings, the orders sought as part of the primary claim are, at [30(a)] and [30(b)], that the River Bed is customary land and should be vested in the claimants. The next three orders sought are expressed as alternatives, dealing with the effect of the issue of title, at [30(c)] and [30(d)], and the fiduciary duty claim, at [30(e)]. But while [30(f)] refers to "such River Bed", the claim to water in this paragraph is not expressed as an alternative. The leave sought to be reserved in [30(g)], which we note the High Court did not strike out, is ancillary to the claims to the River Bed and the river water.

[62] We consider the natural meaning of the wording of [30(f)], understood in the context of the rest of the pleading, is that the claim to water is inherently linked to the primary claim and the various alternative claims to "such River Bed". And that is how Ms Sykes argued it. But its nature as a separate, standalone order means that if the primary and alternative claims to the River Bed fail, the water claim would still remain to be separately considered.

[63] Pleadings can be changed. But, as we said in *Carter*, the Court must deal with the claim as pleaded.[53] Strictly speaking, this is a claim to water only, irrespective of the legal status of any land with which, at tikanga, it must be associated. 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 where there is no land with any legal status on which to ground the claim within the Act.

[64] The freehold title being held by Mercury, rather than Māori freehold title being held by the landowners, does not improve the chances of jurisdiction being found to exist. But the effectiveness of the title depends on whether the Pouākani claimants succeed in their claim that the River Bed has the status of Māori customary land — emphasising the importance of there being land associated with the water as part of the claim.

[65] Neither does the claim being argued on the basis of s 18(1)(h) militate in favour of there being jurisdiction. As we said in *Carter*, s 18(1)(h) confers jurisdiction to

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53 At [60].

determine the status of land.[54] The text, context, and purpose of the Act, including its interpretation in light of tikanga, and the case authorities, are not consistent with the Māori Land Court having jurisdiction to determine claims to water irrespective and independently of the status of associated land.[55] That ruling applies here as well. And, as in *Carter*, arguments about the effect of title or of statutory regimes such as the RMA on the existence and extent of customary title to water are not relevant to the issue of jurisdiction over a claim to water only.[56] Ms Fraser submits that the water claim is determined by the fact that the River Bed has the status of General land or Crown land. But that does not meet the point that the water claim is separate from the land claim. The implications of the title issues for the status of the land are examined further below.

[66] The claim to water, as currently drafted, irrespective and independent of the title status of associated land, may be considered by the High Court. The Māori Land Court does not have the jurisdiction to consider it. Accordingly, we agree with the High Court. We add that it follows, as a corollary, that the ancillary words at [30(g)] — "and the river water flowing over such River Bed" — should also be omitted from the pleading as it currently stands, on the basis of jurisdiction. We make no formal order about that. The point is obvious enough and should be addressed in any repleading.

[67] We dismiss the Pouākani claimants' appeal of the High Court's decision to strike out the water claim.

Issue 2: Does the Māori Land Court have jurisdiction to consider the fiduciary duty claim?

The fiduciary duty claim

[68] The customary land claim, which is the subject of the third issue, is brought on the basis that the River Bed is and always was Māori customary land. Alternatively,

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54 At [56].
55 At [75]–[76].
56 At [77]–[78].

in the Pouākani claimants' amended statement of claim, declarations are sought as follows:

> (c) Alternatively, a declaration that, but for the issue of title or other registration of interests under the [LTA 2017], the River Bed would have been Māori customary land;
>
> (d) Alternatively, a declaration that, but for the issue of title or other registration of interests under the [LTA 2017], the River Bed would have been Māori customary land and would have been vested in the first Applicants as trustees for and on behalf of those who can whakapapa to the Hapū; [and]
>
> (e) Alternatively, a declaration that the Crown or Mercury NZ Limited, as the case requires, hold the titles to such River Bed as a fiduciary for the first Applicants as trustees for and on behalf of those who can whakapapa to the Hapū;

So, the fiduciary duty claim is pleaded as an alternative to the customary land claim. The issue centres on whether the Māori Land Court has jurisdiction to hear a claim that the Crown and Mercury hold titles to the River Bed in a fiduciary capacity for the Pouākani claimants. The claimants say that if the River Bed is determined to be General land or Crown land (rather than Māori customary land), the Crown and Mercury hold their titles to the riverbed as fiduciaries (trustees) on behalf of those who can whakapapa to the relevant Pouākani hapū. The claimants submit that a fiduciary duty arose because the Crown deliberately engaged in self-dealing conduct. Specifically, the Crown issued LTA titles to itself — and subsequently transferred them to Mercury — despite being fully aware of longstanding, unresolved Māori claims to the riverbed. This conduct obligates the Crown and Mercury to return the land to its rightful customary owners. There is no dispute that the High Court has jurisdiction to hear and determine the fiduciary duty claim. But the Pouākani claimants seek to pursue the claim in the Māori Land Court. They submit that a decision of a full court of this Court in 1998 was wrongly decided and that the Māori Land Court is the most appropriate forum to hear the fiduciary duty claim.

Law of jurisdiction

[69] The Pouākani claimants submit that s 18(1)(i) of the Act provides jurisdiction for the Māori Land Court to hear this claim. Section 18(1)(i) provides:

> **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:
>
> …
>
> (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.

[70] When the Act was passed, Professor Paul McHugh observed that the interpretation of this provision "could become a matter of some controversy", identifying that it may permit the Māori Land Court to make orders recognising aboriginal servitudes over any land (whether Māori freehold or otherwise).[57]

[71] The issue was tested in *Attorney-General v Māori Land Court*.[58] There, a claim was brought in the Māori Land Court regarding land which had been acquired by the Crown for a road which was never built, and which was vested in fee simple in the Wairoa District Council. The owners of the adjoining Māori freehold land claimed the land was originally held by the Crown subject to fiduciary obligations.[59] In December 1998, a full court of this Court unanimously held that s 18(1)(i) of the Act does not extend to jurisdiction to hear fiduciary claims to General land or Crown land.[60]

[72] Blanchard J's close reasoning on behalf of the Court held that s 18(1)(i) must be read in context, and the Judge first outlined the Act's long title, the second half of the English version of the Preamble, ss 2(2) and 17 and the definition of "land" in

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57 PG McHugh "A new role for the Māori Courts in the resolution of Waitangi claims?" [1993] NZLJ 229 at 232. The provision was originally introduced as cl 47(1)(e) of the Māori Affairs Bill 1991 (124-1) and was subsequently enacted as s 18(1)(i) of the Act.

58 *Attorney-General v Māori Land Court*, above n 4.

59 At 690.

60 At 701–702.

s 4.[61] The Judge observed that the only mention of "General land" and "Crown land" in s 18(1) is in para (h), which relates to the determination of the status of land.[62] Of s 18(1)(i) the Court stated:[63]

> In its position in s 18 it has the appearance of an ancillary provision. The reference to "land" is not qualified as it is in paras (a)–(h) but, in a section which except for the question of status is referable only to Māori freehold land, it appears at first sight to be similarly limited in its operation. However, the linkage between ss 17 and 18 suggests that it may possibly extend also to General land owned by Māori.

[73] The Court reasoned that the wording and effect of a number of other provisions of the Act indicated that s 18(1)(i) was intended to have a limited, rather than a general, jurisdiction, as the provisions (namely, ss 19–20, 21–25, 27, 131–134, 165, 236–238, 241, 324–325, 328 and 353) largely focussed on Māori land, Māori freehold land, and potentially General land owned by Māori.[64] That told against s 18(1)(i) being interpreted to extend to claims to General land or Crown land held in a fiduciary capacity. The Court stated:[65]

> We are satisfied from this survey of relevant provisions of the Act that, when s 18(1)(i) is placed in its proper context, a reading which would enable it to be applied to General land and Crown land is inappropriate. The Māori Land Court has never had a general power to make orders, other than the declarations of status, in relation to such land. If s 18(1)(i) had really been intended to effect such a remarkable change, which went unheralded during the Act's passage through Parliament, it might have been expected that this would have been done explicitly, by words directly spelling out that the paragraph was to apply beyond Māori land. It is true that "any specified land" in para (i) is the same expression as appears in para (h), but, as indicated above, a more general and necessary purpose is to be discerned in para (h) and confirmed in s 131.
>
> In our view jurisdiction under s 18(1)(i) is limited to the making of vesting orders and granting other relief consistent with the purposes of the Act. The Solicitor-General was able to refer us to examples of its use by the Court in connection with trusts relating to Māori land. But a use relating to General land or Crown land was not intended by Parliament. Claims of Māori to such land based upon the existence of a fiduciary duty are for the High Court to adjudicate, and also for the District Courts within the limits of their equity jurisdiction.

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61 At 698.
62 At 699.
63 At 699.
64 At 699–701.
65 At 701–702.

[74] The decision attracted criticism from respected academic Dr Nin Tomas.[66] There was also parliamentary consideration of the decision. On 5 October 1999, Te Ture Whenua Maori Amendment Bill/Maori Land Amendment Bill was introduced into, and had its first and second readings by, the House of Representatives.[67] It included, at cl 6, an amendment omitting the words "specified land" in s 18(1)(i) and substituting the words "Maori freehold land or General land owned by Maori". This change would have adopted the Court of Appeal's decision, as the explanatory note stated.[68] However, on 30 November 2000, the Māori Affairs Committee struck out the clause. The Committee agreed with submitters that the amendment, which followed from this Court's decision, was inappropriate and that the words "any specified land" would need to be defined to mean "Māori freehold land, Māori customary land, General land owned by Māori, General land, or Crown land".[69] But it noted that this Court's decision was being appealed to the Privy Council and many submitters considered it would be premature to change the Act until after that appeal was determined.[70] That appeal did not proceed.

[75] The Pouākani claimants ask us to depart from this Court's decision in *Attorney-General v Māori Land Court*.

Law of the Court of Appeal departing from its own decisions

[76] As Sir Douglas White stated in the first sentence of an article on the subject, "[r]espect for precedent is an aspect of the rule of law".[71] In 2005, soon after the creation of the Supreme Court, in *R v Chilton* Glazebrook J, on behalf of a unanimous full court of this Court, considered the circumstances in which the Court would be prepared to review and affirm, modify or overrule an earlier decision.[72] The Court did

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66 Nin Tomas "Jurisdiction Wars: Will the Māori Land Court Judges Please Lie Down" (2000) 9 BCB 33.

67 Te Ture Whenua Maori Amendment Bill/Maori Land Amendment Bill 1999 (336–1).

68 Te Ture Whenua Maori Amendment Bill/Maori Land Amendment Bill 1999 (336–1) (explanatory note) at ii.

69 Te Ture Whenua Māori Amendment Bill/Māori Land Amendment Bill 1999 (336-2) (select committee report) at 3.

70 At 2–3.

71 Douglas White "Originality or Obedience? The Doctrine of Precedent in the 21st Century" (2019) 28 NZULR 653 at 653.

72 *R v Chilton*, above n 3, cited with approval by this Court in *Television New Zealand Ltd v Talley's Group Ltd* [2024] NZCA 502 at [27].

not consider that the creation of the Supreme Court "should lead to any change in the way in which this Court approaches its own earlier decisions".[73] But it did note that:[74]

> There is clear potential for injustice if an intermediate appellate Court is bound to follow an obviously incorrect precedent, particularly in cases where an appeal is not available or is not taken to the final appellate Court.

[77] The Court also noted there may be an advantage for the Supreme Court to have a fully reasoned decision as to why this Court considers a particular decision is wrong, rather than "perpetuating clear error".[75] The Court's characterisation of that approach was, in summary:

> [83] This Court has recognised that it is ordinarily bound by its earlier decisions but that it will, in rare cases, be prepared to review and affirm, modify or overrule an earlier decision. It has resisted outlining in detail the circumstances in which it will depart from previous decisions, but it is clear that the approach will be cautious because of the need for certainty and stability in the law …

[78] Those words were adapted from a passage in the judgment of Richardson J in *Collector of Customs v Lawrence Publishing Co Ltd*, which the Court quoted.[76] Also included in the relevant passage was:[77]

> Clearly the Court would and should adopt a cautious approach to the review of earlier decisions. Adherence to past decisions promotes certainty and stability. People need to know where they stand, what the law expects of them. So do their legal advisers. And a Court which freely reviews its earlier decisions is likely to find not only that the Court lists are jammed by litigants seeking to find a chance majority for change, but also that the respect for the law on which our system of justice largely depends is eroded. However, any judicial development and change reflects an assessment that the obtaining of a socially just result outweighs the considerations of certainty and predictability in the particular case.

[79] The Court referred to a number of relevant observations by Cooke P, Richardson and Hardie Boys JJ in *Dahya v Dahya*, as well as Keith J in *Jones v Sky City Auckland Ltd*.[78] It also quoted Blanchard J's call for the Court to "mix caution

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73 *R v Chilton*, above n 3, at [100].
74 At [98].
75 At [99].
76 *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 (CA) at 414–415.
77 At 414, as quoted in *R v Chilton*, above n 3, at [83].
78 *R v Chilton*, above n 3, at [84]–[89], citing *Dahya v Dahya* [1991] 2 NZLR 150 (CA) and *Jones v Sky City Auckland Ltd* [2004] 1 NZLR 192 (CA).

and flexibility" in *R v Hines*.[79] We consider these factors further below where relevant. The Court also accepted that "there may be a mandate for a slightly less restrictive approach in criminal cases, particularly where the liberty of the subject or fair trial rights are at stake".[80]

[80] The most recent substantive consideration of these issues by this Court was in *Singh v Police*, where Kós P, on behalf of a unanimous bench of three, stated:[81]

> [13] In principle the doctrine of precedent (or stare decisis) requires this Court to follow its own prior decisions. But, as with most principles, there are recognised exceptions. There are four primary exceptions. First, the Court is not bound to follow its prior decision where it conflicts with another such decision. Secondly, it is not bound to do so where the decision conflicts with a decision of a superior court. Thirdly, it is not bound to follow its prior decision if it concludes that decision was given *per incuriam*. Those three exceptions were identified in 1944 by Lord Greene MR in *Young v Bristol Aeroplane Co Ltd*, and they remain true today.
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> [14] In New Zealand a fourth, innominate exception exists, in part because this Court has never wholly embraced the classification in *Young v Bristol Aeroplane Co Ltd*. That was apparent when the question came before the Court three years later in *Re Rayner*. The fourth exception permits departure in circumstances not covered by the first three. But in practical terms it is a confined enlargement of the third exception: it permits departure from a previous decision that does not meet the more limited criteria for condemnation as *per incuriam*. This Court has resisted detailing the circumstances in which this exception applies, but has said in *R v Chilton* that its approach "will be cautious because of the need for certainty and stability in the law". Moreover, as Cooke P observed in *Dahya v Dahya*:
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> > Yet it could not be right for this Court to overrule a prior decision of its own, even when sitting on a later occasion with five Judges, merely on the ground that on a finely balanced point of statutory construction the later Bench preferred a different view. Some more cogent reason must be necessary to justify departure from such degree of certainty as the doctrine of stare decisis achieves.
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> [15] In *Dahya* the Court noted a number of considerations relevant to whether it should revisit a previous decision. They included whether there has been any fundamental general change of circumstance since the prior decision, whether contrary decisions have since been delivered by persuasive jurisdictions overseas, the number of judges that sat on the previous decision compared to the number sitting on the present case, whether the previous decision had been decided by a majority, the length of time the earlier decision has stood, and the nature of the issue the case is concerned with. The primacy

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79 *R v Chilton*, above n 3, at [90], quoting *R v Hines* [1997] 3 NZLR 529 (CA) at 587.
80 *R v Chilton*, above n 3, at [103].
81 *Singh v Police* [2021] NZCA 91, (2021) 29 CRNZ 665 (footnotes omitted).

of individual justice in criminal cases means a more flexible approach may be taken in that context.

[16] It is not suggested this broader, essentially evolutionary fourth exception is engaged in this case. The indicia in *Dahya* are not relied upon. Rather, it is said that *Re Solicitor-General's Reference,* a very recent decision of the Permanent Court, is simply wrong. That engages the third, *per incuriam* exception, which now calls for a little exposition. Although the expression "per incuriam" defies definition, the best known examples are where a relevant statute, rule or particularly important precedent have been overlooked (and which, if taken into account, demand a different outcome). There is a clear analogy here with one of the three circumstances in which a criminal decision may be recalled — where "counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance".

[17] The essential point we need to make is this: more is required here than just an argument that the prior decision is wrong. To be *per incuriam* it must be wrong by reason of a fatal and fundamental omission. If so, the decision may be departed from by this Court. If not, it may only be departed from if it falls into the fourth, innominate or evolutionary category, which was not advanced here. Reversal otherwise must occur in the Supreme Court.

Judgment under appeal

[81] In the Māori Land Court, the Judge held, succinctly:[82]

[98] The fiduciary claim, as I read it, relies on a finding that the status of the riverbed in question is or was Māori customary land. If the land in question is Māori customary land then the Court could consider the fiduciary claim. If the claim that the riverbed is Māori customary land is clearly untenable and is struck out, then this part of the claim would also be struck out.

[99] I have found that the claim of Māori customary title is not clearly untenable and should not be struck out. Further consideration of that part of the application is needed. Therefore, it follows that the fiduciary claim aspect of the application should also procced for full consideration.

[82] In the High Court:

(a) The Judge accepted that the fiduciary duty claim was advanced as an alternative to the customary land claim and that the Māori Land Court erred in failing to assess it as a claim in the alternative.[83]

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82 Māori Land Court judgment, above n 1.
83 Judgment under appeal, above n 2, at [62].

(b) The Judge also accepted that the Māori Land Court erred in failing to address the interpretation of s 18 or the binding effect of *Attorney-General v Māori Land Court*.[84] He considered the effect of that decision is that the Māori Land Court would not have jurisdiction under s 18(1)(i) in relation to land if it were determined to be General land owned by Mercury, according to its LTA certificates of title.[85] He noted that Mercury accepted that the Māori Land Court could consider the nature of the status of the land underlying Mercury's registered easements.[86]

(c) The Judge's short answer to the fiduciary duty claim was that *Attorney-General v Māori Land Court* is binding on the High Court and the Māori Land Court.[87] He accepted the Māori Land Court has no jurisdiction to address the claim once it is established the land is General land. And if the land is customary land, no arguable case of fiduciary duties has been identified. So, the claim should be struck out in its entirety.[88]

(d) The Judge characterised this Court's approach in *Attorney-General v Māori Land Court* as "an entirely conventional one which analysed the text of the provisions in light of their purpose".[89] He was not persuaded by the Pouākani claimants' criticisms. He did not agree the fiduciary duty claim engages the specialisation of the Māori Land Court: the fiduciary duty concepts are squarely within the role of the High Court.[90] The argument relating to an overlap of jurisdiction was a criticism of, and did not engage with, the statutory provisions and the binding nature of *Attorney-General v Māori Land Court*.[91] He did not read s 24C of the Act, which was inserted in 2021, as extending the jurisdiction of the

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84 At [63].
85 At [66]–[67].
86 At [67].
87 At [69].
88 At [78].
89 At [70].
90 At [70]–[72].
91 At [73].

Māori Land Court but instead as relating to the relief that it may grant in relation to claims over which it has jurisdiction.[92]

Submissions

[83] Ms Haradasa, for the Pouākani claimants, supported by Tūwharetoa and Raukawa, submits that, on its face, s 18(1)(i) of the Act provides a clear jurisdictional gateway for the fiduciary duty claim. The key obstacle is *Attorney-General v Māori Land Court*, which this Court can depart from despite it being a decision of a full court.[93] The decision is in error because it disregards the definition of "land" in s 4(1) of the Act on the basis that the "context requires otherwise" but, in this case, the context does not. The judgment is outdated in light of the interpretive presumption in favour of consistency with te Tiriti o Waitangi and international law, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the greater recognition of tikanga in our law today.[94] The Court took an unduly restrictive view of the Preamble and s 2 of the Act, suggesting that the key drivers in the Preamble are focussed only on "Māori land".[95] But the Court did not refer to the te reo version of the Preamble, which does not limit land to Māori land and states "ko te whenua he taonga tuku iho". It did not refer to s 2(1) or (3) of the Act, the latter of which required the Māori version to prevail. It omitted the statement in the long title that the Act reforms the law "in accordance with the principles set out in the Preamble". It drew overbroad and incorrect conclusions about the scheme of the Act. There are provisions in the Act giving the Court power to deal with general land. It deliberately read down the broad words "any specified land" in s 18(1)(i), which is wrong because:

(a) The Court failed to appreciate the constitutional foundation of the Act, in contrast to the Supreme Court's recent judgment in *Nikora v Kruger*. In some circumstances, the chain of Māori ownership has not been validly broken and the current proprietors may hold General land or Crown land in a fiduciary capacity for the rightful Māori owners, as is

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92 At [76].
93 Citing *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 as an example of where a three-Judge bench departed from a previous unanimous decision of a full court.
94 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).
95 *Attorney-General v Māori Land Court*, above n 4, at 698.

the case here. The Crown's deliberate, dishonourable and self-dealing conduct grounds the claim to a fiduciary duty here.

(b) In any event, it is not clear the long title has the limited effect ascribed to it and it is inconsistent to rigidly emphasise the statutory definitions in this part of the Court's interpretation and not elsewhere.

(c) The Court was wrong to suggest that because many sections of the Act only apply to Māori freehold land (and some to other land statuses), s 18(1)(i) was not intended to provide a wide-ranging jurisdiction. Rather, the provision expressly confers a fiduciary jurisdiction in respect of "any specified land". Other provisions, such as s 298(2) and (3), expressly exclude General land and Crown land from the Māori Land Court's jurisdiction.

(d) The insertion of s 24C into the Act in 2021 was a significant amendment to the Act since the Court's decision. It confers broad powers of equitable relief on the Māori Land Court. That conferral nullifies the Court's reasoning in *Attorney-General v Māori Land Court* that the Act did not contain sufficient "mechanical" provisions linked to s 18(1)(i) and so the provision was "limited and ancillary to the core jurisdiction over Māori land".[96]

(e) Policy considerations of institutional competence, institutional focus, and access to justice are relevant, as they were in *Nikora v Kruger*. The Māori Land Court has been developing an equitable jurisdiction with a distinctively Māori character and has fluency in tikanga. Concerns about floodgates are misplaced.

[84] Mr Hodder submits that the "entirely conventional" precedent of *Attorney-General v Māori Land Court* has been settled and authoritative law for more than 26 years.[97] It rejected claims strikingly similar to those here. Mercury supports

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96 At 700.

97 Quoting judgment under appeal, above n 2, at [70].

the High Court's reasoning. The High Court has jurisdiction. The Pouākani claimants seek to overturn the core finding of a full bench of this Court and so afford the Māori Land Court jurisdiction over fiduciary claims against any private landowner of fee simple General land under the LTA 2017. The Act is not oriented to the substantive correction of alleged Crown misconduct. Nothing in the Act points to the Māori Land Court having such a wide-ranging jurisdiction. There is no mechanism in the Act to facilitate a vesting order in relation to General land or Crown land if there is jurisdiction under s 18(1)(i), which is telling. Neither the text nor legislative history of s 24C, inserted by Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020, supports expanding the Māori Land Court's jurisdiction. The ratio decidendi of *Nikora v Kruger* is quite narrow and it makes perfect sense for the Māori Land Court to have jurisdiction to deal with post-settlement governance entity issues. The Court should have looked at the te reo version of the Preamble but made no error as a result of not doing so.

[85] Mr Ward submits this Court should not depart from the unanimous judgment of a full court in *Attorney-General v Māori Land Court* which identified the proper interpretation of s 18(1)(i). None of the four exceptions to this Court being bound to follow its previous judgments, as identified in *R v Singh*, are present here. The evolutionary approach to the Court's supervisory jurisdiction over criminal practice or other litigation practice, and in criminal cases generally because of the primacy of individual justice, is distinct to a different view on a "finely balanced point of statutory construction".[98] There has been no shortage of opportunity for Parliament to amend the effect of the judgment. Section 24C does not negate part of the High Court's reasoning but illustrates that Parliament recently considered the relationship between jurisdiction and equity, and did not amend s 18(1)(i). The decision should stand even if it can be departed from. The Preamble does not determine the meaning of the substantive provisions. Nothing can be taken from Parliament's decision not to amend the Act in light of the decision. Neither *Nikora v Kruger* nor interpretive aids nor policy considerations demand a different resolution of the question. The Act was passed in the same year as the Treaty of Waitangi Amendment Act 1993, which precluded the Waitangi Tribunal from recommending that the Crown purchase private

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98 Quoting *Dahya v Dahya*, above n 78, at 155, as quoted in *R v Chilton*, above n 3, at [84].

land for return to claimants. This conflicts with the notion that Parliament, in the same year, would have given the Māori Land Court the jurisdiction that the Pouākani claimants argue it did.

Should the fiduciary duty claim be struck out?

[86] As explained in *R v Chilton* and *Singh v Police*, this Court is ordinarily bound by its own decisions, subject only to rare exceptions in civil cases. That serves the interests of certainty and stability in the law, which is a core element of the rule of law. It preserves the mix of "caution and flexibility" referred to by Blanchard J in *R v Hines* and quoted by the full court in *R v Chilton*.[99] It also still allows the law to develop when a precedent is "obviously incorrect",[100] rather than "perpetuating clear error",[101] according to the relevant considerations identified in *R v Chilton*. Departing from a precedent is also available where it conflicts with another decision or a decision of a superior court,[102] it overlooks a relevant statute, rule or particularly important precedent (thereby demanding a different outcome),[103] or it is "wrong by reason of a fatal and fundamental omission".[104]

[87] We do not consider the conditions here justify departure from the unanimous judgment of a full court of this Court in *Attorney-General v Māori Land Court*, that has stood since 1998.

[88] Neither of the first two exceptions identified in *Singh v Police* are present here. The decision does not directly conflict with another decision or a decision of a superior court. That includes the Supreme Court's recent decision in *Nikora v Kruger*, which was also an exercise of purposive statutory interpretation of the Act but concerned a very different issue. Nor do we consider the third exception (or, if distinct from that, the fourth exception) — the per incuriam (and innominate) ground(s) — applies here. *Attorney-General v Māori Land Court* might not be expressed in the same terms as it would be today, but the High Court was correct in characterising it as a conventional

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99 *R v Hines*, above n 79, at 587, as quoted in *R v Chilton*, above n 3, at [90].
100 *R v Chilton*, above n 3, at [98].
101 At [99].
102 *Singh v Police*, above n 81, at [13].
103 At [16].
104 At [17].

exercise in statutory interpretation, having regard to the text, context and purpose elucidated by the relevant provisions of the Act.

[89] Ms Haradasa is correct that the Court in *Attorney-General v Māori Land Court* did not refer to the te reo version of the Preamble or s 2(1) or (3) and abbreviated its quotation of the long title.[105] This Court would draft differently today, as the Supreme Court did in *Nikora v Kruger*, and as we did in *Carter*. But we do not consider it is clear enough that that makes a difference to the outcome of the interpretation such as to warrant us departing from it.

[90] Section 2(1) requires the provisions of the Act to be interpreted in a manner that best furthers the principles set out in the Preamble and s 2(3) provides that the Māori version prevails in the event of any conflict between the two versions of the Preamble. Ms Haradasa points to the recognition in the te reo Māori version that "nā te mea e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori". The English language version, which was quoted by the Court, is "whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people".[106] No material differences in meaning between the two versions have been identified to us, either in evidence or submissions. And s 2(2) states particularly that:

> … 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 …

[91] The Court did refer to s 2(2), which is a more operationally direct statement of the effect of s 2(1) in relation to this subject matter, stating that there is no suggestion to be found in s 2(2) that "the Act is intended to be a vehicle whereby General land beneficially claimed by Māori can be the subject of a vesting order in favour of Māori".[107]

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105 *Attorney-General v Māori Land Court*, above n 4, at 698.
106 At 698.
107 At 698.

[92] Ms Haradasa points to the departures by a three-judge bench of this Court in *Moses v R* from a decision of a full court in *Hessell v R*, and by a full court in *Attorney-General v Ngāti Apa* from a decision of a panel of three in *In Re the Ninety-Mile Beach.*[108] But:

(a) *Moses v R* involved the issuance of a guideline judgment pursuant to this Court's supervisory jurisdiction over criminal practice. The Court explicitly noted the more flexible approach that may be warranted in relation to "litigation practice" and criminal proceedings.[109]

(b) The judge in *Attorney-General v Ngāti Apa* who addressed the issue directly considered that *Re the Ninety-Mile Beach* represented "revolutionary doctrine" and while it had "stood for a long time, it is better in the end that the law now be set upon the correct path".[110]

[93] We are also conscious of the parliamentary context of the passage of s 18(1)(i) of the Act in 1993 and of the consideration of whether to amend it in 1999 and 2000. As the Crown referred to in argument before us and submitted to this Court in *Attorney-General v Māori Land Court*:[111]

> The Crown naturally had a concern that any such jurisdiction might enable the making of orders in respect of grievances which would otherwise be the subject of claims to the Waitangi Tribunal, and would there face the barrier, in respect of General land, deliberately erected by Parliament in the 1993 amendment to the Treaty of Waitangi Act 1975. That amendment prohibited the tribunal, except in the case of its specified resumptive powers, from recommending the return of any private land to Māori or its acquisition by the Crown (s 6(4A)). The amendment had been intended to avoid any repetition of the 1992, "Te Roroa Report" (Wai 38). The [Act] had been passed within three weeks of the introduction of that amendment. It was, the Solicitor-General submitted, highly unlikely that Parliament, having moved to prevent the tribunal from even recommending the return of private land to Māori, would at much the same time have intentionally given the Māori Land Court the power to revest private (ie General) land in Māori without the consent of its owners. The parliamentary emphasis is on resolution of historical grievances by political settlements, Mr McGrath QC said, not

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108 *Moses v R*, above n 93, at [44], referring to *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298 and citing *R v Chilton*, above n 3, at [83], [96] and [103]; and *Attorney-General v Ngāti Apa*, above n 49, at [13] per Elias CJ, [158] per Keith and Anderson JJ and [215] per Tipping J, referring to *Re the Ninety-Mile Beach* [1963] NZLR 461 (CA).

109 *Moses v R*, above n 93, at [44].

110 *Attorney-General v Ngāti* Apa, above n 49, at [215] per Tipping J.

111 *Attorney-General v Māori Land Court*, above n 4, at 696.

> through Court processes. If the proprietors are unable to reach agreement with the council, they can go to the tribunal in an attempt to achieve settlement.

[94] We consider there is still considerable force in that submission, which has not been altered by subsequent parliamentary events. In 1999 and 2000, Parliament considered a Government Bill that, as introduced, would have affirmed the Court's decision.[112] The Committee did not favour it and deleted the proposed provision, instead effectively favouring overruling the decision. But it did not recommend an amendment to do so and Parliament did not consider that. This episode does not provide grounds to infer parliamentary intent to either endorse or overrule *Attorney-General v Māori Land Court*. Twenty-one years later, in 2021, Parliament explicitly decided to expand the powers, but not the jurisdiction, of the Māori Land Court to confer equitable relief. This does not give much of a clue about parliamentary intent either.

[95] There have been developments in international law since 2005, such as the UNDRIP, and in New Zealand's domestic law and social conditions, as there always are. That includes increased recognition of the legal status and effects of tikanga by both Parliament, in statutes, and by the courts. Policy considerations can be relevant to, but are not determinative of, statutory interpretation. They do not constitute sufficient justification to depart from *Attorney-General v Māori Land Court*.

[96] *Attorney-General v Māori Land Court* was concerned with an issue of statutory construction and was decided by a full court of five judges. It has stood as the law for 27 years. Parliament has had, but not taken, the opportunity to amend its effect over that period. There has not been any fundamental general change of circumstance. No statute, rule or particularly important precedent has been overlooked. The decision is not wrong by reason of a fatal and fundamental omission. Of course, conducting the exercise afresh as the (now) apex court, the Supreme Court could arrive at a different interpretation to that in *Attorney-General v Māori Land Court*. But we do not consider that the law governing this Court's ability to depart from its own decisions justifies us, as a panel of three, in departing from the unanimous, long-standing decision of a full

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[112] Te Ture Whenua Maori Amendment Bill/Maori Land Amendment Bill.

court in *Attorney-General v Māori Land Court* in the current circumstances. And we are not convinced that decision is wrong.

[97] We dismiss this ground of the appeal.

Issue 3: Is the customary land claim untenable?

The customary land claim

[98] As already traversed, the amended statement of claim includes the customary land claim as the primary claim. The claim is that the bed of the Waikato River at the specified points is and always was Māori customary land that is or should be vested in ngā kaumātua on behalf of ngā hapū. An alternative declaration is sought that, but for the issue of title or registration under the LTA 2017, the River Bed would have been Māori customary land and/or would have been vested in ngā kaumātua.

[99] The basis for Mercury's application to strike out the customary land claim is significantly less focussed on the Māori Land Court's jurisdiction than the first two issues. The essence of the argument is that the claim is untenable due to the indefeasibility of the registered land titles as General land or Crown land, because registration extinguished any customary title that may have earlier subsisted. The High Court declined the application for strike out. Mercury and the Crown appeal that decision. The Pouākani claimants oppose the appeal.

Law of strike out

[100] There is no dispute about the legal principles that apply to the striking out of claims. In the Māori Land Court, the Judge noted that the Court has inherent powers to regulate its own procedure, extending to striking out proceedings.[113] On the basis

[113] Māori Land Court judgment, above n 1, at [65], citing *Proprietors of Maraeroa C v NZ Forest Products Ltd* (2007) 121 Waikato MB 258 (121 W 258) at [12]; Te Ture Whenua Māori Act, s 6(2); and *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) at 276.

of *Attorney-General v Prince and Gardner*, *Couch v Attorney-General*, and *Nicholas v Official Assignee*,[114] the Judge held:[115]

> [69] Therefore, there is clear authority for a strike out to be considered in the Māori Land Court, on the following basis:
>
> (a) Pleaded facts in the statement of claim are assumed to be true, whether or not these are admitted;
>
> (b) The causes of action must be so clearly untenable they cannot possibly succeed;
>
> (c) The jurisdiction to strike out must be exercised sparingly and only where the Court is satisfied it has the requisite material;
>
> (d) Where applications to strike out raise difficult questions of law and require extensive argument, jurisdiction is not excluded; and
>
> (e) Particular care is required in areas where the law is confused or developing.
>
> [70] As Judge Ambler noted in *Maraeroa C*, "the Court must guard against straying into an assessment of the substantive evidence and the merits of the case under the guise of a challenge to jurisdiction."

[101] In considering relief, the High Court agreed with the Māori Land Court's approach to strike out, stating:[116]

> [99] There is no statutory provision in the [Act], or any rules of court established under the [Act], permitting the Māori Land Court to strike out a proceeding. Judge Coxhead referred to the earlier decision of the Māori Land Court in the *Proprietors of Maraeroa C v NZ Forest Products Ltd* and concluded that the Court had inherent strike out powers. I agree with that view, which would be particularly important in relation to proceedings that involve an abuse of process. It is also appropriate to exercise such a power with respect to claims that are outside the Court's jurisdiction, such as the present case. The use of such a power otherwise might only be appropriate in the plainest of cases. However, jurisdiction plainly exists.

[102] We agree. We do not consider Cooke J's observation about striking out only "in the plainest of cases" adds anything material to the usual approach summarised by

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114 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J; and *Nicholas v Official Assignee – Lot 6 DP 34349* [2021] Māori Appellate Court MB 228 (2021 APPEAL 228) at [8].

115 Māori Land Court judgment, above n 1 (footnote omitted).

116 Judgment under appeal, above n 2 (footnote omitted).

the Māori Land Court, in particular regarding strike out being available when "causes of action [are] so clearly untenable they cannot possibly succeed".[117]

[103] Since then, the Supreme Court has expanded on the nature of untenability for strike out purposes in *Smith v Fonterra Co-operative Group Ltd*. That case involved argument about causes of action in tort, including a novel climate system damage tort with an associated duty of care. The Court explained the relevance of policy considerations and novelty in different contexts, including as applied in *Couch v Attorney-General*.[118] The Court said:[119]

> *Our approach*
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> [83] These authorities articulate what are long-established principles: a measured approach to strike out is appropriate where a claim—whether in negligence, nuisance or otherwise—is novel, but at least founded on seriously arguable non-trivial harm. That is so even if attribution to individual respondents remains difficult. In such a case the common law should lean towards receipt of the claim, and full evaluation based on evidence and argument at trial, over pre-emptive elimination.
>
> [84] Such an approach is consistent with fully informed access to civil justice by those who have a tenable case that they have been harmed, and who will otherwise go without remedy based on a pre-emptive evaluation only. And, as was observed in *Couch*, a refusal to strike out a cause of action "says little about its eventual merit". That is to say, it is not a commentary on whether or not the claim will ultimately succeed.
>
> [85] Pre-emptive elimination is only appropriate where it can be said that whatever the facts proved, or arguments and policy considerations advanced at trial, a case is bound to fail.

Judgment under appeal

[104] The Māori Land Court acknowledged that the cases relied on by Mercury and the Crown "clearly hold that registration of title in the land transfer system does

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117 Māori Land Court judgment, above n 1, at [69(b)]. This dictum reflects this Court's finding in *Attorney-General v Prince and Gardner*, above n 114, at 267.

118 *Smith v Fonterra Co-operative Group Ltd*, above n 50, at [76]–[82], citing *Couch v Attorney-General*, above n 114.

119 *Smith v Fonterra Co-operative Group Ltd*, above n 50 (footnote omitted).

extinguish customary title".[120] But the Judge identified factors which raise questions about that holding here:

(a) a lack of authority as to the effect of registration when the Crown's assertion of ownership has been found to be wrong and original ownership has yet to be determined;[121]

(b) a lack of clarity as to whether indefeasibility can defeat Māori customary title when title is issued on an erroneous basis under the LTA alone;[122]

(c) uncertainty as to the effect of the principle that the Crown can only grant land that had been lawfully acquired from Māori;[123] and

(d) uncertainty as to the effect of an easement over an area where there may not be an LTA title issued, or that is still recorded as Crown land, and the assumption of title is found to be erroneous.[124]

[105] The Māori Land Court Judge reviewed the Supreme Court decisions in *Paki (No 1)* and *Paki (No 2)* and considered that "[c]learly the Supreme Court was of the view that the determination of the status of the riverbed could be heard in the Māori Land Court", which persuaded him to take a cautious approach to the strike-out application.[125] He said, in summary:

> *Summary*
>
> [94] I consider therefore that the situation is not as clear and straight forward as Mercury and the Attorney-General submit. Although there are titles registered under the LTA, the Supreme Court *Paki* decisions make it clear that the Crown assumption of ownership under the Coal Mines Act was wrong and the *ad medium filum aquae* presumption did not apply to the Pouākani lands without proof. On that basis, the Supreme Court considered the status of the riverbed was undetermined and could be investigated by this Court to establish if it continues as customary land. Those facts raise issues

120 Māori Land Court judgment, above n 1, at [75].
121 At [77].
122 At [78].
123 At [79].
124 At [80].
125 At [93].

> as to the Crown's title and whether Māori customary title has in fact been extinguished, which require further argument and consideration.
>
> [95] In my view, the Pouākani application is tenable and should not be stuck out, in so far as it relates to land under the fee simple title owned by the Crown and Mercury, or in which Mercury has beneficial interest, and Mercury's easements.

[106] In considering Mercury's application for judicial review, the High Court accepted that the Māori Land Court had not engaged with Mercury's argument based on the indefeasibility of title issued under the LTA.[126] Cooke J did not accept that the Supreme Court in *Paki (No 2)* confirmed that the Māori Land Court had jurisdiction to inquire into customary title over land subject to LTA titles.[127] After reviewing the indefeasibility arguments, he said:

> [20] Based on these and other authorities, I accept the submissions from Mercury and the Attorney-General that indefeasibility of title under the LTA will extinguish any claims, including claims for customary title that can be recognised by the Māori Land Court, unless the Pouākani claimants can come within a recognised exception to indefeasibility provided for by the LTA.

[107] He noted that the land in question "has never been brought within the regime of the [Act] or its legislative predecessors" but that the Crown had issued title to itself in 2002–2005 under the LTA 1952.[128] That potentially engaged "important presumptions of statutory interpretation which the prior authorities have not needed to address",[129] that:

(a) the burden is on the Crown to establish it had clearly extinguished native title;[130]

(b) Parliament does not authorise the Crown to take property without compensation;[131] and

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126 Judgment under appeal, above n 2, at [13].
127 At [15].
128 At [23].
129 At [23].
130 At [25].
131 At [26(a)].

(c) Parliament does not legislate inconsistently with the principles of the Treaty | te Tiriti.[132]

[108] The Judge considered the statutory provisions of the Act and the LTA 2017 in light of those presumptions. In particular, ss 145 and 146 of the Act restrict the alienation of Māori customary land and Māori freehold land, respectively. Section 51(3)(b) of the LTA 2017 provides that a registered title is subject to any other enactment that overrides or limits the title. The Judge did not consider that the cited authorities, which concluded that the LTA indefeasibility provisions necessarily prevail over the Act's restrictions on alienation of Māori freehold land, are equally applicable to Māori customary land.[133] He did not consider that s 51(3)(b) of the LTA 2017 can necessarily be given a limited interpretation, based on its plain wording and in light of its purpose.[134] He also noted that the statutory exception to indefeasibility enacted in the LTA 2017 may lead to a different conclusion than that reached by the previous authorities.[135] And he considered:

> [47] These points arise irrespective of the presumptions of statutory interpretation that I have referred to above. I consider that the presumptions have a decisive impact in this case. If the bed of the Waikato River is indeed properly to be regarded as Māori customary land — and that is what the Pouākani claimants are asking the Māori Land Court to assess and determine — then the Crown and Mercury are asserting that the Crown was able to unilaterally take this land by the act of arranging title to be issued to itself. The strike out application involves an argument that these circumstances cannot even be inquired into. Parliament is presumed not to have authorised such action in the absence of very clear statutory provisions. The conduct would be a breach of the presumption that such a taking cannot be achieved without the free consent of the native occupiers, the principle that the Crown cannot take property without compensation, and the presumption that statutes should be interpreted consistently with Treaty principles where possible.

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132 At [26(b)].
133 At [36]–[37].
134 At [43]–[45].
135 At [46].

[109] He did not consider there was persuasive authority to the contrary.[136] He concluded:[137]

> *Conclusion*
>
> [56] Given the above matters, I have reached the conclusion that the combined effect of the restrictions on the alienation of Māori customary land contained in the [Act], and the exception to indefeasibility contained in s 51(3)(b) of the LTA, interpreted in light of the presumptions I have referred to, mean that the Pouākani claimants' customary land claim can continue, and should not be struck out. In particular, the Pouākani claimants are entitled to ask the Māori Land Court to assess whether the relevant land was (and is) Māori customary land irrespective of the registered titles that are held by Mercury. It will be for the Māori Land Court to assess whether the land is properly categorised as Māori customary land, including the assessment of the implications of that categorisation.
>
> [57] I see the position as the same as the claims to the foreshore and seabed dealt with in *Attorney-General v Ngāti Apa*. In that case, Tipping J said:
>
> > When a claim is made that a particular piece of land has the status of Māori customary land, the Māori Land Court must investigate the claim in accordance with the statutory provisions in that behalf. A claim may fail as a matter of fact but the Māori Land Court's investigation into the facts must be allowed to proceed unless it can be shown beyond doubt that the land cannot, as a matter of law, have the status asserted for it. In my view it follows that in principle, and subject to any clear statutory indication of extinguishment, the question whether Māori customary title existed and continues to exist over the seabed and the foreshore is essentially a matter of fact which is both general and specific to the site in question. It is a question which necessarily involves an examination of tikanga Māori which is the "exclusive jurisdiction" of the Māori Land Court: see s 132(1) of [the Act].
>
> [58] It is this paragraph to which Elias CJ referred in *Paki (No 2)* when discussing the Māori Land Court's inquiry here. I do not accept that Mercury's reliance on its certificates of title mean that as a matter of law the land cannot have the status asserted for it.
>
> [59] For these reasons I agree with the conclusion reached by the Māori Land Court on this issue, albeit for different reasons. I dismiss this aspect of Mercury's challenge.

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136 At [48]–[55], citing *Kereopa v Te Roroa Whatu Ora Custodian Ltd* [2013] NZCA 327, [2013] NZAR 1029, *Roman Catholic Bishop of the Diocese of Auckland v Boynton* [2019] NZHC 1446 and *Minister of Conservation v Māori Land Court* [2008] NZCA 564, [2009] 3 NZLR 465.

137 Judgment under appeal, above n 2 (footnotes omitted).

Submissions

[110] In summary, Mr Hodder submits the High Court judgment erred in analysing the LTA 2017 rather than the LTA 1952, which was applicable when all of Mercury's titles were obtained. Registration of those titles created and perfected title, involving immediate indefeasibility under ss 62 and 63 of the LTA 1952, absent fraud. Neither statute created an exception to indefeasibility for a customary ownership interest. Where registered title can be produced for land, it cannot be Māori customary land.[138] The judgment also erroneously identified s 51(3)(b) of the LTA 2017 as new, significant and applicable in overriding the effect of indefeasibility when its legislative history, and that of the LTA 2017 as a whole, explicitly recognised the primacy of indefeasibility. None of the presumptions relied upon by the High Court eroded the immediate indefeasibility of the titles created by registration under the LTA 1952.

[111] Mr Ward submits the central error with the judgment is that its conclusion is diametrically at odds with the purpose of the Torrens system and the LTA scheme and context, which is to ensure it is not necessary for purchasers to look into the historical title of a parcel of land. Registration of title under the LTA extinguishes customary title, even if it is registered contrary to protections against the alienation of Māori land in the Act. Land held by a registered owner under the LTA cannot be Māori customary land. None of the exceptions to indefeasibility apply here. Section 51(3)(b) does not restore customary property interests and does not apply to the facts here, and neither LTA intended to depart from immediate indefeasibility on registration.[139] The judgment draws erroneous distinctions between this case and the settled case law and misapplies principles of statutory interpretation.[140]

[112] Mr Smith submits it is a long-standing and well-established principle that native title rights continue to exist until and unless they are lawfully abrogated. This principle was endorsed by te Tiriti o Waitangi and given statutory force by the Act.

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138 Citing *Attorney-General v Ngāti Apa*, above n 49, and *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC).

139 Citing *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 (HC) and *Warin v Registrar-General of Land*, above n 138.

140 Referring to *Attorney-General v Ngāti Apa*, above n 49, *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 (HC), *Te Roroa Whatu Ora Custodian Ltd v Kereopa* [2012] NZHC 1052 and *Gregory v Thames Coromandel District Council* [2017] NZHC 2323.

The Crown's self-interested raising and registration of titles cannot meet the necessary standard of extinguishment. There is no default presumption that security of title under either LTA 1952 or LTA 2017 must prevail over that fundamental principle. The Act and the LTAs are reconcilable. The LTA 2017 did not materially change the relevant law from the LTA 1952 and s 51(3)(b) of the LTA 2017 makes explicit an exception to indefeasibility recognised under the LTA 1952.[141] Presumptions and canons of interpretation reinforce this analysis. None of the authorities relied upon by Mercury or the Attorney-General involve the validity of title in the context of Māori customary land under the Act, and so are not determinative. Registration does not lead to a default change of status under the Act, which requires a formal inquiry and declaration by the Māori Land Court.[142] There is a spectrum of possibilities as to how native title can be given effect today. Their nature and extent here are quintessentially trial issues for the Māori Land Court. If it comes to it, the Pouākani claimants will argue they suffered compensable loss under the LTA 2017, under the alternative pleaded claim. That necessarily depends on a finding that the River Bed was Māori customary land.

Should the customary land claim be struck out?

[113] This issue involves two different doctrines relating to property rights in New Zealand: indefeasibility of registered title and non-extinguishment of customary title. These doctrines are given statutory effect in the LTA regime and the Act, respectively. This is a strike-out application, and we bear in mind the Supreme Court's caution that a measured approach to strike out is appropriate where a claim is novel. The question is whether the LTA 1952 prevails over the Act at law such that the Pouākani claimants' case is so clearly untenable that it cannot possibly succeed, whatever the facts proved or arguments advanced at trial. We consider their case is so clearly untenable.

[114] We consider, in turn:

(a) indefeasibility and its exceptions under the LTA regime;

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141 Referring to *Miller v Minister of Mines* [1963] NZLR 560 (PC).

142 Citing *Warin v Registrar-General of Land*, above n 138, at [139] and *Warin – Whangaruru Whakaturia 4 Lot 32 DP 126453 (Part)* (2011) 30 Taitokerau MB 37 (30 TTK 37) at [107].

(b) the Act and extinguishment of customary title;

(c) presumptions of statutory interpretation;

(d) the LTA regime and the Act; and

(e) are the claims untenable?

(a) Indefeasibility and its exceptions under the LTA regimes

[115] There is no doubt that indefeasibility of registered title is a central tenet of the Torrens system as implemented in New Zealand since the Land Registry Act 1860 and then the more effective Land Transfer Act 1870.[143] Amendments were consolidated in the Land Transfer Act 1885, which was the basis for the Land Transfer Act 1915 and the LTA 1952.[144] The purpose of indefeasibility is to provide certainty to purchasers and sellers of land as to what is being bought and sold. As Lord Wilberforce, for the Privy Council, said in the iconic New Zealand case of *Frazer v Walker*:[145]

> It is [ss 62 and 63 of the LTA 1952] which, together with [s 75] confer upon the registered proprietor what has come to be called "indefeasibility of title". The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personam*. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[116] In 2009, in *Cashmere Capital Ltd v Carroll (on appeal from Cashmere Capital Ltd v Crossdale Properties Ltd)*, the Supreme Court examined the meaning of a statutory exception to indefeasibility in the LTA 1952.[146] It expressed the legislative

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143 Law Commission | Te Aka Matua o te Ture *Review of the Land Transfer Act 1952* (NZLC IP10, 2008) at [1.7]. See also at [2.9].

144 At [1.17].

145 *Frazer v Walker* [1967] NZLR 1069 (PC) at 1075–1076.

146 *Cashmere Capital Ltd v Carroll (on appeal from Cashmere Capital Ltd v Crossdale Properties Ltd)* [2009] NZSC 123, [2010] 1 NZLR 577.

purpose underlying indefeasibility of title as that summarised by the Privy Council in *Gibbs v Messer* in 1891:[147]

> The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

[117] We accept Mr Hodder's submission that it is the LTA 1952, not the LTA 2017, that governs the effect of the relevant titles here when they were raised and registered by 2011. Mr Smith observed that, in the High Court, the written submissions of Mercury and the Attorney-General, and Mercury's pleadings and oral argument, all proceeded on the basis the LTA 2017 applies. But Mr Smith did not dispute that it is the LTA 1952 that applies to the effect of the titles at the time they were raised and registered. That must be so. Particular provisions of the LTA 2017 may govern particular ongoing decisions in relation to these titles from its date of commencement, but they are not material here unless noted specifically. And we do examine the light thrown by the legislative history of the LTA 2017 on the continuing effect of the doctrine of indefeasibility.

[118] The LTA 1952 sets up a comprehensive regime for the registration of land.[148] Part 2 of the Act traverses the land that is subject to the LTA 1952. Sections 10 and 11 state:

> **10 What lands subject to this Act**
>
> The following land shall be subject to the provisions of this Act:
>
> (a) all land which has already in any manner become subject to the provisions of any former Land Transfer Act:
>
> (b) all land hereafter alienated or contracted to be alienated from the Crown in fee:

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147 At [73], quoting *Gibbs v Messer* [1891] AC 248 (PC) at 254.

148 We examine the version of the Land Transfer Act 1952 [the LTA 1952] in effect as at 1 January 2011, as the date relevant to Mercury's (and the Crown's) titles.

(c) all land in respect of which any order is hereafter made under the provisions of any Maori Land Act in force for the time being which has the effect of vesting that land in any person in freehold tenure:

(d) all land which hereafter becomes vested in any person for an estate in fee simple in possession by virtue of any Act of the Parliament of New Zealand.

11 Special provision as to land under Maori Land Act

Land over which the Maori title has been extinguished since the constitution of the district within which the same is situate, but before 31 August 1874 (being the date of the passing of the Land Transfer Act 1870 Amendment Act 1874), shall come under the provisions of this Act upon the registration of a Crown grant, or certificate of title in lieu of grant.

[119] For land subject to the LTA 1952, s 12 provides that a Crown grant may not be issued but, in lieu of that, the Registrar-General of Land (the Registrar) may be directed to issue a certificate of title which, when signed and registered, has the force and effect of a Crown grant. Schedule 1 provides for the form of a certificate of title, which states that it is "a certificate in lieu of grant" that the registered proprietor "is seised of an estate in fee simple … in the land hereinafter described".

[120] On that basis, the LTA 1952 effects the doctrine of immediate indefeasibility of registered title as held by the Privy Council in *Frazer v Walker*. Part 3 of the LTA 1952 provides for registration, imposing duties on the Registrar to keep a register, deeming when instruments are registered, deeming when a person is the registered proprietor, and providing for registration procedure. For the purposes of this judgment, these provisions culminate in ss 62, 63 and 64, which are materially unchanged since *Frazer v Walker*:

(a) Section 62 provides that "the registered proprietor of land or of any estate or interest in land under the provisions of this Act" shall, except in the case of fraud (which is not pleaded here), and with specified exceptions (which we traverse further below), "hold the same" subject to the encumbrances, liens, estates, or interests notified on the register, "but absolutely free" from all others "whatsoever".

(b) Section 63(1) protects the proprietor of a registered estate or interest from any action for possession or recovery of land, with specified exceptions. Section 63(2) provides that production of the register is "an absolute bar and estoppel to any such action …, any rule of law or equity to the contrary notwithstanding".

(c) Section 64 provides that, after land has become subject to the LTA 1952, "no title thereto, or to any right, privilege, or easement in, upon, or over" it "shall be acquired by possession or user adversely to or in derogation of the title of the registered proprietor.

[121] In pt 4 of the LTA 1952, which deals with certificates of title, s 75 reinforces these provisions by providing that such certificates shall be conclusive evidence that the person named in the certificate "is seised or possessed of that land for the estate or interest therein specified", from the effective date of the certificate, and the property "has been duly brought under this Act".

[122] The extent of indefeasibility has been examined on a number of occasions. In 1977 the Property Law and Equity Reform Committee proposed to give courts a discretion to avoid consequences of immediate indefeasibility but concluded there was no compelling case for changing the law.[149] In 2008, the Law Commission released an Issues Paper which canvassed whether to retain immediate indefeasibility as confirmed in *Frazer v Walker* or change it.[150] In its 2010 Report, the Commission recommended that the "new Act should confirm the current system of immediate indefeasibility upon registration, but modify it by introducing judicial discretion as a means of avoiding manifest injustice in limited cases".[151] We discuss this further below. The explanatory note to the Bill which became the LTA 2017 explained the Bill "retains the core principles of the Torrens system", including that "a purchaser should not need to go behind the register to investigate the root of title".[152] There were consistent references throughout the parliamentary debates to the centrality and

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149 *Report of the Property Law and Equity Reform Committee on the Decision in Frazer v Walker* (Wellington, June 1977) at 10–11.

150 Law Commission, above n 143, at ch 2.

151 Law Commission | Te Aka Matua o te Ture *A New Land Transfer Act* (NZLC R116, 2010) at 15.

152 Land Transfer Bill 2016 (118–1) (explanatory note) at 1–2.

retention of indefeasibility.[153] To emphasise the point, "[f]or clarity and certainty" the Government Administration Committee recommended inserting what became s 3(d) into the purpose clause of the Bill.[154]

[123] As enacted, s 3 of the LTA 2017 provides that its purpose is to replace the LTA 1952 with a modern Act that:

> (a) continues and maintains the Torrens system of land title in New Zealand; and
>
> (b) retains the fundamental principles of that system, which are to—
>
> (i) provide security of ownership of estates and interests in land:
>
> (ii) facilitate the transfer of and dealings with estates and interests in land:
>
> (iii) provide compensation for loss arising from the operation of the system:
>
> (iv) provide a register of land that describes and records the ownership of estates and interests in land; and
>
> (c) reflects the fact that the land transfer register is kept and operated electronically and that most dealings in land are carried out electronically; and
>
> (d) by all of the above means, maintains the integrity of title to estates and interests in land.

[124] Sections 51 and 52, the successors to ss 63 and 64, provide for a materially similar effect of registration of title to the LTA 1952, in plainer language:

> **51 Title by registration**
>
> (1) On registration under this Act of a person as the owner of an estate or interest in land, the person obtains a title to the estate or interest that cannot be set aside.

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153 See (15 March 2016) 712 NZPD 9683: "[t]o ensure people continue to be secure in their property ownership, the bill retains the principle of indefeasibility of title" (Hon Louise Upston MP); (15 March 2016) 712 NZPD 9696: "really housekeeping legislation" that "should not be changing the law in any fundamental way" (Hon David Parker MP); (12 October 2016) 717 NZPD 14248: the "principles of the Torrens system stay intact" (Eugenie Sage MP); (21 June 2017) 723 NZPD 18870: the "whole system rests upon" indefeasibility (Michael Wood MP); (27 June 2017) 723 NZPD 19025: "retains the core principles of the Torrens system" (Hon Mark Mitchell MP); (4 July 2017) 623 NZPD 19212: "retained the key principles at the core of our Torrens system: the indefeasibility of title" (Ms Sage); and (4 July 2017) 623 NZPD 19216: the bill "understands and fundamentally does not alter the linchpin of the confidence in land title in New Zealand, which is indefeasibility of title" (Brett Hudson MP).

154 Land Transfer Bill (118-2) (select committee report) [select committee report] at 2.

(2) The title of the registered owner is free from estates and interests in the land that—

(a) are not registered or noted on the register; or

(b) are not capable of being registered or noted on the register.

(3) Despite subsections (1) and (2), the title of the person registered as owner of the estate or interest is subject to—

(a) the exceptions and limitations in sections 52 to 56, subparts 1 and 3 of Part 4, and section 204; and

(b) any enactment other than this Act that overrides or limits the title.

(4) Subsections (1) and (2) apply whether or not the registered owner acquired the estate or interest—

(a) for valuable consideration; or

(b) from a fictitious person.

(5) Nothing in this section affects the *in personam* jurisdiction of the court.

[125] We consider there is no material difference between the LTA 1952 and the LTA 2017 in their emphasis on the centrality of indefeasibility of registered title.

[126] Indefeasibility is an ideal and not absolute in all circumstances.[155] The nature and extent of exceptions to indefeasibility have been much litigated over the years.[156] After quoting *Gibbs v Messer* on indefeasibility, in *Cashmere Capital Ltd* the Supreme Court again quoted the Privy Council on exceptions to indefeasibility:[157]

> [74] In *British American Cattle Co v Caribe Farm Industries Ltd (in rec)* the Privy Council, in affirming this fundamental principle, said:
>
> > To achieve this objective, it is critical to keep to a minimum the number of matters which may defeat the title of the registered proprietor. However, it is well established that there are certain exceptions.

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155 Law Commission, above n 143, at [1.24] and [2.3]–[2.9].

156 See ch 2.

157 *Cashmere Capital Ltd v Carroll (on appeal from Cashmere Capital Ltd v Crossdale Properties Ltd)*, above n 146, citing *British American Cattle Co v Caribe Farm Industries Ltd (in rec)* [1998] 1 WLR 1529 (PC) at 1533–1534.

[127] The exceptions to indefeasibility in s 63 of the LTA 1952 are:

> (a) the case of a mortgagee as against a mortgagor in default:
>
> (b) the case of a lessor as against a lessee in default:
>
> (c) the case of a person deprived of any land by fraud, as against the person registered as proprietor of that land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud:
>
> (d) the case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of that other land, or of its boundaries, as against the registered proprietor of the other land, not being a transferee or deriving from or through a transferee thereof bona fide for value:
>
> (e) the case of a registered proprietor claiming under the instrument of title prior in date of registration, under the provisions of this Act, in any case in which 2 or more grants or 2 or more certificates of title, or a grant and a certificate of title, may be registered under the provisions of this Act in respect to the same land.

[128] Part 11, entitled "Guarantee of title", provides for compensation for loss or damage to those disadvantaged by a mistake or misfeasance by the Registrar. Section 172 of the LTA 1952 enabled a person deprived of any land, or an estate or interest in land, including by registration of any other person as proprietor, to bring an action against the Crown for recovery of damages.[158] As part of this regime, ss 182 and 183 specifically protect those purchasing from registered proprietors from having to inquire into the circumstances of registration, and relieve bona fide purchasers, or mortgagees of a registered proprietor, of an estate or interest for value from liability for damages or possession or deprivation of the estate or interest on the basis of registration through fraud or error.

[129] Section 51(3)(a) of the LTA 2017 identifies exceptions to indefeasibility in ss 52 to 56, subpts 1 and 3 of pt 4 of that Act, and s 204:

> (a) Section 52 provides for exceptions to similar substantive effect to those in ss 62 and 63(1) of the LTA 1952 — where title is acquired by fraud on the part of the registered owner; where an estate or interest is

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158 For a comprehensive account of exceptions to indefeasibility under the LTA 1952, see Law Commission, above n 143, at chs 2 and 3.

registered or noted at time of registration; where a person has a valid claim under a prior record of title; where there has been an incorrect description of area or boundaries; or where an easement has been omitted or incorrectly described.

(b) Section 53 follows s 77 of the LTA 1952 in creating an exception in relation to an unlawfully registered or unauthorisedly acquired road or reserve.

(c) Sections 54 and 55, extensions of the compensation mechanism in s 172 of the LTA 1952, provide for the Law Commission's proposed limited judicial discretion to avoid manifest injustice. They enable a person so deprived to apply to the court for an order cancelling registration, which the court can make "only if it is satisfied that it would be manifestly unjust" for the other person to remain the registered owner, and that "in the circumstances the injustice could not properly be addressed by compensation or damages".[159] Section 56 provides that an order under s 55 is not available if the estate or interest has been transferred to a third person acting in good faith.

[130] In the parliamentary debates over what became ss 54 and 55 of the LTA 2017, there were consistent references to the threshold for the new manifest injustice exception being "narrow" and "very high" and the exception applying only in "exceptional circumstances".[160] The Government Administration Committee recommended further amendments, including to cl 57(3) to clarify that an order may only be made "if the court is satisfied that in the circumstances the injustice could not

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159 Section 55(1) and (3).

160 See (15 March 2016) 712 NZPD 9683: "[t]he manifest injustice threshold is intended to balance the need for certainty of property rights with the need to protect against unfair outcomes" (Ms Upston); (12 October 2016) 717 NZPD 14242: "the threshold for manifest justice is very high and court orders can be made under these provisions only in exceptional circumstances when compensation cannot properly address the injustice" (Hon Christopher Finlayson MP); (12 October 2016) 717 NZPD 14249: "[i]t does have a very high threshold so that concept of indefeasibility is protected" (Ms Sage); (21 June 2017) 723 NZPD 18859: "[t]he threshold for manifest injustice is very high indeed" (Mr Finlayson); (21 June 2017) 723 NZPD 18871: manifest injustice is "a narrow way through the Torrens system in terms of the utter integrity and indefeasibility of the land register" (Mr Wood); and (27 June 2017) 723 NZPD 19025: the Bill is "not throwing the baby out with the bathwater" (Mr Mitchell).

properly be addressed by compensation or damages". The amendments were passed in order to affirm that the exception should only apply in "exceptional cases".[161]

[131] Of most relevance to this case in the LTA 2017 is the exception to indefeasibility in s 51(3)(b), which states:

> (3) Despite subsections (1) and (2), the title of the person registered as owner of the estate or interest is subject to—
>
> …
>
> (b) any enactment other than this Act that overrides or limits the title.

[132] Mr Hodder submits that the High Court erroneously identified s 51(3)(b) as new, significant and applicable in overriding indefeasibility.[162] But the High Court did not so identify the section. The Judge explicitly noted Mercury's argument that the purpose of the exception was to address the many statutes that constrain the rights of registered land owners.[163] He did not consider s 51(3)(b) could necessarily be given the more limited interpretation for which Mercury and the Crown advocated.[164]

[133] We agree the exception in s 51(3)(b) is not new to the LTA regime. In 2008, in its Issues Paper about the LTA 1952, the Law Commission had a whole chapter on "Overriding statutes", which started:[165]

> 9.1 Certain statutory provisions outside the LTA create legal rights, powers or charges that affect land held under that Act. In some cases where there have been conflicts between the provisions, these other provisions have been held to override the LTA. Concerns have been raised about the implications of this for the principle of indefeasibility of title underpinning our land transfer system.
>
> 9.2 Statutory rights affecting the title to land under the LTA, which are not noted on the register, can prevail against the title of a registered proprietor. However, to have priority over the interests of registered proprietors, these rights must be set out in statutory provisions in which there is an express direction, or clear implication, that the LTA provisions are not to apply.

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161 Select committee report, above n 154, at 4; and Land Transfer Bill 2016 (118–2).
162 Judgment under appeal, above n 2, at [46] and [56].
163 At [41].
164 At [43].
165 Law Commission, above n 143.

[134] The Commission quoted passages from the Court of Appeal and Privy Council judgments in *Miller v Minister of Mines*, which held special provisions regarding mining privileges to be valid and effective against the registered title of a proprietor under the LTA 1952.[166] In the Privy Council, Lord Guest said:[167]

> It is not necessary in their Lordships' opinion that there should be a direct provision overriding the provisions of the Land Transfer Act. It is sufficient if this is proper implication from the terms of the [relevant] statute.

[135] This, and the "exception" recognised by s 51(3)(b), simply reflect the ordinary legal process of interpreting and reconciling two different statutory regimes if they apparently conflict. The Commission noted that the text by Hinde, McMorland and Sim identified 12 statutes that appeared to provide exceptions to the doctrine of indefeasibility, including for the purposes of compulsory acquisition, relationship property, water rights under the RMA, aspects of unit titles, overseas investment, proceeds of crime, terrorism suppression, contractual mistake, and the Act.[168] The Commission's Issues Paper was followed by a Report in 2010 which led directly to the LTA 2017, as we discuss further below.[169]

[136] Determining whether the Act is another exception to indefeasibility, by interpreting the two regimes together, is the primary task to be undertaken in resolving the issue here. We do not consider the High Court's reliance on the LTA 2017, rather than the LTA 1952, makes a significant difference to the legal issues involved in doing that.

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166 *Miller v Minister of Mines* [1961] NZLR 820 (CA); and *Miller v Minister of Mines*, above n 141.

167 *Miller v Minister of Mines*, above n 141, at 569.

168 Law Commission, above n 143, at [9.8], citing DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (looseleaf ed, LexisNexis) at [9.062]–[9.077]. The equivalent discussion is now found in DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (online ed, LexisNexis) at [9.034]–[9.055]. See also Law Commission, above n 143, at [9.17]–[9.25].

169 See below at [161].

(b) Te Ture Whenua Māori Act and extinguishment of Māori customary title

[137] At the beginning of this judgment, we set out the core relevant provisions of the Act, including, in summary:

(a) the Preamble's emphasis on the promotion of retention of land, as a taonga tuku iho of special significance to Māori, in their hands;

(b) Parliament's interpretive directions in relation to the Act:

(i) in s 2(1), to interpret the Act "in a manner that best furthers the principles set out in the Preamble";

(ii) in s 2(2), that Parliament's intention is 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"; and

(iii) in s 2(3), that in the event of any conflict in meaning between the Māori and English versions of the Preamble, the Māori version prevails.

(c) the primary objective of the Māori Land Court, in s 17, is to promote and assist the retention of Māori land in the hands of the owners;

(d) the general jurisdiction of the Māori Land Court under s 18, including to determine "whether any specified land is or is not Maori customary land" under s 18(1)(h);

(e) pt 6 provides that all land must have one of six statuses for the purposes of the Act, determined by the Māori Land Court, which has exclusive jurisdiction to investigate the title to Māori customary land, and restricts the alienation of Māori customary land;

(f) the recent Supreme Court judgment of *Nikora v Kruger* which characterised the Act as straddling two very different and untidily fitting views of the kind of legal relationship individuals should have with their land: conserving the native land tenure system of individualised, undivided interests held by whānau and hapū; and preserving Māori ownership of their ancestral land;[170] and

(g) our decision in *Carter* which noted:[171]

> [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". …

We also noted in *Carter* that "tikanga and te ao Māori will often be important" to the operation and interpretation of the Act, and the need to read it in its statutory context, including statutes such as the LTA 2017.[172]

[138] Native Land Acts from 1862 allowed Māori land to be vested in individuals, alienating it from hapū and iwi.[173] The Act changed how easy that is. It permits Māori customary land to lose that status only in very limited circumstances. In this part of the judgment we refer to the version of the Act in force as at 1 January 2011, in accordance with the date Mercury, and the Crown, obtained title.

(a) Section 129(1) requires that "all land in New Zealand shall have one of the following statuses", which includes Māori customary land.

(b) Section 129(2)(a) provides that "land that is held by Maori in accordance with tikanga Maori shall have the status of Maori customary land".

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170 *Nikora v Kruger*, above n 26, at [54].
171 *Carter v Attorney-General*, above n 24 (footnote omitted).
172 At [51].
173 At [19].

(c) Section 129(3) requires that any land with a particular status before the commencement of the Act "shall continue to have that particular status unless and until it is changed in accordance with this Act".

(d) Section 130 provides:

> No land shall acquire or lose the status of Maori customary land or of Maori freehold land otherwise than in accordance with this Act, or as expressly provided in any other Act.

(e) Section 131(1) confers jurisdiction upon the Māori Land Court "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".

(f) Section 132 governs the process of changing Māori customary land to Māori freehold land. In particular, s 132(1) provides that: "The Maori Land Court shall continue to have exclusive jurisdiction to investigate the title to Maori customary land, and to determine the relative interests of the owners of the land." And s 132(2) provides every title to, and interest in, Māori customary land "shall be determined according to tikanga Maori".

(g) Sections 139–142 effect the changing of status of land:

(i) s 139(1) provides that "[t]he land to which any vesting order made under section 132 applies shall, on the making of the order, become subject to the [LTA 1952]" and s 139(4) requires the Registrar-General of Land to "embody the order as a folium in the provisional register";

(ii) s 140 requires every status order and every vesting order under s 134 to be registered under the LTA 1952;

(iii) s 141 provides that every vesting order has the effect of vesting the land for a legal estate in fee simple; and

(iv) s 142 provides that, upon registration, every status order gives the land the particular status specified in the order.

(h) Section 145 restricts alienation of Māori customary land, saying: "No person has the capacity to alienate any interest in Maori customary land or to dispose by will of any such interest."

(i) Sections 146–150D, in pt 7 of the Act, are further provisions governing the alienation of Māori land.

[139] These provisions of the Act reflect, and express in statutory form, the common law presumption that native title rights continue to exist until and unless they are lawfully abrogated. This is a long-standing and well-established doctrine in New Zealand and other common law jurisdictions such as Australia, Canada and the United States. It was confirmed by this Court in *Attorney-General v Ngāti Apa*.[174] What is known as Māori customary land under the Act is property the common law recognises was in existence at the time Crown colony government was established in New Zealand in 1840.[175] As is well established in other common law jurisdictions, such as Canada and the United States,[176] the Crown's "radical title", obtained with sovereignty, was consistent with and burdened by pre-existing native customary property.[177]

[140] As to extinguishment of customary title and rights, a full court of this Court restated in *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General*:[178]

> It has been authoritatively said that [existing native rights] cannot be extinguished (at least in times of peace) otherwise than by the free consent of

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174 *Attorney-General v Ngāti Apa*, above n 49, at [34]–[45] per Elias CJ and [185] per Tipping J.

175 At [14] per Elias CJ, [140] per Keith and Anderson JJ and [183] per Tipping J.

176 Kent McNeil "Legal Rights and Legislative Wrongs: Māori Claims to the Foreshore and Seabed" in Claire Charters and Andrew Erueti (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) 83 at 85–86.

177 *Attorney-General v Ngāti Apa*, above n 49, at [21]–[22] per Elias CJ, citing *R v Symonds* (1847) NZPCC 387 (SC), *Re the Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41, *Nireaha Tamaki v Baker* [1901] AC 561 (PC), *Manu Kapua v Para Haimona* [1913] AC 761 (PC) and *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA).

178 *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General*, above n 43, at 24, citing *R v Symonds*, above n 177, at 390, *Nireaha Tamaki v Baker*, above n 177, and *Oyekan v Adele* [1957] 1 WLR 876 (PC) at 880. See also *Attorney-General v Ngāti Apa*, above n 49, at [29].

> the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes.
>
> …
>
> It may be that the requirement of free consent has at times to yield to the necessity of the compulsory acquisition of land or other property for specific public purposes which is recognised in many societies; but there is an assumption that, on any extinguishment of the aboriginal title, proper compensation will be paid, …

In the judgment of another full court of this Court in *Attorney-General v Ngāti Apa*, Elias CJ noted that customary property can be extinguished "by sale to the Crown, through investigation of title through the Land Court and subsequent deemed Crown grant, or by legislation or other lawful authority".[179] In relation to arguments that customary property in the foreshore and seabed land at issue there was extinguished by statutes, this Court held that "[t]here seems no argument that, if the [(area-specific)] legislation confers freehold interests, it extinguishes any pre-existing Māori customary property rights inconsistent with such interests".[180] But the terms of the legislation were not the subject of argument and the customary property had not been identified, so the Court preferred "to avoid answering the question in those terms, while indicating that any customary property in the areas vested seems unlikely to survive".[181]

[141] Keith and Anderson JJ provided a slightly different formulation as to when native title and rights may be lawfully extinguished by legislation, describing the need for "clear and plain" extinguishment to be well established.[182]

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179 *Attorney-General v Ngāti Apa*, above n 49, at [47]. See also at [99] per Gault P, [142] per Keith and Anderson JJ and [185] per Tipping J.

180 At [58] per Elias CJ.

181 At [58] per Elias CJ. See also at [181] per Keith and Anderson JJ.

182 At [154] and [162]. See also at [170].

[142] Tipping J put it more strongly, saying Parliament would need to make its intention "crystal clear" by express words or by necessary implication, which is a matter of "express language and logic not interpretation".[183]

[143] We accept that the doctrine of recognition of customary title and rights, and the presumptive conditions for extinguishment, is reflected in art II of the Treaty | te Tiriti, which the Act invokes in its preamble. And art III gave Māori the same legal protections over their property rights as other New Zealanders. It was also reflected in the Letters Patent of 1840 and the Land Claims Ordinance 1841.[184] As Mr Smith points out, it is consistent with the protection of private property by ch 29 of the Magna Carta 1297, which is part of the laws of New Zealand.[185]

[144] As Elias CJ stated in *Attorney-General v Ngāti Apa*, the Act was not constitutive of Māori customary land but "assumed its continued existence".[186] As Mr Hodder submits, the Act recognises Māori customary title, a tikanga right, as a status of land. Accordingly, the Act effectively provides the current process for the lawful abrogation of customary title and rights, recognised by the common law and tikanga, through the conversion of Māori customary land into land with another status under the Act.

(c) Presumptions of statutory interpretation

[145] In the High Court, the Judge considered that three presumptions "have a decisive impact" in this case.[187] Counsel disagree about the relevance of these presumptions. We consider them briefly in turn.

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183 At [185], quoting *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [45] per Lord Hobhouse. Tipping J also noted that s 130 of the Te Ture Whenua Māori Act specifically provides that Māori customary land shall not lose that status otherwise than in accordance with the Act or as expressly provided in any other Act, so it "may therefore leave no room for extinguishment by implication": at [193]. This can be contrasted with *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [138], where Tipping J considered the LTA 1952 was not overridden by the Property Law Act 1952 unless that was expressly stated, because of the "fundamental importance of indefeasibility of title".

184 *Attorney-General v Ngāti Apa*, above n 49, at [35]–[36] per Elias CJ. See also at [140] per Keith and Anderson JJ and [213]–[214] per Tipping J.

185 Magna Carta 1297 (Eng) 25 Edw 1 c 29, pursuant to Imperial Laws Application Act 1988, s 3(1) and sch 1.

186 *Attorney-General v Ngāti Apa*, above n 49, at [47]. See also at [193] per Tipping J.

187 Judgment under appeal, above n 2, at [47].

[146] The first presumption is that the burden is on the Crown to establish it had clearly extinguished native title.[188] For customary property rights to be extinguished by legislation, it must be clear that the legislation has done that. To the extent it is a "presumption", the presumption is that customary property rights are not extinguished by legislation unless that is clearly intended, as illustrated above and stated by full courts of this Court in *Te Rūnanganui o Te Ika Whenua Inc Society* and *Attorney-General v Ngāti Apa*. Mr Hodder submits that presumption is not directed to the LTA 1952's creation of indefeasibility upon registration, which gives statutory title priority ahead of customary title. As we understand it, this is not exactly a submission that title has been extinguished by clear and plain intention but, rather, a submission that "the intention to give statutory title priority ahead of customary title is clear". We consider that submission below. Mr Ward submits that common law principles regarding customary title in *Te Rūnanganui o Te Ika Whenua Inc Society* and *Attorney-General v Ngāti Apa* are not good authority here because the relationship between Torrens title and customary title was not at issue in those cases.[189] We do not accept that submission. The presumption stated is a general presumption. Its applicability is not limited to the particular legislation at issue in the cases that state it. It is clearly applicable, and must be considered, here.

[147] The second presumption is that Parliament does not authorise the Crown to take property, such as land, without compensation.[190] As the Supreme Court explained in *Waitākere City Council v Estate Homes Ltd*, the Magna Carta requires that no one "shall be dispossessed of his freehold … but by … the law of the land".[191] The Supreme Court also explained the common law presumption that "the Courts have been astute to construe statutes expropriating private property to ensure fair compensation is paid", though the presumption only applies "if there is actually a taking".[192] *Te Rūnanganui o Te Ika Whenua Inc Society* illustrates the application of

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188 At [25], citing *Attorney-General v Ngāti Apa*, above n 49, at [27]–[31] and [47] per Elias CJ, [143]–[144] and [148] per Keith and Anderson JJ and [185] per Tipping J.

189 *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General*, above n 43; and *Attorney-General v Ngāti Apa*, above n 49.

190 Judgment under appeal, above n 2, at [26(a)], citing *Waitākere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.

191 *Waitākere City Council v Estate Homes Ltd*, above n 190, at [45], quoting Magna Carta c 29.

192 *Waitākere City Council v Estate Homes Ltd*, above n 190, at [45]–[46], citing Michael Taggart "Expropriation, Public Purpose and the Constitution" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, Oxford, 1998) 91 at 104–105.

the principle of customary property. Mr Hodder is correct that that principle does not preclude, but assumes, there is a taking, and requires subsequent compensation which is a feature of the Torrens regime. Mr Ward is similarly correct that the presumption is not that Parliament does not authorise takings but that the LTA provides for compensation. Mr Smith is correct that no compensation has been paid here, yet. In the context of this case, we consider this principle reinforces the first principle, and its limits.

[148] The third presumption is that Parliament does not legislate inconsistently with the principles of the Treaty | te Tiriti.[193] It is well established that "the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of Treaty",[194] | te Tiriti, with which legislation must be interpreted consistently "unless that intention is made quite clear".[195] This is a particular application of the principle of legality. Mr Hodder submits that principle is limited by the need "not to do violence" to the statutory text, as a full court of this Court stated in *Urlich v Attorney-General*.[196] Mr Ward submits the statutory interpretation the Pouākani claimants favour "contravenes discernible parliamentary intention", which is another limit identified by this Court in *Urlich* on the presumption to avoid an interpretation "repugnant" to the principles of the Treaty | te Tiriti.[197] These qualifications simply reflect the usual approach to statutory interpretation mandated by Parliament in s 10 of the Legislation Act 2019, of ascertaining the meaning of legislation from its text and in the light of its purpose and its context, with which the presumption is compatible. Mr Ward also submits, given the range of mechanisms for mitigating the effect of indefeasibility and the availability of resumption by order of the Waitangi Tribunal, that the Treaty | te Tiriti principles do not support the Pouākani

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193 Judgment under appeal, above n 2, at [26(b)], citing *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [98] and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151].

194 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 656 per Cooke P.

195 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 193, at [151] per William Young and Ellen France JJ. The Court unanimously endorsed that approach: at [8]. The other members of the Court also individually expressed their agreement: at [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ. See *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643. See also Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 684.

196 *Urlich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [62].

197 At [55] and [62].

claimants' interpretation. Again, this is effectively a submission that the statutory intent is clear, and we consider the submission below.

[149] Mr Smith submits that another relevant principle of statutory interpretation is that general provisions do not derogate from specific provisions and, accordingly, the Act's provisions protecting a specific subset of land, namely Māori customary land, must have primacy relative to the general provisions of the LTA. We agree that is a relevant principle, though there are obvious limits to its usefulness. We bear it in mind in considering the interrelationship between the Act and the LTA.

(d) The LTA regime and Te Ture Whenua Māori Act

[150] In general, the Act and the LTA regime are complementary. Land can only have one status. Land which has the status of Māori customary land can only lose that status by going through the processes set out in the Act. Only once that has happened is land registered and does title become indefeasible under the LTA. But what if title to land is registered without following the legal requirement to go through the Act's processes?

[151] The Māori Land Court considered the Supreme Court held, in *Paki (No 1)* and *Paki (No 2)*, that the status of the River Bed could be determined in the Māori Land Court.[198] The High Court Judge did not accept the Supreme Court had determined the Māori Land Court had jurisdiction to inquire into the customary status of land that is subject to LTA titles.[199] He accepted indefeasibility of title under the LTA will extinguish claims for customary title unless one of the exceptions to indefeasibility applies.[200] We observe that the Supreme Court was aware that there were certificates of title over the River Bed and that indefeasibility was raised in argument, and that the Court considered the Māori Land Court would be the appropriate forum to determine a claim to customary title.[201] However, as the High Court Judge noted, the Supreme Court was considering more than the parts of

198 Māori Land Court judgment, above n 1, at [93].
199 Judgment under appeal, above n 2, at [15].
200 At [20].
201 *Paki (No 2)*, above n 5, at [4], [19]–[20], [45]–[46] and [79] per Elias CJ and [209] per William Young J.

the River Bed subject to certificates of title, and it did not address indefeasibility.[202] As Mr Smith fairly acknowledges, the issue in this appeal was not squarely before the Supreme Court.

[152] It is clear that the legal relationship between earlier versions of the LTA and earlier versions of the Act were resolved in favour of the primacy of the LTA in that registration conferred immediate indefeasibility and customary title was not an exception to that. There is longstanding and consistent authority to that effect. In particular:

(a) In 1905, in *Beale v Tihema Te Hau*, Edwards J in the Supreme Court held that, although all parties to the original sale admitted it was fraudulent and the Native Land Court gave effect to it without jurisdiction, the fact it was registered and transferred to a third party who was a bona fide purchaser for value meant the registered title was indefeasible. As a result, an entire Māori community was dispossessed.[203]

(b) In 1902, in *Mere Roihi v Assets Co Ltd*, a majority of this Court considered an invalid and illegal transaction converting Māori customary title into freehold title fell within the fraud exception to indefeasibility, and held the land had never come under the LTA.[204] In 1905, on appeal, the Privy Council reviewed the Land Transfer Act 1870, the Land Transfer Act 1885, the Native Land Act regimes and relevant case law.[205] It advised that "the sections [of the LTA] making registered certificates conclusive evidence of title are too clear to be got over".[206] Once Assets Co Ltd became the registered proprietor under the LTA, its title was indefeasible. The primary exception in cases of fraud required the proprietor themselves to be a direct

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202 Judgment under appeal, above n 2, at [15].

203 *Beale v Tihema Te Hau* (1905) 24 NZLR 883 (SC). See Richard P Boast "The Implications of Indefeasibility for Māori Land" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) 101 at 104–109.

204 *Mere Roihi v Assets Co Ltd* (1902) 21 NZLR 691 (CA) at 725–728 per Denniston J.

205 *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC).

206 At 202.

participant, and fraud meant actual fraud, involving dishonesty by the registered proprietor, not constructive fraud.[207] Their Lordships stated:[208]

> Their Lordships are keenly alive to the necessity of vigilance to protect natives against unfair and oppressive dealings on the part of Europeans; but on the other hand it is equally important not to disturb registered titles of bona fide purchasers, especially when accompanied by long possession and large outlays.

(c) In 1988, in *Housing Corp of New Zealand v Māori Trustee*, the High Court held that the interest being protected by a special provision in the Māori Affairs Act 1953 was not such as to warrant overriding indefeasibility under the LTA 1952.[209]

(d) In 1994, in *Registrar-General of Lands v Marshall*, a Registrar had registered title notwithstanding its transmission to an administrator of an estate as Māori freehold land, and did not comply with a procedural requirement under s 83 of the Māori Affairs Amendment Act 1967.[210] Hammond J in the High Court interpreted the compensation provision so as to give a relatively wide scope for compensation.[211] But he observed that the statutory claim to compensation was instituted because "the guillotine of immediate indefeasibility operates with ruthless efficiency with respect to other interests".[212] He stated that the LTA 1952 must trump the "Māori Affairs legislation" and that it was "simply untenable" for non-compliance with the reporting requirement to "somehow affect indefeasibility of title".[213] He decided that the Registrar's omissions did cause loss and compensation was available.[214]

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207 At 210.
208 At 211.
209 *Housing Corp of New Zealand v Māori Trustee* [1988] 2 NZLR 662 (HC) at 678.
210 *Registrar-General of Land v Marshall*, above n 139, at 191.
211 At 194–196.
212 At 196.
213 At 198–199.
214 At 200–201.

(e) In 1995, in *Faulkner v Tauranga District Council*, Blanchard J in the High Court considered whether land which met the definition of Māori customary land under the Māori Affairs Act 1953 continued to be Māori customary land notwithstanding its registration under the LTA 1952.[215] In the course of his reasoning, relying on previous authorities, he stated:[216]

> I too think that when land is held by way of an estate in fee simple, especially where there is a registered title under the [LTA 1952], the title must be regarded as one derived from the Crown. It is impossible, I think, to say that such a title is merely Crown recognised and continues, so far as the fee simple owners (registered proprietors) are concerned, to be held according to custom. I observe that in *Te Paea v Tareha* at p 65 the advice of the Privy Council, referring to an Act saying that grants to Māori were to be to them in fee simple, calls that "an expression quite inapplicable to lands held by native custom".

(f) In 2021, in *Johnson v Johnson*, Associate Judge Bell in the High Court stated that a certificate of title issued under the Land Transfer (Compulsory Registration of Titles) Act 1924 showed that the land had been the subject of a Crown grant, which extinguished any indigenous title such that "it can no longer be Māori customary land".[217]

[153] In 1993, the Act was finally passed after a lengthy legislative history. Neither counsel nor this Court has been able to identify any material indication in that history that, in passing the Act, Parliament intended to override the LTA 1952 or to set up the Act, or Māori customary land, as an exception to the doctrine of indefeasibility. The Bill, and resulting Act, focussed on retention rather than alienation of Māori land as its purpose. It instituted protections on the process of alienation of Māori customary land. It did not provide for an exception to indefeasibility.

[154] Since then, there have been a few judicial observations about the relationship between the Act and the LTA 1952 which also all favour the primacy of indefeasibility.

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215 *Faulkner v Tauranga District Council*, above n 140, at 363.
216 At 365.
217 *Johnson v Johnson* [2021] NZHC 624 at [14].

(a) In 2003, in *Attorney-General v Ngāti Apa*, Gault P touched directly on the effect of registered title on Māori customary land under the Act:[218]

> [99] By s 129 all land in New Zealand must have one of the statuses listed in that subsection. Subsection (2), if intended to be comprehensive, leaves some difficult questions as to the status of some land not easily fitting the descriptions provided. The underlying intention seems to be that once land has been vested in fee simple (that is a Crown grant has issued), so long as the estate subsists (whoever may own it) it cannot have the status of Māori customary land. That is consistent with the conventional approach to native title claims. They are extinguished in respect of land that has been alienated by the Crown as by Crown grant or consequent upon Crown purchase: *R v Symonds* [1847] NZPCC 387 at p 391, *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321. It is common ground also that they cannot survive the enactment of legislative provisions that are clearly inconsistent with their continued existence.

(b) In 2008, in *Minister of Conservation v Māori Land Court*, there was a conflict between title issued by the Native Land Court and LTA title, with the plan underlying the latter explicitly excluding an estuary.[219] Chambers and Robertson JJ in this Court held that boundaries earlier fixed by the Native Land Court ceased to be definitive upon registration of LTA title, and the Māori Land Court had no jurisdiction under the Māori Affairs Act to alter boundaries on a land transfer title.[220] They emphasised the "supremacy" of land transfer title[221] and also stated:

> [73] The bringing of Māori land under the land transfer system does not rob the Māori Land Court of all jurisdiction. The most important aspect of the court's continuing jurisdiction is its recording of interests in land. Indeed, somewhat ironically, it has been and still is the Māori Land Court recording system which has a fuller record of title than does the land transfer system, albeit the interests recorded by the Māori Land Court are all equitable interests. (The land transfer system does not record and never has recorded equitable interests.)

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218 *Attorney-General v Ngāti Apa*, above n 49. See at [58] per Elias CJ for the effect of area-specific legislation on customary title.

219 *Minister of Conservation v Māori Land Court*, above n 136.

220 At [70].

221 At [71], citing *Assets Co Ltd v Mere Roihi*, above n 205, *Re Mangatainoka 1 BC (No 2)* (1913) 33 NZLR 23, *Housing Corp of New Zealand v Māori Trustee*, above n 209, *Registrar-General of Land v Marshall,* above n 139, at 198, Richard Boast "Māori Land and Other Statutes" in Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 253 at [15.2] and Boast, above n 203.

(c) In 2012, in *Te Roroa Whatu Ora Custodian Ltd v Kereopa*, Judge Bell in the High Court noted that one of the ways in which customary rights can be extinguished is when land is subject to a registered title under the LTA 1952.[222] He found there was no exception to the indefeasibility of the registered title, transferred under the relevant Treaty | te Tiriti settlement legislation, there.[223] In 2013, this Court dismissed an application for extension of time to appeal, including on the basis of the indefeasibility provisions of the LTA 1952 and the inapplicability of any exception.[224]

(d) In 2012, in *ANZ National Bank v Uruamo*, Judge Bell in the High Court held in relation to registered General land that "[o]nce land is brought under the [LTA 1952], any customary rights will have been extinguished", and so the registered proprietor had an indefeasible title.[225]

(e) In 2014, in *Hoole v Pickens*, Judge Bell in the High Court held that it was possible to take judicial notice that registration of land under the LTA 1952 entailed that customary status has been extinguished, and that "[a]lleged customary rights deriving from antiquity cannot survive under s 62 and the other indefeasibility provisions".[226]

(f) In 2017, in *Gregory v Thames Coromandel District Council*, Whata J in the High Court accepted "the basic proposition that customary title to land brought under the land transfer system cannot survive the indefeasibility provisions of the LTA (where the title covers the ground)".[227]

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222 *Te Roroa Whatu Ora Custodian Ltd v Kereopa*, above n 140, at [21(d)].
223 At [37].
224 *Kereopa v Te Roroa Whatu Ora Custodian Ltd*, above n 136, at [24] and [28].
225 *ANZ National Bank Ltd v Uruamo* [2012] NZHC 1895, [2012] 13 NZCPR 643 at [24]–[25].
226 *Hoole v Pickens* [2014] NZHC 620 at [53]–[54].
227 *Gregory v Thames Coromandel District Council*, above n 140, at [40], citing *Hoole v Pickens*, above n 226, at [53] and Richard Boast "The Evolution of Māori Land Law 1862–1993" in Richard Boast and others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 65 at [4.2.1(b)].

[155] The reform of the LTA 1952 into the LTA 2017 is well documented and also touches on the relationship between the LTA regime and the Act. In its 2008 Issues Paper, the Law Commission questioned the relationship, concluding:[228]

> 10.38 An examination of the provisions of the two Acts shows that the relationship between the LTA and [the Act] is unclear. While it is likely that the general courts would favour an interpretation that the LTA overrides the [Act's] record, it is arguable that the latter could prevail. Therefore, it is appropriate to clarify the relationship of the two statutes.

[156] Clarification was promptly supplied by Allan J in the 2008 High Court decision of *Warin v Registrar-General of Land*.[229] It is carefully written and considered.

[157] In *Warin*, the Māori Trustee subdivided Māori freehold land that was vested in in it.[230] The land was registered under the LTA 1952, a certificate of title was created, and the land sold to a purchaser.[231] No confirmation of the transfer was sought from the Māori Land Court prior to registration, contrary to the Act.[232] In 2002, the purchasers discovered the land was Māori land and not General land and applied to the Māori Land Court for an order changing the status of the land to General land.[233] The Māori Land Court dismissed the application because the memorandum of transfer was of no force and effect because it was not confirmed by the Court under s 228(3) of the Act (since repealed) and, by virtue of s 126 of the Act, the Registrar should not have registered it.[234] The purchasers' appeal to the Māori Appellate Court was also dismissed.[235] The Māori Appellate Court made a status order determining the land to be Māori land and directed that the status order be registered against the title in the Land Transfer Office, under s 131 of the Act.[236] The purchasers applied to the High

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228 Law Commission, above n 143.
229 *Warin v Registrar-General of Land*, above n 138.
230 At [12].
231 At [12]
232 At [13]; and Te Ture Whenua Māori Act, s 228(3) (since repealed). Section 228(3) required that an alienation of land by way of sale, transfer or gift by the trustees of a trust (constituted under pt 12 of the Act) must first be confirmed by the Māori Land Court (or the Māori Appellate Court). It was repealed by Te Ture Whenua Maori Amendment Act 2002 and substantially re-enacted in the form of s 150A(3)(a) of the current Act.
233 *Warin v Registrar-General of Land*, above n 138, at [14].
234 At [32].
235 *Jensen – Whangaruru-Whakaturia 4 Lot 32 DP 126435* (2003) 6 Whangarei Appellate Court MB 116 (6 APWH 116).
236 At 127. See *Warin v Registrar-General of Land*, above n 138, at [22].

Court for declarations that they had indefeasible title under the LTA and the status order registered against the title be discharged.[237]

[158] Allan J referred to the centrality of registration, examined exceptions to indefeasibility, and considered the text and legislative history of the Act.[238] He identified four separate respects in which the Act was not complied with: restrictions on the Māori Trustee's powers of alienation; preferred classes of alienees not being given a right of first refusal; no valuation being obtained; and no confirmation being sought from the Māori Land Court under ss 153 and 154 (since repealed).[239] But he did not accept that s 146 of the Act precludes a Registrar from validly registering an instrument of transfer, because that does not amount to a "disposition" of the sort the Act seeks to prevent.[240] And, having had title registered even though it should not have been, he did not accept that ss 126, 156 and 228 of the Act necessarily override the earlier indefeasibility provisions of the LTA 1952.[241] After considering various authorities, the Judge concluded:

> [125] There is a degree of substance in much of what Mr Bell says but, in the end, I have not been persuaded that the factors that particularly appealed to McGechan J in the *Housing Corporation* case ought not to carry determinative weight in this case, despite the significantly more protective regime established by the Act in comparison with earlier days. Security of title by registration lies at the very heart of this country's system of land ownership. The legislature must be taken to have been well aware of that, as is noted by McGechan J at p 673 of the *Housing Corporation* case. Those responsible for drafting the Act must be taken to have known of the Judge's comments in that case and have been aware of the need, if the intention was to override the [LTA 1952], to say so expressly. Had Parliament intended to impinge upon indefeasibility entitlements, then that could have been simply achieved, either by a specific section in the Act, or by an appropriate amendment to s 63 of the [LTA 1952]. Instead, Parliament enacted s 126 of the Act, which, although directing that the first defendant must not register an instrument which has not been confirmed by the Court, stops short of taking the next step of declaring that any such registration would itself be of no effect. I do not accept that the availability of possible compensation claims would constitute an appropriate remedy to dispossessed registered proprietors who have acquired land in good faith and for value, possibly decades after the original alienation.
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> [126] I do not overlook Mr Bell's comprehensive and determined arguments to the contrary, and in particular I do not overlook the possibility that, in an

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237 *Warin v Registrar-General of Land*, above n 138, at [7]–[8].
238 At [50]–[66].
239 At [67].
240 At [79]–[80].
241 At [81]–[86].

> appropriate case, indefeasibility may be lost by statutory implication (*Miller v Minister of Mines*). But where, without fraud, a purchaser of Māori land becomes registered as proprietor without complying with the requirements of the Act, I am unable to conclude that the legislature intended that no indefeasible title would accrue to the purchaser, nor to any successor in title. In reaching that conclusion, I have taken into account both the Preamble to the Act, and the provisions of ss 2 and 17(1).
>
> [127] I accept Mr Bell's submission that the [LTA 1952] is not legislation of a special character which enjoys inherent priority over other enactments. But, as was observed by Lord Browne-Wilkinson in *British American Cattle Co v Caribe Farm Industries Ltd* at p 1533:
>
> > … it is critical to keep to a minimum the number of matters which may defeat the title of the registered proprietor …
>
> in order that the integrity of the system of land registration is maintained. That must be so although the [LTA 1952] may be over-ridden by implication, that implication must be plain from the terms of the over-riding statute (see the discussion in *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643 at p 655).
>
> [128] In determining whether ss 62 and 63 of the [LTA 1952] have been overridden by implication, I am entitled to have regard, not only to the legislative purposes which underpin the Act, but also to the need to preserve, so far as is possible, the integrity of the Torrens System.
>
> [129] I am satisfied that in enacting the Act, Parliament did not intend to override the security of title which ss 62 and 63 of the [LTA 1952] confers.

[159] The Judge noted that compensation to Māori owners deprived of land through the operation of the LTA 1952 "will simply not make good the loss; land is regarded as a taonga and not to be surrendered".[242] He granted the declaration that the purchasers have the benefit of indefeasible title.[243]

[160] However, the High Court considered the question of the status of the land under the Act was "quintessentially a matter for the Māori Land Court and the Māori Appellate Court" and declined to grant a declaration that the status order registered against the title should be discharged.[244] The applicants then applied to the Māori Land Court for a change of the status of the land to General land.[245] The Māori Land Court dismissed the application, stating that it was important that the land

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242 At [131].
243 At [135].
244 At [139]–[140].
245 *Warin – Whangaruru Whakaturia 4 Lot 32 DP 126453 (Part)*, above n 142, at [2].

retain its status as Māori freehold land so that Māori with residual interests in the land could continue to retain some protections provided to them by the Act.[246]

[161] In its 2010 Report, in conjunction with Land Information New Zealand | Toitū Te Whenua (LINZ), the Law Commission proposed a new LTA, and attached a draft Bill accordingly:[247]

(a) The Commission said that the clause that would eventually become s 51(3)(b):[248]

> … will at least signal that there are interests outside the LTA that may affect a registered owner's land, although it does not solve the problem of searching beyond the register for title information and the consequent costs.

(b) In relation to the LTA 1952's relationship with the Act, the Commission noted that *Warin* had been issued since its 2008 Issues Paper.[249] It noted that Māori Land Court judges had submitted to the Commission that the Act should override the LTA 1952 and that s 126 of the Act should expressly provide that registration in breach of that section does not confer indefeasibility.[250]

(c) The Commission acknowledged that what became the manifest injustice exception:[251]

> … can operate to restore land to its Māori owners where a transfer is void or voidable due to non-compliance with [the Act], provided it has not been on-transferred to a bona fide third party.

(d) As a further and separate policy exercise, the Commission recommended "[t]here should be an in-depth review into the registration of Māori Land",[252] stating:

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246 At [62]–[64] and [107]; and Te Ture Whenua Māori Act, s 147A.
247 Law Commission, above n 151.
248 At [5.6].
249 At [6.4].
250 At [6.15]–[6.16].
251 At [6.20].
252 At 52.

> 6.23 The issues surrounding the relationship between the [LTA 1952] and [the Act] and how they are best addressed are significant and complex. It is not just a simple matter of providing that an instrument registered under the [LTA 1952] has no effect if it does not comply with [the Act]. If Māori land registered under the [LTA 1952] is defeasible in certain circumstances, it is possible that there may be a negative impact on the ability to use such land as security. We believe the issues require separate and more detailed study than we have been able to give them in the context and within the timeframes set for this project which is, in essence, to review the [LTA 1952].
>
> 6.24 We acknowledge the importance of the issues. However, we think that the time and resources required to identify and put in place an effective and enduring solution to the problems is likely to delay significantly the implementation of the reforms to the [LTA 1952] proposed in this report. We think the issues surrounding the relationship between the two Acts and how they can best be resolved should be the subject of a further separate project to be undertaken jointly, possibly by the Law Commission, LINZ, the Māori Land Court, the Ministry of Justice and Te Puni Kōkiri.

[162] In response, the Government asked officials to report back to Ministers on what aspects of Māori land registration should be the subject of review.[253] In considering the Bill that became the LTA 2017, the Government Administration Committee was advised by LINZ officials that they remained of the view that the primacy of the LTA over the Act did not need to be reviewed:[254]

> 9. That investigation found that most problems with Māori Land registration were caused by the practical issues. Incomplete and misaligned data means that transactions can take place on the basis of incomplete information which may result in alienation of Māori land contrary to the wishes of the beneficial owners. The conceptual issue of one act prevailing over the other only arose when a process error occurred.

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253 See (21 June 2017) 723 NZPD 18861: "the Government did respond to the Law Commission recommendation, and, in fact, it asked for Te Puni Kōkiri, Land Information New Zealand, and the Ministry of Justice to investigate the issues and report back to Ministers on what, if any, aspects of Māori land registration should be subject to the review. The recommendation of that process, however, was that a review of the relationship between the two Acts was not deemed to be needed or appropriate" (Louisa Wall MP).

254 Land Information New Zealand | Toitū Te Whenua *Land Transfer Bill: Report of Land Information New Zealand to the Government Administration Committee — Addendum to Main Departmental Report* (8 August 2016).

> 10. The investigation also found that various initiatives involving the three agencies, either recently completed or still in train at the time, were likely to largely resolve these practical issues. Any residual risk of Māori land being alienated against the wishes of beneficial owners will be further mitigated through the manifest injustice provisions.
>
> 11. Officials recommended and Ministers agreed that in view of these practical initiatives, the issues of indefeasibility in the case of alienation of Māori land, and the primacy of the [LTA] over the [Act], will have low negative impacts on Māori land registration and did not need to be reviewed at that time.
>
> 12. We remain of that view. We note also that the more recent Te Ture Whenua Māori review did not recommend a review of the relationship between the two acts.

[163] The parliamentary debates also demonstrate that MPs did not understand or intend that the Bill that resulted in the LTA 2017 would change the relationship between the LTA regime and the Act, including not introducing a "different standard of conduct in respect of Māori land compared with other land" [255], and that they were conscious of ensuring that the House had "not opened the gate too broadly in respect of another exception to indefeasibility of title in respect of Māori land".[256] To the extent such issues were raised, as contributions by then Attorney-General, the Hon Christopher Finlayson, demonstrate, they were intended to be addressed through the manifest injustice exception.[257]

[164] On the basis of the text of the Act, considered in the context of the case law before and since, and its legislative history, we consider it is crystal clear and plain that Allan J in *Warin* was correct that Parliament did not intend to create Māori customary land as an exception to indefeasibility under the LTA 1952. The text, legislative history, and context of the LTA 2017 demonstrates that Parliament intended that Act to continue the existing relationship between the two statutory regimes. The presumption that Parliament does not intend to legislate inconsistently with te Tiriti | the Treaty, which is effectively written into the Act, does not affect that analysis. Neither does the presumption that the general does not derogate from the

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255 (21 June 2017) 723 NZPD 18866.

256 (12 October 2016) 717 NZPD 14253.

257 See (21 June 2017) 723 NZPD 18867: "in instances where due process was not followed under [the Act], resulting in an incorrectly registered title, the manifest injustice provision would allow the court to consider—at least consider—the overturning of the registration to avoid an unfair outcome", that provision accordingly "reinforc[ing] current protections under the [Act]" (Mr Finlayson).

specific. And we note in that regard that s 129 of the Act is specific about the status of Māori customary land.

(e) Are the claims untenable?

[165] We now draw together the threads of the law we have canvassed above regarding indefeasibility and customary title. We examine whether the Pouākani claimants' customary land claim is so clearly untenable that it cannot possibly succeed, whatever the facts proved or arguments advanced at trial.

[166] We proceed on the basis of the following propositions that emerged in our examination of the law above:

(a) Indefeasibility of registered title is a central tenet of the Torrens system as implemented in, and confirmed by, the LTA 1952 and the LTA 2017. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register; no adverse claim may be brought against the registered proprietor.[258] It is the LTA 1952 that is relevant to the effect of the titles at the time they were registered here. But there is no material difference between the LTA 1952 and the LTA 2017 in their emphasis on the centrality of indefeasibility of registered title.

(b) The exception to indefeasibility expressed in s 51(3)(b) of the LTA 2017, for any other enactment that overrides or limits the title, is not new in that Act. It simply reflects the ordinary legal process of interpreting and reconciling two different statutory regimes if they apparently conflict. It does not make a significant difference to the legal issues involved, whether that has to be done for the LTA 1952 or the LTA 2017.

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[258] *Frazer v Walker*, above n 145, at 1075–1076; and *Cashmere Capital Ltd v Carroll (on appeal from Cashmere Capital Ltd v Crossdale Properties Ltd)*, above n 146, at [73], citing *Gibbs v Messer,* above n 147, at 254.

(c) The Act reflects, and expresses in statutory form, the common law presumption that native title rights continue to exist until and unless they are lawfully abrogated. Extinguishment of customary title by legislation must be plain and crystal clear to be effective — by express words or necessary implication.[259] The Act effectively provides the current process for the lawful abrogation of customary title and rights, recognised by the common law and tikanga, through the conversion of Māori customary land into land with another status under the Act. The Māori Land Court has exclusive jurisdiction to investigate a claim that particular land has the status of Māori customary land, unless it can be shown beyond doubt that, as a matter of law, the claimed land cannot have that status under the Act.[260]

(d) Only once Māori customary land has been through the processes set out in the Act, which incorporate significant safeguards promoting the retention of land, can that land be registered and does title become indefeasible under the LTA. If title to land was registered nevertheless, the clash between earlier versions of the LTA and earlier versions of the Act was resolved in favour of the primacy of the LTA.[261]

(e) There is no express statement in the Act, and no material indication in its lengthy legislative history, that, in passing the Act, Parliament intended to change the relationship between the LTA regime and the Māori land law regime, to override the LTA 1952 or to set up the Act, or Māori customary land, as an exception to the doctrine of indefeasibility. All the case law points in the same direction, that customary title or rights are not an exception to the indefeasibility of registered title.[262] In the 2008 decision in *Warin*, Allan J in the

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259 *Attorney-General v Ngāti Apa*, above n 49, at [154] and [162] per Keith and Anderson JJ. See also at [170] per Keith and Anderson JJ and [185] per Tipping J.

260 Te Ture Whenua Māori Act, s 132(1); and *Attorney-General v Ngāti Apa*, above n 49, at [186] per Tipping J.

261 See above at [154].

262 *Attorney-General v Ngāti Apa*, above n 49; *Minister of Conservation v Māori Land Court*, above n 136; *Te Roroa Whatu Ora Custodian Ltd v Kereopa*, above n 140; and *Gregory v Thames Coromandel District Council*, above n 140.

High Court concluded that, in enacting the Act, Parliament did not intend to override indefeasibility of title.[263]

(f) In the light of *Warin*, the 2010 Law Commission report recommended an in-depth review of the issue without delaying its recommendations for reform of the LTA 1952.[264] A LINZ report to Ministers subsequently advised that most of the problems were caused by practical issues and the primacy of the LTA 1952 over the Act did not need to be reviewed.[265] The parliamentary debates show that MPs did not understand or intend that the Bill that resulted in the LTA 2017 would change the relationship between the LTA regime and the Act.[266]

(g) On the basis of the text of the Act, considered in the context of the case law before and since, and its legislative history, we consider it is crystal clear and plain that Allan J in *Warin* was correct that Parliament did not intend to create Māori customary land as an exception to indefeasibility under the LTA 1952. The text, legislative history, and context of the LTA 2017 demonstrate that Parliament intended that Act to continue the existing relationship between the two statutory regimes where the LTA regime has primacy.

[167] Accordingly, we consider that it follows from our above analysis of the law that Mercury's registered titles to the relevant land are indefeasible. We accept that s 145 of the Act prevents acts of alienation of Māori customary land. But neither the version of s 145 in force in 2011 nor that in force now overrides or limits the indefeasibility of a title that has been registered nevertheless. To the extent that Māori customary title or interests are inconsistent with the nature and incidents of fee simple ownership, they have plainly and clearly been extinguished by necessary implication of the LTA regime, even if the land did not pass through the Act's required processes. Having the status of Māori customary land under the Act would not be an exception to that indefeasibility.

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263 *Warin v Registrar-General of Land*, above n 138, at [129].
264 Law Commission, above n 151, at [6.23]–[6.24].
265 Land Information New Zealand, above n 254, at [9]–[12].
266 See above at [163].

[168] How does this affect Mercury's application to strike out the customary land claim of the Pouākani claimants? As a reminder, the relief sought in relation to this claim is:

> (a) A status order that the River Bed is still and always was Māori customary land;
>
> (b) Declaring that such Māori customary land (whether direct or via the Crown and/or Mercury NZ Limited) is or should be vested in the First Applicants as trustees for and on behalf of those who can whakapapa to the Hapū;
>
> (c) Alternatively, a declaration that, but for the issue of title or other registration of interests under the [LTA 2017], the River Bed would have been Māori customary land; [and]
>
> (d) Alternatively, a declaration that, but for the issue of title or other registration of interests under the [LTA 2017], the River Bed would have been Māori customary land and would have been vested in the first Applicants as trustees for and on behalf of those who can whakapapa to the Hapū[.]

[169] We consider each subparagraph of the claim, in reverse order.

[170] [30(c)] and [30(d)] of the claim seek, in the alternative, declarations that, but for the issue of title or other registration of interests, the River Bed would have been Māori customary land and/or would have been vested in ngā kaumātua. There is nothing in our findings that would impede those claims being considered by the Māori Land Court. There is nothing in what counsel argues that makes those claims so clearly untenable they cannot possibly succeed. We note that the High Court struck out those claims.[267] But it is not clear that was intended, since the Court considered the primary claims were tenable and no reasoning for striking them out was provided. Accordingly, we reinstate those subparagraphs.[268]

[171] As far as [30(b)] of the claim is concerned, we consider that the indefeasibility of Mercury's registered titles is inconsistent with an order being made under the Act vesting that land in ngā kaumātua. Mr Ward submits that the claim to ownership is adverse to Mercury's rights as registered proprietor and so, at the least, the claim to ownership should be struck out. We apprehend him to be referring to the claim at

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267 Judgment under appeal, above n 2, at [100].
268 Court of Appeal (Civil) Rules 2005, r 48(4) and (5)(a).

[30(b)]. Under s 132(6) of the Act, the Māori Land Court, having determined "the owners" of the Māori customary land, can vest the land in the trustees of a trust constituted to hold the land for the beneficial owners.[269] Under s 141(1)(b), every vesting order, upon registration, has the effect of vesting the land in the persons named for a legal estate in fee simple. Such steps are inconsistent with the indefeasibility of Mercury's registered titles. The relief sought is not tenable in light of our findings on indefeasibility.

[172] As far [30(a)] of the claim is concerned, the question is whether the indefeasibility of Mercury's registered titles means that the Māori Land Court cannot make a status order that the River Bed "is still and always was Māori customary land". We consider it follows from our analysis above that registered title cannot, in law, have the status of Māori customary land under the Act. That is the effect of the Act giving statutory voice to the doctrine of aboriginal or customary title by recognising the status of Māori customary land. If customary title is extinguished, it is not lawfully available for the land to have the status of Māori customary land. As Gault P stated in *Attorney-General v Ngāti Apa* of the Act:[270]

> The underlying intention seems to be that once land has been vested in fee simple … so long as the estate subsists … it cannot have the status of Māori customary land. That is consistent with the conventional approach to native title claims.

[173] Registration of title to land and the status of that land are separate concepts, governed by separate Acts. Mr Smith is correct that registration of title under the LTA regime does not necessarily lead to a default change of status under the Act.[271] For example, registering the transfer of land to non-Māori owners in ignorance of the land's status as Māori freehold land does not change that land's status from Māori freehold land to General land, as illustrated by *Jensen v Registrar-General of Land*[272] and the outcome of the High Court decision in *Warin*.[273] However, we consider that the conclusion we have come to about the primacy of the LTA regime over customary

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269 Section 132(1).

270 *Attorney-General v Ngāti Apa*, above n 49, at [99].

271 Boast, above n 221, at 259.

272 *Jensen v Registrar-General of Land* [2013] NZHC 3525, (2013) 15 NZCPR 44 at [60]–[61] and [76].

273 *Warin v Registrar-General of Land*, above n 138; and *Warin – Whangaruru Whakaturia 4 Lot 32 DP 126453 (Part)*, above n 142.

title requires that registered title cannot, in law, have the status of Māori customary land under the Act.

[174] That is the whole point of the provisions of the Act for the registration of title after changing the status of Māori customary land by vesting order: the effect of that order, upon registration, is to change the status of that land to Māori freehold land.[274] Further, as Mr Ward submits, s 129 of the Act requires land to have only one status, and fee simple land is not "land that is held by Māori in accordance with tikanga Māori", as Māori customary land is defined by s 129(2)(a) of the Act. Accordingly, title cannot be registered in respect of land and that land have the status of Māori customary land. The operation and context of the Act's provisions concerning Māori customary land, and its specific provisions, are inconsistent with Māori customary land having registered title under the LTA.

[175] As required by s 130 of the Act, the centrality of the indefeasibility of title means the LTA 1952 has "expressly provided" for land over which title has been registered to have lost the status of Māori customary land. Mr Smith submits it is legally possible for the Māori Land Court to declare or confirm that land always has been Māori customary land notwithstanding its registration under the LTA 1952. But we do not consider that can be so, for the reasons explained above. In Tipping J's language in *Attorney-General v Ngāti Apa*, the "clear statutory indication of extinguishment" that we have concluded exists means that the claim that the River Bed is Māori customary land is legally unavailable.[275]

[176] Accordingly, the claim at [30(a)] of the amended statement of claim is so clearly untenable that it cannot possibly succeed, whatever the facts proved or arguments advanced before the Māori Land Court. It must be struck out accordingly.

[177] We are conscious this result will be felt by the Pouākani claimants to be unfair. It is the result of the law giving primacy to indefeasibility of title under the LTA over the Act. Parliament was advised of the issue and did not change the law. In this regard, we note the following points:

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274 Te Ture Whenua Māori Act, s 141(1)(c).
275 *Attorney-General v Ngāti Apa*, above n 49, at [186].

(a) Mr Ward is explicit that the Attorney-General does not suggest that registered title is inconsistent with each and every customary interest relating to land, but rather that it is inconsistent with those which are "proprietal".

(b) As noted in the judgment under appeal, Mercury has apparently accepted that the Māori Land Court could consider the nature of the status of the land underlying Mercury's registered easements.[276]

(c) Mr Smith submits that if it comes to it, the Pouākani claimants will argue they suffered compensable loss under the LTA 2017, under the alternative pleaded claim, but that necessarily depends on a finding that the River Bed was indeed Māori customary land. That is the effect of the alternative claims at [30(c)] and [30(d)], which we have reinstated.

Costs

[178] Costs on the Pouākani claimants' appeal of the High Court's decision to strike out the water claim follow the event, as do costs on the Pouākani claimants' cross-appeal of the High Court's decision to strike out the fiduciary duty claim. We certify for second counsel.

[179] However, there is a high degree of public interest in determining the availability of the Māori customary land claim by interpreting the LTA regime and the Act. That matter has not been the subject of direct appellate authority in New Zealand before. We therefore make no order as to costs on those appeals.

Result

[180] The Pouākani claimants' appeal in CA426/2023, of the High Court's decision to strike out the water claim, is dismissed.

[181] The Pouākani claimants' cross-appeal in CA425/2023 and CA434/2023, of the High Court's decision to strike out the fiduciary duty claim, is dismissed.

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[276] Judgment under appeal, above n 2, at [67].

[182] Mercury's appeal in CA425/2023, and the Attorney-General's appeal in CA434/2023, of the High Court's decision not to strike out the customary land claim are allowed to the extent that paragraphs [30(a)] and [30(b)] of the amended statement of claim are struck out but paragraphs [30(c)] and [30(d)] are reinstated.

[183] For the appeal in CA426/2023, the Pouākani claimants must pay one set of costs each to Mercury and the Attorney-General for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

[184] For the cross-appeal in CA425/2023 and CA434/2023, the Pouākani claimants must pay one set of costs each to Mercury and the Attorney-General for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

[185] We make no order as to costs for the appeals in CA425/2023 and CA434/2023.

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Ministry of Justice, Wellington for Māori Land Court (First Respondent in CA425/2023 and Second Respondent in CA426/2023 and CA434/2023)
Baden Vertongen, Wellington for Raukawa Settlement Trust (Fifth Respondent in CA425/2023, Fourth Respondent in CA426/2023 and Fifth Respondent in CA434/2023)
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